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Sovereign Immunity, *Quo Vadis?*

Halil Rahman Basaran*

I. Introduction

The concept of sovereignty is one of the cornerstones of international law. It aims at demarcating respective domains of countries (hereafter referred to as sovereign States) and determining who has the right to say what is lawful on a certain territory. It equips the State with a certain veil, which is difficult to pierce.[1]

Inter-state relations are based on the respect for sovereignty of States. A sovereign State cannot interfere in the sovereign affairs of another State. As a corollary, the concept implicates immunity of a State before courts of other States. Sovereign acts of a State cannot be questioned before the judiciary of another sovereign. Sovereigns are equal before the law and cannot sit in judgment on each other's sovereign domains.[2] The recent *Jurisdictional Immunities* ruling of the International Court of Justice (ICJ) confirmed this understanding, the status quo.[3] Thus, the case for civil claims emanating from citizens of a State against another State before courts of the former for the breach of international human rights or international humanitarian law seems, at first sight, settled. However, this issue is still topical. This topicality has intensified with the *Jurisdictional Immunities* ruling.

Instead of a sovereign directly challenging another sovereign, civil suits pit private individual rights against sovereign immunity and question established parameters of international law, which is based on inter-sovereign relations. In fact, civil claims represent the Achilles' heel of sovereign immunity and lay bare the difficulties inherent in the inter-sovereign system. This is due to the development of human rights law. Human rights have become a robust corpus after the Second World War. Human rights conventions, human rights committees and human rights courts, which recognize the right to individual petition, have accorded individuals a place in international law.[4] Individuals are empowered against their own sovereign.

Nevertheless, this empowerment is not as robust in respect to the foreign sovereign before the courts of the nationality of the wronged individual. International human rights law and international humanitarian law do not accord individuals the right to challenge the foreign sov-

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1. *See* U.N. Charter art. 2, para. 7 (confirming that nothing contained in the present Charter shall authorize the United Nations to intervene in matters that essentially are within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter).

2. *See* U.N. Charter art. 2, para. 1 (discussing how the Organization is based on the principle of the sovereign equality of all its Members).

3. *See* Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 143, ¶ 139 (Feb. 3).

4. *See, e.g.*, European Court of Human Rights, Inter-American Court of Human Rights.

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ereign in their courts of nationality. The recourse to courts of the foreign sovereign is necessary. However, in the event of the rejection of the latter, the individual does not have any robust remedy against the foreign sovereign.

In this respect, the tension between sovereign immunity and protection of human rights is unabated. Hence, this article aims at contextualizing and conceptualizing that tension, arguing that an international court cannot change the current parameters of sovereign immunity. International courts are limited in their capacity to shape the concept of State immunity.

The first section below exposes the difficulties pertaining to sovereign immunity. The next section looks specifically at the *Jurisdictional Immunities* ruling. The following section deals with international legal theories, which explain the *Jurisdictional Immunities* ruling from various perspectives. Then, the article concludes by clarifying the present state of sovereign immunity.

II. Difficulties Caused by State Immunity

A. No Definition

The first difficulty is that State immunity is not definitely determined by either international law or national law. There is neither a State immunity provision in the U.N. Charter nor a universal convention on State immunity that has the adherence of the international community. In fact, the immunity of sovereigns was not at issue often but must have been presumed to exist—sovereign immunity seems to have derived doctrinally from that of the ambassador.[5] In other words, a certain practice of States has led to the formation of the concept of sovereign immunity. There is no clear-cut legal category of State immunity in international law, which is determined with all its parameters. It is rather a vague concept of customary international law.[6]

To be precise, there are international conventions and national legislations concerning State immunity.[7] However, the conventions either are not in force, e.g., the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property, or have attracted a very small number of adherents, e.g., the 1976 European Convention on State Immunity. On the other hand, national legislations and practices are not uniform, hindering a coherent understanding of the matter. The corollary of this situation is that one can talk of, at most, a transnational public policy—not coherent national, supranational or international public policies—in respect to sovereign immunity. The adjective "transnational" denotes the patchwork of different voices originating from different platforms. On this reading, interna-

5. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 326 (7th ed. Oxford Univ. Press 2008).

6. YEARBOOK OF THE INTERNATIONAL LAW COMMISSION [1980] 2 Y.B. Int'l L. Comm'n 2, U.N. Doc. A/CN.4/SER.A/1980, ¶ 26. The International Law Commission affirmed that the rule of State immunity had been adopted as a general rule of customary international law solidly rooted in the current practice of States.

7. *See* United Nations Convention on Jurisdictional Immunities of States and Their Property, U.N. GAOR, 59th Sess., at 2, U.N. Doc. A/59/49 (Dec. 2, 2004); European Convention on State Immunity, 1972, E.T.S. No. 74; *see also* Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory,* 97 AM. J. INT'L L., 741, 761 (2003); *see also* Sevrine Knuchel, *State Immunity and the Promise of Jus Cogens,* 9 NW. U. J. INT'L HUM. RTS. 149, 182 (2011). Customary international rules on foreign sovereign immunity emerge primarily from the practice of individual States.

tional law of State immunity is not a check on State self-interest; it is rather a product of the very State self-interest.[8] International law, in the field of State immunity, is "not outside" the international political system. In fact, power produces and regulates the reality of the international system.[9] Law is not the vis-à-vis of the power, speaking absolute truth or universal justice to power, but in fact a form of power itself that produces a truth regime through legal knowledge claims.[10]

B. Rule or Comity?

The second difficulty could be defined by this question: Is sovereign immunity to be presented as a *rule or principle of law*—notwithstanding the doubts about its legal nature—or is it merely a practical doctrine based on the *comity and good relations* among nations? In support of the latter, some legal scholars argue that the general judicial silence (judicial abstention) in respect to State immunity stems less from a normative command than from prudential reasons.[11] That is to say, sovereign immunity is a political principle that requires prudence on the part of courts because it is not amenable to judicial assessment. Courts should be cautious in that they should not endanger the position of the executive organs of the State and risk destabilizing inter-State relations—sovereign immunity is a matter for international politics. For instance, it is possible to read the *Arrest Warrant* ruling of the ICJ—where the immunity of a sitting foreign minister was confirmed—as a case for international diplomacy and stability rather than the vindication of the legal rule of state immunity.[12] The Court simply wanted to favor comity and good relations on prudential grounds. The European Court of Human Rights highlighted the comity and good relations between States in respect to civil suits against States as well.[13] This is understandable, because, otherwise, the number of cases against States could have increased exponentially. The stability of the international system, which is based on State sovereignty, could be jeopardized. This is such a sensible issue that even a mere speculation or risk of breaching sovereign immunity could damage the international system. The ICJ, in the *Arrest Warrant* ruling, highlighted the importance of the avoidance of such risk:

> Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to

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8. JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW 310 (Oxford Univ. Press 2005).

9. Tanja Aalberts & Ben Golder, *International Legal Theory—Symposium on Foucault, On the Uses of Foucault for International Law,* 25 LEIDEN J. INT'L L. 603, 604 (2012).

10. *Id*. at 608.

11. Daniele Amoroso, *A Fresh Look at the Issue of Non-justiciability of Defence and Foreign Affairs,* 25 LEIDEN J. INT'L L. 942 (2012).

12. Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. (February 14), ¶ 53 [hereinafter Arrest Warrant] (stating that, in customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit but to ensure the effective performance of their functions on behalf of their respective States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that . . . he or she is recognized under international law as representative of the State solely by virtue of his or her office).

13. *See* Al-Adsani v. United Kingdom, 97 Eur. Ct. H.R. 21 (2002), ¶ 54; *see also* McElhinney v. Ir., 96 Eur. Ct. H.R. (2001), ¶ 38.

> legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.[14]

Actually, the Court implied that the real problem was the sovereign equality between States, not sovereign immunity as such. The problem is whether a State can try the officials of another State—not the feasibility of trying State officials as such. Indeed, the Nuremberg trials after the Second World War and the international criminal courts (International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda and the permanent International Criminal Court) have tried State officials. But they are *international* courts, not national—clash of equal sovereigns is not at issue. Moreover, these courts have tried only State officials—not States as such.[15]

However, the difficulty concerns the feasibility of distinguishing between law and comity. Comity can be defined as politics; yet, the distinction between law and politics is not easy to make in concrete cases. Hence, some argue that international comity is not mere politics but something in between courtesy and law.[16] Yet, what is the frontier between courtesy and comity? Being fully aware of this vagueness, a safe path is to define State immunity both as a legal rule and a principle of comity. A prominent example of reliance on both is the *Al-Adsani* ruling of the European Court of Human Rights.[17] However, the inconvenience is that relying on both arguments for sovereign immunity at the same time undermines a solid legal foundation.

C. Forum

The third difficulty concerns the forum of adjudicating sovereign immunity. Who is in charge? Who should handle disputes regarding sovereign immunity? Is it national courts or international courts? Or is it national executive organs, namely, governments? Is it really better to handle sovereign immunity issues at the "judicial" level by courts or rather at the "informal" and "social" level by governments?[18] Which authorities of international law and domestic law have the right to contribute to the formation and alteration of the concept?

In case the courts are seen as legitimate instances to deal with the clash of sovereign immunity and human rights, the general judicial strategy of courts is to be considered as well. In this connection, international courts—specifically the International Court of Justice and the European Court of Human Rights—tend to comment on sovereign immunity in terms of obiter dictum.[19] Thus, the practice of courts draws a distinction between *de lege lata* and *de lege fer-*

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14. Arrest Warrant, *supra* note 12, ¶ 55.

15. *Id.* ¶ 58.

16. Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMP. L. 631, 649 (2009).

17. Al-Adsani, *supra* note 13, ¶ 54.

18. VAUGHAN LOWE, INTERNATIONAL LAW 30 (Oxford Univ. Press 2007) (confirming that the rational choice in almost every context is to handle a dispute at the informal social level rather than translating it into a legal context).

19. *E.g.*, McElhinney v. Ireland, App. No. 31253/96, 12 Eur. Ct. H.R. 114, at ¶ 39 (2001).

enda—between positive law and ideal law. This is a signal that the concept of sovereign immunity is susceptible to change and reevaluation in international law. Nonetheless, to date, in nearly all cases *de lege lata* has carried the day: sovereign immunity has almost always been endorsed.[20]

This discussion smacks of the formation of the European Union (EU) legal order. Despite the monist view of supremacy of EU law over national laws held by the European Court of Justice, based on solely EU law itself, national courts—in particular national constitutional courts—of the member States have claimed to have the ultimate say on the supremacy of the EU legal order.[21] According to this view, the supremacy and validity of EU law are rooted in the maneuvering room conceded by the national constitutional orders. This implies that the national constitutional courts can intervene in the EU legal order and bar the supremacy of EU law whenever they feel that national sensitivities are breached and national fundamental values are being threatened.[22] Be that as it may, the national constitutional courts and the European Court of Justice entered into a constructive dialogue and agreed, in the end, on a legal concept—supremacy of EU law over national laws. Is the same possible for the legal concept of State immunity where national and international courts would engage in a constructive dialogue and reframe foreign State immunity? In this respect, can one talk of a "global community of courts" like a "European community of courts"?[23]

D. Nature of State Immunity

The fourth difficulty has to do with the purported nature of State immunity. Is it substantive or procedural? The case for its procedural nature is strong.[24] Indeed, classifying sovereign immunity as a matter of procedural law lightens the burden of the application of the concept: if sovereign immunity were to be seen as a substantive concept, the normative hierarchy theory favoring *jus cogens* would loom large. Breach of international human rights and international humanitarian law would in some cases qualify as breaches of *jus cogens*—and *jus cogens* prevails upon other substantive rights. And this would threaten the current inter-State system—the status quo. Thus, to put sovereign immunity in the black box of procedural rules excludes the challenges of the normative hierarchy. This may be good for the stability and preservation of the current international legal and political system, which does not seem ready for discarding State immunity for the sake of *jus cogens* rules. Indeed, the current substantive law has been insisting on striking the balance between human rights and State immunity in favor of the lat-

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20. Ferrini v. Germany, Appeal decision, no. 5044–4, ¶ 9, ILDC 19 (IT 2004) (Mar. 11 2004) and the Greek *Distomo* (Greek Supreme Court, May 2000) ruling.

21. *See* Case 6–64, Judgment of the Court of 15 July 1964. Flaminio Costa v. E.N.E.L. Reference for a Preliminary Ruling: Giudice Conciliatore di Milano—Italy, 1964 EUR-Lex 170, *6 (July 15, 1964); Case 106–77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA, 1978 EUR-Lex. 408, *5 (March 9, 1978).

22. *See* Case 2 Bal 52–71, Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle fur Getreide und Futtermittel, 2 C.M.L.R. 540, 546–47 (1974); Case 2 BvR 197–83, Re the Application of Wunsche Handelsgesellschaft. V, 3 C.M.L.R. 225, 227–8 (1987); Case 183, Frontini v. Ministero delle Finanze, 2 C.M.L.R. 372, 385 (1973).

23. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 193–94 (2003).

24. Arrest Warrant, *supra* note 12, ¶ 60.

ter. For instance, the 2004 U.N. Convention on Jurisdictional Immunities, which represents the most actual understanding of sovereign immunity, does not provide for any exception to State immunity based on *jus cogens*.[25]

Nevertheless, there are disadvantages to dismissing civil claims against a sovereign on procedural grounds. First, this implies the avoidance of the real issue of immunity, which has become an acute problem of the international community. Second, it undermines the comprehensiveness and trustworthiness of international law. Third, it neglects the problematic distinction between substance and procedure: every procedural issue is substantive and every substantive issue is procedural; they are closely intertwined. When a substantive rule is made, it implicates assumptions about its procedural feasibility. Procedural rules enable or obstruct the enforcement of substantive rules and become the indispensable part thereof. That is to say, procedures are embedded in substantive law and, if not applied, can lead to over- or under-enforcement of the substantive mandate.[26] Hence, substantive law and procedural law address the same matter, and the frontier between them is vague.

E. Access to Justice

The final difficulty is termed right of access to justice of individuals. Access to justice means having a legal remedy. In principle, the effective remedy and redress for damages incurred by individuals as a result of the action of the foreign State occur through diplomacy—State-to-State negotiations and treaties. Such treaties are concluded after the cessation of hostilities between States. Yet, these treaties may prove insufficient and ineffective. For the sake of international peace and security, States representing rights of wronged citizens may forsake full compensation from the wrongdoing State on the international level. *Raison d'état*—which requires long-term thinking and a large perspective on State-to-State relations—may require some concession on the part of the State whose citizens are harmed by the other State.

In response, private individuals may seek out the help of their own national judicial system to remedy this injustice. However, first, it is impossible to enforce a national court decision against another sovereign State. Second, if the methodological starting point is the vision of a complete system of an international legal order, judicial chaos and parochialism caused by national court decisions are to be prevented by a robust remedy mechanism in international law.[27] This mechanism should function through the systematic and consistent interpretation of the international legal order by competent international courts. Nonetheless, thus far, international courts—prime examples of which are the ICJ and the European Court of Human Rights—have been reluctant to concede the right of access to justice of private individuals vis-à-vis States for their civil claims due to the personal injury or damage resulting from the breach of international human rights law or international humanitarian law.

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25. G.A Res. 59/38, ¶ 5, U.N. GOAR, 59th Sess., Supp. No. 49, U.N. Doc. A/59/49, at 3-4 (Dec. 02, 2004).

26. Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 802, 841 (2010).

27. Kerstin Bartsch & Bjorn Elberling, *Jus Cogens vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the Kalogeropoulou et al. v. Greece and Germany Decision*, 4 GER. L.J. 477, 488–89 (2003).

Actually, this is a question of perspective on international law: Does international law have an obligation for providing access to justice for individuals? Does the ICJ or any other international court have the duty to consider alternative means of securing redress? As a matter of fact, the search for an alternative means of redress implies constitutional understanding of international law. Constitutional law requires the fulfillment of rights of individuals through appropriate remedies. Constitutional perspective envisions a legal order in which there are no self-standing entities that care solely for themselves without regard for the overall consequences for the legal order. Instead, the consistency and the reliability of the overall legal system are paramount. The individual legal acts on the part of actors within the legal system are to be interpreted and evaluated in the light of fundamental principles of the legal system, which would eventually fill gaps. There should be no loophole in the legal system, which would concede maneuvering room for injustices. In contrast, classical international legal order envisages self-helping subjects where concern for the general character, comprehensiveness and the consistency of the legal order are not an issue. Thus, the intensity of relationship between the actors in constitutional law and international law differs: Constitutional order involves cooperation, whereas international order consists of coexistence—a looser form of relationship.

In that regard, is international law on the path to becoming the common constitutional law of sovereign States, looking from the perspective of sovereign immunities? Has international law matured that far? Would the ICJ assume the role of constitutional court of the international order and worry about individuals' right of access to justice? Is international law on the path to fill the gap of access to justice?

Now, in the following section, a look at the *Jurisdictional Immunities* ruling will contextualize the present approach of the ICJ towards the aforementioned difficulties.

III. The Last Episode in Sovereign Immunity—*Jurisdictional Immunities* Ruling of the International Court of Justice

In view of the difficulties presented in the last section, this section analyzes the contribution of the *Jurisdictional Immunities* ruling. The World Court's ruling is a touchstone for the assessment of State immunity. Though the ruling should not be seen as a panacea covering all aspects of sovereign immunity, it is the latest concretization of the concept by the International Court of Justice.

A. Summary of the *Jurisdictional Immunities* Ruling

Germany instituted proceedings against Italy before the International Court of Justice for the alleged violation of its State immunity. The dispute arose from the fact that the Italian Supreme Court, in its *Ferrini* decision, found Germany liable for violations of international humanitarian law, which were committed on Italian citizens in the Italian territory during the Second World War. On top of Italian citizens' civil claims, Greek citizens who obtained judgments against Germany in Greek courts, but who could not enforce them in Greece, enforced these judgments in Italy by having taken measures of constraint against German State property

in Italy.[28] In the end, the International Court of Justice held in favor of Germany and stated that Italy violated Germany's immunity under international law. It required Italy to eliminate measures breaching German State immunity in Italy.

B. Rule or Comity?

The *Jurisdictional Immunities* ruling made it clear that immunity is governed by international law and is not merely a matter of comity.[29] The ruling admitted that there was no international treaty law that determined the issue of sovereign immunity regarding the dispute between Germany and Italy.[30] However, not only the Court, but also both parties (Italy and Germany), at the start, agreed that the dispute was one of international law.[31] This meant that both wanted to discuss the sovereign immunity issue in an international forum in terms of legal language. This demonstrates the tendency to provide State immunity with a robust basis. Indeed, the Court stressed that the issue of sovereign immunity was not to be considered lightly:

> If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skillful construction of the claim.[32]

This passage demonstrated that the ICJ did not see sovereign immunity merely as comity, but a rule.

C. Forum

As to the *forum* of adjudicating sovereign immunity issues, both national courts and the ICJ deemed themselves competent. On the one hand, the Italian courts of first instance and the Italian Supreme Court (Court of Cassation) considered themselves apt to interpret international law of State immunity. The Supreme Court engaged in the systematic and constitutional interpretation of the international legal order regarding sovereign immunity.[33] In doing that, it behaved as if it were the competent court of international law and as if it had the authority to resolve the sovereign immunity issue.

The Italian Supreme Court relied on three arguments to bolster its standing. First, the tortious acts were committed on the Italian territory (death, personal injury and damage to prop-

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28. Ferrini v. Republica federale di Germania, Cass., sez. un., 11 marzo 2004, n. 5044, 128 I.L.R. 659 (It.).

29. Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, at para. 53 (Feb. 3, 2012), http: //www.icj-cij.org/docket/files/143/16883.pdf. [hereinafter Jurisdictional Immunities of the State].

30. *Id.* at para. 54.

31. *Id.*

32. *Id.* at para. 82.

33. *Ferrini*, 128 I.L.R. at paras. 9.1, 9.2; Pasquale DeSena & Francesca De Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, 16 EUR. J. INT'L L. 89, 100 (2005).

erty).[34] Tort exception is provided in the U.N. Convention on Jurisdictional Immunities and also recognized in various national systems.[35] Hence it has some support in positive law. Second, Germany is not entitled to immunity because those acts involved the most serious violations of rules of international law of a peremptory character (*jus cogens*), international crimes, for which no alternative means of redress was available.[36] This is the invocation of normative hierarchy theory and access to justice. But normative hierarchy theory has not been supported by the practice of national and international courts apart from the recent Italian *Ferrini* and Greek *Distomo* court decisions.[37] As to access to justice, the Italian Supreme Court's argument presupposes that compensation for individuals is inherent in *jus cogens* rights. Actually, this is a philosophical question.[38] Do *jus cogens* rights implicate a compensation right of individuals or not? At present, there is no rule of international law providing it. Third, the Court advanced a certain evolution of the concept of sovereign immunity:

> [I]n the field of tortious liability, accepted practice is evolving towards adoption of a different standard from that based on the distinction between acta iure imperii and acta iure gestionis, with the inadequacy of this distinction for this kind of dispute having been referred to by legal theory.[39]

The *Al-Adsani* and *McElhinney* rulings of the European Court of Human Rights were concerned with the right to access to justice of individuals vis-à-vis States as well. In both rulings, the Court rebuffed the challenges of individuals to State immunity—that is, the European Court of Human Rights reached a different conclusion from that of the Italian Supreme Court regarding the evolution of State immunity. Indeed, in the *McElhinney* ruling, the Court stressed that the so-called "evolution," as argued by the Italian Supreme Court, has not matured enough to further erode sovereign immunity of the State:

> . . . the trend (of enlarging the scope of tortious liability) may primarily refer to "insurable" personal injury, that is incidents arising out of ordinary road

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34. Jurisdictional Immunities of the State, at para. 61.

35. *See* U.N. Convention on Jurisdictional Immunities of States and Their Properties, art. 12, U.N. Doc. A/59/49 (Dec. 2, 2004). Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission. *See, e.g.,* Jurisdiction of the English courts in respect to foreign States is governed by the State Immunity Act 1978. State Immunity Act, 1978, c. 33 § 5 (Eng.). Section 1(1)(a) provides: "A State is not immune as respects proceedings in respect of death or personal injury . . . caused by an act or omission in the United Kingdom."

36. *Ferrini*, 128 I.L.R., at para. 7.

37. Ferrini v. Republica federale di Germania, Cass., sez. un., 11 marzo 2004, n. 5044, 128 I.L.R. 659 (It.), and the Greek *Distomo* (Greek Supreme Court, May 2000) ruling.

38. *Countermeasures as a Possible Justification for Denying Foreign Sovereign Immunity for Grave Violations of Human Rights*, Round and Round (Feb. 16, 2012, 8:24 PM), http://roundandround.wordpress.com/2012/02/16/countermeasures-as-a-possible-justification-for-denying-foreign-sovereign-immunity-for-grave-violations-of-human-rights.

39. *Ferrini*, 128 I.L.R., at para. 10.1.

> traffic accidents, rather than matters relating to the core area of State sovereignty such as the acts of a soldier on foreign territory which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security[40] (parentheses added).

In this, the European Court of Human Rights behaved as if it were the constitutional court of international law. The Court did this through referring to article 31(3)(c) of the Vienna Convention on the Law of Treaties, which requires looking at other relevant rules of international law.[41] Thus, a larger systematic framework considering the general international law—a constitutional approach—is adopted. Likewise, in the *Al-Adsani* ruling, the Court highlighted comity and good relations between States through the respect of another State's sovereignty and referred to the concept of "community of nations."[42] It added that the public international law rule of State immunity was not a disproportionate restriction on access to justice—a human right.[43]

Be that as it may, the *Ferrini* ruling of the Italian Supreme Court is a blatant exception to sovereign immunity. It easily provoked the German application to the ICJ. Germany knew that the Italian courts' rulings did not stand much chance of succeeding before the ICJ. Both case-law and legal doctrine were weak with regard to Italy's case. Then, why did Italy set out on this path? Why did Italy, in its courts, allow civil claims to be brought against Germany based on violations of international humanitarian law, being aware that this violated its obligation to respect the immunity that Germany enjoys under international law?

In effect, the Italian courts set Italy on this path. The Italian government could not overrule its courts. On this view, the ICJ ruling is a source of relief for the Italian government, which could not face down its courts. The Italian government could not deal with its national judiciary otherwise. The Italian government just wanted a reaction from the World Court to use against its own courts later on, and the ICJ ruling was seen as an effective forum to mollify the Italian courts in the face of status quo. As a matter of fact, this perspective of the Italian government was clear from its attitude before the ICJ.

> . . . Italy itself appeared to demonstrate uncertainty. . . . While Italy acknowledges that in this area the law of State immunity is undergoing a process of change, it also recognizes that it is not clear at this stage whether this process will result in a new general exception to immunity—namely a

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40. McElhinney v. Ireland, 2001 Eur. Ct. H.R. 1, 8, at para. 38.

41. Al-Adsani v. United Kingdom, 2001 Eur. Ct. H.R. 1, at para. 55; *McElhinney*, 2001 Eur. Ct. H.R. 1, 8, at para. 36.

42. *Id.*, at para. 56, 66.

43. *Id.*, at para. 56.

> rule denying immunity with respect to every claim for compensation arising out of international crimes.[44]

Indeed, Italy conceded too many points before and during the proceedings. It could, at least, have argued that the lifting of German State immunity was a countermeasure against the nonpayment of reparations to the Italian victims.[45]

The situation is similar to the positions of German and Italian governments who witnessed the judicial dialogue between their respective constitutional courts and the European Court of Justice for the clarification of the supremacy of the European Community (EC) legal order—which is a subsystem of the international legal order.[46] Although the national constitutional courts and the European Court of Justice relied on different legal bases, in the end, they agreed on the supremacy of the EC legal order vis-à-vis national legal orders. Notwithstanding the lack of any supremacy provision in the EC treaties, the dialogue between the courts resolved the ambiguity. Likewise, as regards sovereign immunity in terms of human rights violations, the Italian, German and Greek governments did not engage in direct resolution of the problem of civil claims but, instead, left the issue to be resolved by their courts. The issue of State immunity has become a matter for both international courts and national courts. Indeed, the dialogue between national and international courts—rather than governments and international organizations—could be more helpful in clarifying the parameters of sovereign immunity.

Accordingly, as a continuation of the process started by the *Ferrini* ruling of the Italian Supreme Court, the ICJ handed down a ruling clarifying the current status of sovereign immunity in international law. Sort of a dialogue developed between Italian Supreme Court and the World Court. The judicialization of civil claims vis-à-vis sovereign immunity played out instead of direct diplomatic overtures among States.

However, the ICJ itself maintained that government-to-government deals are as important as the role played by courts, and that courts are limited in remedying the wrongs committed in the field:

> . . . Yet national courts in one of the countries concerned are unlikely to be well-placed to determine when that point has been reached. Moreover, if a lump sum settlement has been made—which has been the normal practice in the aftermath of war, as Italy recognizes—then the determination of whether a particular claimant continued to have an entitlement to compensation would entail an investigation by the court of the details of that settlement and the manner in which the State which had received funds (in this case the State in which the court in question is located) has distributed those

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44. Jurisdictional Immunities of the State, at para. 86.

45. Andrea Bianchi, *"On certainty,"* Blog of the European Journal of International Law (Feb. 16, 2012), http://www.ejiltalk.org/on-certainty/#comments.

46. *See, e.g.,* Case 6/64, Costa v. ENEL, 1964 E.C.R. 585; Case 11/70 Internationale Handelsgesellschaft v. Einfuhr, 1970 E.C.R.1125; Case 106/77 Amministrazione delle Finanze dello Stato v. Simmenthal, 1978 E.C.R. 629; Case 2 BvL 52/71.

> funds. Where the State receiving funds as part of what was intended as a comprehensive settlement in the aftermath of an armed conflict has elected to use those funds to rebuild its national economy and infrastructure, rather than distributing them to individual victims amongst its nationals, it is difficult to see why the fact that those individuals had not received a share in the money should be a reason for entitling them to claim against the State that had transferred money to their State of nationality.[47]

Indeed, the ICJ requested that the parties to the dispute—Italy and Germany—talk and find a solution to the issue. It stated that the dispute was "subject of *further negotiation* involving the two States concerned, with a view to resolving the issue."[48]

By this passage, the Court underlined that the issue of sovereign immunity needed an extensive dialogue among governments. In practical terms, governments come first. Nevertheless, it is essential to point out that the ICJ—as a court—made this statement. State immunity has already become an issue for both national courts and the World Court. Hence the concept of State immunity in international law is to be constructed by both fora—courts and governments.

D. Nature of State Immunity

The *Jurisdictional Immunities* ruling indicates that the law of immunity is essentially procedural in nature.[49] It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law. The ruling points out:

> The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. . . . For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a jus cogens rule.[50]

Hence, the ICJ is certain that there is an absolute distinction between procedural rules and substantive rules. The Court does not lend any support to the view that there could be exceptions in certain contexts. There is no balancing out of different interests, which could create an exception to the procedural hurdle. Either an issue is procedural or substantive—this is to be determined at the start. There is no balancing of sovereign immunity and human rights—no substantive analysis at all:

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47. Jurisdictional Immunities of the State, at para. 102.

48. *Id.* at para. 104 (emphasis added).

49. *Id.* at para. 58.

50. *Id.* at para. 93.

> . . . national courts have to determine questions of immunity *at the outset* of the proceedings, before consideration of the merits. Immunity cannot, therefore, be made dependent upon the outcome of a balancing exercise of the specific circumstances of each case to be conducted by the national court before which immunity is claimed.[51]

In this respect, it is also interesting to note that Italy did not effectively dispute, in its pleadings, the dichotomy between substance and procedure.

E. Obiter Dictum

The ICJ, as expected, resorted to obiter dictum and tried to direct future developments by signaling the need for change. The classic distinction between *de lege lata* and *de lege ferenda* in respect to right of access to justice of individuals is made, and the aspiration for change is implied. The court did not manifestly challenge sovereign immunity. However, it left the door open to new developments with its obiter dictum—noting that the current international law did not permit the breach of the German State sovereignty and did not give the Court the competence to compensate victims, but this state of matters did not comport with ideal justice: "The Court considers that it is a matter of surprise and regret that Germany decided to deny compensation to a group of victims."[52]

The counterargument is that this passage means the Court merely opposes the practical consequences of State sovereignty for individual claimants in a specific situation. Thus, one shall not qualify this passage as a strong tendency for the change in sovereign immunity but merely a criticism of a concrete result in a specific context.

Dissenting opinions of a ruling constitute *obiter dictum* as well. The dissenting opinions of the *Jurisdictional Immunities* ruling criticized the lack of legal redress for the victims of the violation of international humanitarian law, and this further supported the general *de lege ferenda* vision with respect to civil claims. The Court was divided on the issue, and a vocal minority argued that the current legal situation of sovereign immunity was not the ideal one.[53]

F. Access to Justice

Italy, in its pleadings before the Court, maintained that there was no alternative means of redress. Nevertheless, the Court responded, "The Court can find no basis in the State practice from which customary international law is derived that international law makes the entitle-

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51. *Id.* at para. 106 (emphasis added).

52. *Id.* at para. 99.

53. Jurisdictional Immunities of the State, Trindade, J., Yusuf, J., Gaja, J. dissenting, http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=60&case=143&code-=ai&p3=4.

ment of a State to immunity dependent upon the existence of effective alternative means of securing redress."[54]

Three points are in order regarding this passage.

First, the Court was not obliged to make such an assertive and clear declaration on the nexus between access to justice and immunity. However, it preferred to establish a certainty.[55]

Second, this shows that the Court considers the effects of its rulings on its own standing in the international system. It is well aware of the fact that it is an inter-State Court—its clients are States, not individuals. It cannot question its paymasters directly and openly.[56] Hence, opening the path to numerous cases, which would stem from atrocities committed before 1945, would endanger the 1945 United Nations system, which is an inter-State system.

Third, the Court, with this passage, implicitly distinguished between international law and constitutional law. It acted as an international court, not as a constitutional court, of the international legal order; a constitutional court would be concerned about access to justice of individuals. Constitutionalism implies a place for the rights of individuals and would fill eventual gaps of access to justice. However, the ruling made it clear that there is no limitation of State immunity by reference to the gravity of the violation or the peremptory character of the rule breached.[57] Such offenses do not crack an opening for access to justice. This is in line with the finding in the European Court of Human Rights' *Al-Adsani* decision, where the Court maintained,

> Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.[58]

The right of access to justice of individuals based on claims pertaining to violation of international human rights or international humanitarian law is further qualified by the ICJ's *Jurisdictional Immunities* ruling

> against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the pay-

54. *Id.* at para. 101.

55. Bianchi, *supra* note 45.

56. Peter Wilson, *The English School's Approach to International Law, in* THEORISING INTERNATIONAL SOCIETY: ENGLISH SCHOOL METHODS 167, 180–81 (Cornelia Navari ed., 2009).

57. Jurisdictional Immunities of State, at para. 89.

58. *Id.* at para. 61.

> ment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted.[59]

This passage makes it clear that individuals cannot claim to have absolute right to full compensation. Inter-state agreements, which do not provide full compensation for individuals, prevail over individual claims. The individual cannot question the status quo as constructed by States—the real actors in international law. Indeed, this was the position of Germany: there had been accords concluded between Germany and Italy determining the compensation for the wrongs done by Germany to Italy and Italian citizens in the Second World War. Hence, these agreements had definitely resolved the issue.

IV. Theoretical View of the *Jurisdictional Immunities* Ruling

Theory is necessary to understand the functioning and development of international law. There are two dimensions to theory. First, legal analysis touching upon no theory at all and denying its importance is implicitly sticking to an old established theory whereas talking of theory implies the effort to bring a new dimension to an already established theory.[60] Second, international law is not systematically formed and centrally enforced. It is not as robust and clear-cut as domestic law in terms of functioning and development. It is not an as effective and powerful law. Indeed, the power of international law may stem mainly from the robustness of the idea of international law. And, this idea of international law may come from international legal theories.

The *Jurisdictional Immunities* ruling of the ICJ is interesting in that it fits well with various international legal theories coextensively. The background, phases and repercussions of the ruling present aspects from several theories. The disadvantage is that one cannot conceptualize the ruling in the black box of a single theory, which could simplify and make understandable the ruling in a clear-cut way. As a matter of fact, a single theory—a grand theory—could facilitate both the contextualization and conceptualization of the *Jurisdictional Immunities* ruling. On the other hand, the interaction of multiple theories in the explanation of the ruling can be seen as a source of an understanding based on a rich variety of perspectives. In fact, relying on a unique theory could narrow our understanding and limit our outlook. Under this view, the cooperation of various theories with respect to a ruling of the ICJ could give occasion to interpret the ruling from a broader angle and, at the same time, test a number of theories. Thus, this section proceeds on the latter view and cites various theories—international relations-international law theories (Realism, Liberalism, Rational Choice, International Legal Process) and policy-oriented ones (New Haven, Critical Legal Studies, Central Case Approach). It concludes with a methodology rather than a theory—that is, legal process.

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59. *Id.* at para. 94.

60. Richard Falk, *The Adequacy of Contemporary Theories of International Law,* 50 VA. L. REV. 231, 233 (1964).

A. Realism

Under the realist theory, international law may address only peripheral matters that do not affect States' power or autonomy. States try to survive in an anarchic international system. The State's interest and its perpetual struggle to increase its prospects of survival are the dominant factors. States do not engage in cooperation merely on the basis of normative commitments, but on their interests.

Indeed, Germany was not affected at all by the international human rights and international humanitarian law language invoked by the Italian Supreme Court, which denied its immunity. It insisted on the formal configuration of the classical international order where State immunity is an indispensable component. The classical international law is premised upon the understanding that the only way to perpetuate an international system is through the maintenance of the preponderance of the main subjects of international law—that is, States. And this is feasible only through a robust recognition of sovereign immunity.

Sovereign immunity is one of the pillars on which the realist view of international law stands. It is an indispensable element of the functioning of international law. Likewise, the ICJ confirmed Germany's stance in this regard and threw its weight behind the realist view of international law. Further, the reference by the ICJ to negotiations between governments with regard to sovereign immunity is added evidence of the dominance of realism in the *Jurisdictional Immunities* ruling. It is thus only through the consent of States—not by a revolutionary judicial decision—that a change in the field could take place.

B. Liberalism

Liberalism's focus is domestic politics and the aggregation of domestic actors. Thus, internal factors influence the approach of States vis-à-vis international law. This theory explains, in particular, the position of Italy in relation to international law. The Italian government was not happy to engage in a confrontation with Germany. Indeed, the Italian government was relieved after the *Jurisdictional Immunities* ruling favoring Germany. However, the domestic politics of Italy and the aggregation of the preferences of key domestic individuals and groups toward the rule of law and international law set Italy on the collision path with Germany. The Italian individuals who felt wronged by the German attitude impacted the Italian courts and obtained rulings, which challenged the classical structure of international law. This was somewhat a liberal questioning of the classical international law on the part of the Italian domestic configuration. Though, on the international level, this questioning did not bear fruit, it explains the background of the position of the Italian government before the ICJ.

C. Rational Choice

The rational choice theory requires limited conditions under which individual actors seek to maximize their preferences. This theory focuses, in particular, on costs of identifying actors, negotiating, enforcing and violating agreements and costs of resorting to judicial instances. The actors are rational and seek to minimize their costs in all these instances.

For Germany, the cost of recurring compensation claims every now and then is not acceptable. Negotiations with a view to such compensation claims are now all the more burdensome for Germany as it had already established a fund for it in 2000.[61] Germany wants legal stability in the field through drawing a line under these claims, which have accumulated since the Second World War. It does not want to face any more prospects of further compensation claims based on the Second World War. Hence Germany found it rational to challenge the rulings of Italian courts. The ICJ platform was a good choice for Germany in that respect. It is the World Court, which has a high degree of visibility, though its rulings are binding solely on the parties to the dispute before it.[62] Germany calculated that such a high-profile ruling on the part of the World Court would be a clear signal to the international community and, in particular, to the national courts of various States that might set out on the same path as the Italian and Greek courts. Instead of constantly making bilateral diplomatic overtures to other States and dealing with them one by one—which would be more demanding—Germany preferred a less costly and durable method. The legal dimension of the ruling of the ICJ has a larger effect than the solely political and diplomatic dimension of dealing with States one-to-one.

As for the Italian government, its acceptance of the ICJ's jurisdiction in respect to compensation claims stemming from Second World War injuries was a rational choice as well. A certain chasm opened up between the Italian executive and judiciary. It was difficult to close this gap, because the rulings issued by the Italian courts had achieved certain publicity. This Pandora's box was opened and rulings started to come out against Germany one after another. The Italian executive did not have much room for maneuvering vis-à-vis its own courts. Thus, the ICJ, as an outside actor, was seen as an exit route from this conundrum between the Italian executive and the judiciary. Put another way, the ICJ reduced the costs for the Italian executive of scaling the hurdle erected by its judiciary. The Italian executive, which was under pressure from Germany on the one side and the Italian courts on the other side, rationally opted for a ruling of the ICJ. In this connection, attitudes of both the Italian and German governments also could be accounted for in terms of international legal process, another theory that is touched upon under the next title.

Rational choice theory explains the approach of the Court to access justice as well: access to justice of individuals would be costly for the international system. The international system is still not ready for a major overhaul of the State-based international legal order, and the ICJ itself is part of the present international legal order, being an inter-State court. It is natural that it protects its own clients. The least costly way to protect this state of affairs is labeling State immunity as a procedural matter. Indeed, the Court followed this path. In this respect, the use of obiter dictum is another embodiment of the rational choice theory: obiter dictum is not a costly way to influence the development of international law. The Court made its voice heard without unsettling the current parameters of sovereign immunity in international law.

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61. The Foundation Remembrance, Responsibility and Future (Dec. 26, 2012), http://www.stiftung-evz.de/eng/the-foundation.html.

62. Charter of the United Nations and Statute of the International Court of Justice art. 59, June 26, 1945, 1 U.N.T.S. 16, http://treaties.un.org/doc/Publication-/CTC/uncharter.pdf (confirming that the decision of the Court has no binding force except between the parties and in respect of that particular case).

D. International Legal Process

This theory's focus is not exposition of rules and their content but how the makers of foreign policy use international legal rules and institutions. Under this view, international law plays little role in international affairs. Therefore, it is close to realism. International law does not force decision makers' actions. International law is an organizing device whose effectiveness is in doubt because it rather serves as a justification. Thus, what we have to look at is not intrinsic qualities of international legal rules and institutions, but the way they are effectively invoked and utilized by actors on the international stage.

In that connection, both Germany and Italy saw the ICJ as a favorable institution of international law to be used to advance their respective agendas. It turned out that the ICJ is a convenient platform where makers of the German and Italian foreign policies converged. The ICJ played a pivotal role in the international legal process of sovereign immunity. The *Jurisdictional Immunities* ruling greased the wheels of international law—it endorsed the current status quo and eliminated any doubt about it.

E. New Haven Approach

The New Haven Approach seeks a minimum world public order and aims at the progress toward the development of shared values. These shared values embody social choices made. These values are shaped through a process involving authoritative decisions—mainly jurisprudence—and not traditional rules in a positivist sense.[63] In that connection, context counts more than traditional obedience to foreordained rules.

Hence, one of the shared values of the international community is sovereign immunity. There is a certain status quo in the field of sovereign immunity: sovereign immunity of a State cannot be challenged before municipal courts of another State. This is a social choice made by the international community. To deviate from this, a new social choice is needed. However, the ICJ, as an authoritative decision maker, ruled against a new social choice.

In the New Haven approach, the ultimate value of international stability is to be achieved through equilibrium and predictability. In this respect, the *Jurisdictional Immunities* ruling reflects the present equilibrium regarding sovereign immunity. It confirmed predictions. The ICJ, as a legal authority, has made an assertion of control in the field—that is, it found sovereign immunity relevant in respect of individual challenges before national courts. The ICJ opted for sovereign immunity vis-à-vis human rights and clarified the social choice of the international community.[64] Although its obiter dictum implied the aspiration for the change of the status quo, individuals' access to justice was perceived as harmful to the world order and stability. In this, the characterization of State immunity as a procedural matter functioned as an easy shortcut to international stability.

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63. W. Michael Reisman et al., *The New Haven School: A Brief Introduction*, 59 YALE J. INT'L L. 575, 579–80 (2007).

64. Peter Wilson, *The English School's Approach to International Law, in* THEORISING INTERNATIONAL SOCIETY: ENGLISH SCHOOL METHODS 167–88 (Cornelia Navari ed., 2009) (confirming that this also smacks of the English School's approach to international law where international law is interpreted as the law of expectations of the international community).

The New Haven approach to international law comprises a communicative stream and enables a process of exchange between different actors of international law. This communicative stream does not recognize any dichotomy between national law and international law. The New Haven approach favors transnational law, that is, law is neither purely domestic nor purely international; it is hybrid. And international courts play an important role in this regard.[65]

Transjudicial dialogue is an important component of the New Haven approach. This dialogue promotes human dignity as a policy objective in the world public order. The relationship among domestic courts, international tribunals and non-State entities (individuals) is essential to the shaping of social choices made on the global scale. On this view, a community of courts contributes to the formation of international law. Hence, the way the dispute between Italy and Germany reached the ICJ from the Italian Supreme Court could be conceived in the framework of human dignity as against State immunity. Yet, the outcome of the ruling does not favor individuals. Instead of a liberal democratic view of the world order based on individual dignity, a State-centric approach is adopted.

F. Critical Legal Studies

Critical legal studies (CLS) focuses upon the language of law, which is considered biased. This theory enables one to acquaint himself or herself with the lopsided functioning of international law. It argues that the language of international law is placed in the conventional structures of politics and power on the international stage. The international legal doctrine is indeterminate. It is subject to historical contingencies and textual ambiguities and is not conducive to a real universality of international law. The language of international law mirrors a certain imbalance and the CLS is pessimistic in that it is nearly impossible to reverse this state of matters.

The language of international law is biased in favor of States. Individuals still do not have a robust place on the international stage. Although there have been some encouraging developments in international law favoring individuals, such as individual petitions to international courts, e.g., the European Court of Human Rights, the politics of international law still regard States as the prime subjects of international law. Likewise, the ICJ is an inter-State court whose only clients are States. The politics of the court require that it defer to States. This imbalance placed in the foundation of the court necessarily affects the outcome of the cases brought before it. Indeed, the *Jurisdictional Immunities* ruling confirmed that by siding with the State (Germany) instead of individual rights.

CLS argues that some actors are favored over others under the surface of legal talk. Procedure-substance distinction is such typical legal talk. It is the reflection of the conventional structures in international law. This is the language of international law, which hides the power relationship—that is, the favoring of States over individuals. The inherently political and arbitrary aspect of State sovereignty is embodied in the procedure-substance dichotomy as confirmed by the *Jurisdictional Immunities* ruling.

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65. Harold Hongju Koh, *Michael Reisman, Dean of the New Haven School of International Law*, 34 YALE J. INT'L L. 501, 502 (2009).

G. Central Case Approach

The central case approach is opposed to binary presentation of international legal issues. It allows for more complexity. It points to the shades of grey instead of an all-out black-and-white approach. This leads to the detection of trends in international law. The central case approach determines a central case (ideal case) as a benchmark and evaluates trends approaching this benchmark or moving away from it.

In classic international law, the central case (ideal case) is absolute immunity, but there took place a certain trend of moving away from the central case toward a more watered-down sovereign immunity thanks to the distinction made between sovereign acts and private acts of the State. The central case approach tries to find if there is really more of such a trend in the international society. Indeed, this approach advises that we look at the challenges to state sovereignty mounted by individuals in Greece and Italy as an effort aimed at reaching a more permissible and nuanced area in respect to State sovereignty.

In general, at present, with a few exceptions like China and India, there is no reign of absolute sovereignty in the world. Starting from the beginning of the 20th century, a certain exception has been created for commercial transactions—that is, matters dealt with by a State outside its sovereign powers. The individual challenges to sovereign immunity mounted in Greece and Italy should be read as an effort to widen this breach—already opened in the wall of sovereignty by the doctrine of commercial acts of State. The Italian Supreme Court argued that this trend was in the process of growing. However, the ICJ, in the *Jurisdictional Immunities* ruling, made it clear that there is no such trend.

H. Legal Process as a Methodology

Legal process could be envisaged more as a method than as a theory. Method has to do with what counts as persuasive arguments in international law. It is a way to find persuasive international legal arguments. Indeed, legal process holds that the judge either should be able to refer to a black letter rule or societal value that supported his decision—that is, something beyond the judge's personal opinion.[66] In short, according to the legal process approach, the judge has to provide reasoned elaboration to fill gaps or resolve ambiguities in positive law.

Legal process argues that the aim is to restrain subjectivity of judges through fundamental values deeply rooted in the international system. Hence, judges are not completely free in making new law. The legal process holds that lawmaking by judges is rather a more limited and constrained occurrence. Indeed, not judges, but international treaties or strongly established international custom are to make radical changes such as the abolition of State immunity in the face of civil suits for damages, which stem from human rights violations.

In this, State sovereignty—and its corollary State immunity—constitutes an important societal value. Human rights are not so important and persuasive in the international system. Hence, the Court did not challenge the status quo regarding sovereign immunity. It left the

66. Mary Ellen O'Connell, *Legal Process School, in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1, 2–3 (2006), http://opil.ouplaw.com/home/EPIL.

matter to the new developments in treaty law and customary law. Indeed, the *Jurisdictional Immunities* ruling of the ICJ is compatible with legal process understanding of law.

V. Conclusion

The *Jurisdictional Immunities* ruling of the ICJ delineated the basic parameters of State immunity: State immunity is a rule of international law—not a matter of comity. Both courts and governments are competent to decide issues of State immunity. Obiter dictum is a handy instrument of courts to indicate that the present situation of State immunity is not ideal. State immunity is procedural in nature. Finally, the individual's right of access to justice is not a concern of the World Court when deciding the issues of State immunity.

The *Jurisdictional Immunities* ruling demonstrates that realism is still dominant in the functioning of international law. In terms of liberal theory, the internal political aggregation of nations can have repercussions on the international stage. States agree on less costly ways to resolve their disputes in line with rational choice theory and this makes the ICJ a favorable venue for dispute resolution. The ICJ functions as an important instrument of international legal process of State immunity. In line with the New Haven approach, the ICJ made a social choice in respect to State sovereignty and stonewalled in the face of individual challenges—the Court opted for international stability. In line with the Critical Legal Studies, the language of international law, which is biased in favor of States over individuals, is confirmed. Under the central case approach, the ICJ detected no trend toward further eroding State immunity. Lastly, the legal process methodology seems the most cogent in that it envisages international law making by judges as an activity limited by societal values. Judges themselves cannot radically change fundamental principles of international law. Indeed, neither the European Court of Human Rights nor the International Court of Justice has changed the basic principle of sovereign immunity vis-à-vis human rights claims. On this view, sovereign immunity is to be dealt with at "informal" and "social" levels among governments. At the "legal" level, international courts do not want to introduce a novelty into this area.

MOFCOM's Review of Global Mergers and Acquisitions in Recent Years: Deals and Lessons

Sabrina H. He, Fang Han*

I. Introduction

Global merger and acquisition (M&A) transactions often need to be approved by antitrust authorities of multiple jurisdictions. When parties to the M&A transactions have significant turnover in China, these deals will very likely trigger the Chinese merger filing thresholds and have to be submitted to China's Ministry of Commerce (MOFCOM) for review.[1] The parties can consummate these deals only after MOFCOM approves them.

The 2008 Anti-Monopoly Law (AML) heralded a new era for merger control enforcement in the country. Since then, MOFCOM reviewed 690 cases of concentration of undertakings declarations and settled 643 cases, approving 624 of the cases unconditionally and 18 conditionally.[2] The only case that was prohibited by MOFCOM was one back in 2009.[3]

MOFCOM's decisions in recent years have shown that it is continuously developing its review approach, as well as offering valuable guidance to firms seeking to make M&A deals in China. This article summarizes MOFCOM's review of nine major transactions, and analyzes the characteristics of MOFCOM's merger control regime and practice implications for parties to M&A transactions.

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1. *See* Zhonghua Renmin Gongheguo Fan Longduan Fa (中华人民共和国反垄断法) [Anti-monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), Art. 21, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ68 (China), http://english.mofcom.gov.cn/aarticle/policyrelease/announcement/200712/20071205277972.html.

2. *See* Shangwubu Fan Longduan Zhifa Qude Jiji Jinzhan (商务部反垄断执法取得积极进展) [Commerce Department Made Positive Progress in Antitrust Enforcement], *Daily Press Release*, MINISTRY OF COMMERCE] (Aug. 2, 2013) (China), http://www.mofcom.gov.cn/article/ae/ai/201308/20130800226124.shtml.

3. *Id*. *See also* Zhonghua Renmin Gonghe Guo Shangwu Bu Gonggao (2009 Nian) Di 22 Hao (Shangwu Bu Guanyu Jinzhi Kekoukele Gongsi Shougou Zhongguo Huiyuan Gongsi Shencha Jueding de Gonggao) (中华人民共和国商务部公告 [2009 年] 第 22 号（商务部关于禁止可口可乐公司收购中国汇源公司审查决定的公告) [Ministry of Commerce on the Prohibition of the Coca-Cola Company decided to acquire China Huiyuan Examination Announcement] (promulgated by the Ministry of Commerce of China, effective Mar. 18, 2009); MINISTRY OF COMMERCE ANTI-MONOPOLY BUREAU, 2009 No. 22 (China), http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html.

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II. MOFCOM's Merger Review Decisions in Recent Years

A. *Uralkali/Silvinit Acquisition*

On June 2, 2011, after a two-phase review, MOFCOM conditionally cleared the proposed acquisition of Silvinit (a Russian fertilizer producer) by Uralkali (a Russian fertilizer producer).[4] After examining the impact of the proposed transaction on competition in relevant markets, MOFCOM concluded that the acquisition would restrict and limit competition. Because of the anti-competitive effects of the acquisitions, MOFCOM imposed four conditions for its approval.[5]

In MOFCOM's preliminary analysis of the acquisition, it first defined the relevant market as the potassium chloride market. MOFCOM determined that the proposed new entity would be the world's second-largest potash supplier with a global market share exceeding one-third.[6] The combined market share of the world's largest potash supplier would exceed 70% of global supply.[7] MOFCOM also noted that more than 50% of China's total import of potassium chloride was provided by Silvinit, Uralkali, and their associated companies.[8] MOFCOM believed that the increased market share would enhance the parties' dominance and affect the global potassium chloride trading environment, as well as eliminate and restrict competition in China's border trade market of potassium chloride.[9]

In addition to MOFCOM's concern about the effects of the acquisition on market shares, it also found the barriers to market entry highly restrictive. The production of potassium chloride depends on access to natural potassium resources, which only a limited number of business entities have. Limited access to resources, development length, and technological and financial risks prevent new competitors from entering the market. Furthermore, MOFCOM is also concerned that the proposed transaction would strongly affect Chinese agriculture industry and related industries.[10]

After several rounds of negotiations with the parties, MOFCOM accepted a proposed remedy plan that focused on Chinese markets. The plan imposed the four following behavioral restrictions on Silvinit and Uralkali as conditions for the approval of the transaction:

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4. *See* Shangwubu Gonggao 2011 Nian Di 33 Hao Guanyu Futiaojian Pizhun Wulaer Kaifangxing Gufen Gongsi Xishou Hebing Xieerweinite Kaifangxing Gufen Gongsi Fanlongduan Shencha Jueding De Gonggao (商务部公告 2011 年第 33 号?于附条件批准乌拉尔开放型股份公司吸收合并谢尔维尼特开放型股份公司反垄断审查决定的公告) [Conditional of Approval Urals Joint-Stock Company Merged 谢尔维尼特 Open Joint-Stock Company's Antitrust Review of Decision Notice] (promulgated by Ministry of Commerce of China, effective June 2, 2011) MINISTRY OF COMMERCE ANTI-MONOPOLY BUREAU; 2011 No. 33 (China), http://fldj.mofcom.gov.cn/article/ztxx/201106/20110607583288.shtml.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

- The new entity shall maintain the preexisting sales process regarding the sale of potassium chloride to China, specifically through direct trade in a reliable and diligent manner and channeled by railway or marine shipping;
- The new entity shall continually meet the demands of Chinese customers in terms of volume and range of its products, including potassium chloride with 60% and 62% potassium oxide;
- The new entity shall follow the business customs in the Chinese potassium chloride market, including spot sales and contract sales; and
- The new entity shall report to MOFCOM at least every six months regarding its compliance with imposed conditions. It shall appoint a monitoring trustee to assure the new entity's compliance with these conditions.[11]

Prior to MOFCOM's conditional approval, this transaction had been approved by Russia.[12]

B. *Penelope (Alpha V)/Savio Acquisition*

MOFCOM's two-phase review led to its conditional clearance of the proposed acquisition of Savio Macchine Tessili S.p.A. (Savio) by Penelope S.r.l. (Penelope), a company specifically established for this transaction by Alpha Private Equity Fund V (Alpha V) on October 31, 2011.[13] After examining the impact of the proposed acquisition on relevant markets, MOFCOM found the proposed concentration to have anti-competitive effects and imposed four conditions for its approval of the acquisition.[14]

In MOFCOM's analysis of the acquisition, it defined the relevant market as the automatic winder electronic yarn cleaners market. Loepfe Brothers Ltd. (Loepfe), a wholly owned subsidiary of Savio and Uster Technology Co., Ltd. (Uster), the largest shareholder of which is Alpha V, are the only two providers of certain products in both the global and Chinese markets. MOFCOM examined Uster's shareholder structure, voting system, historical attendance records of general assembly, and the composition and voting system of the board of directors.[15] MOFCOM found that it could not exclude Alpha V's influence over the business activities of Uster as its 27.9% stockholder and concluded that after the transaction, Alpha would obtain control over both competitors in this market.[16]

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11. *Id.*
12. *Id.*
13. *See* Shangwubu Gonggao 2011 Nian Di 73 Hao Guanyu Futiaojian Pizhun Peineiluopu Youxian Zeren Gongsi Shougou Saweiao Fangzhi Jixie Gufen Youxian Gongxi Fanlongduan Shencha Jueding De Gonggao (商务部公告2011年第73号?于附条件批准佩内洛普有限责任公司收购萨维奥纺织机械股份有限公司反垄断审查决定的公告) [The Conditional Approval of a Limited Liability Company Acquired Penelope Savio Textile Machinery Company Limited Antitrust Review of the Decision Notice] (promulgated by Ministry of Commerce of China, effective Oct. 31, 2011), MINISTRY OF COMMERCE ANTI-MONOPOLY BUREAU, 2011 No. 90 (China), http://fldj.mofcom.gov.cn/article/ztxx/201111/20111107855585.shtml.
14. *Id.*
15. *Id.*
16. *Id.*

MOFCOM was also concerned that, due to the requirement for significant capital and R&D, the barriers to market entry for new participants would be very high. As a result of these findings, MOFCOM found the proposed consolidation had anticompetitive effects and imposed one structural remedy and subsequent requirements:

- Alpha V sell its 27.9% shares in Uster to a third party within 6 months;
- Alpha V report the details of the divestiture process to MOFCOM;
- Alpha V not participate or influence the business activities of Uster before the divestiture; and
- Alpha V appoint an independent trustee to oversee the divestiture process.[17]

This is MOFCOM's first conditional approval involving a private equity investor and its first decision under MOFCOM's provisional regulation on divestiture remedies that was adopted in 2010.[18]

C. *Seagate/Samsung Acquisition*

On December 12, 2011, after an extensive two-phase review, Seagate's proposed acquisition of Samsung's hard disk drive (HDD) business was conditionally cleared by MOFCOM.[19] MOFCOM found that the proposed transaction would remove a key competitor in the relevant market and increase the possibility of coordination among the remaining HDD producers. Because of its finding, MOFCOM imposed significant restrictions on the transaction.[20]

In this acquisition, MOFCOM defined the relevant market as the global HDD market. Seagate owns 33% of the market, while Samsung owns 10% of the market.[21] It investigated the HDD market conditions, procurement model, capacity utilization, product innovation, buyer bargaining power and its impact on consumers, market access difficulty, and the potential impact of the transaction on consumers and competitors in the global and Chinese HDD markets.[22] MOFCOM concluded that Seagate's proposed acquisition of Samsung's HDD business would restrict and possibly eliminate competition in the HDD market.[23]

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17. *Id.*
18. *Id.*
19. *See* Shangwubu Gonggao 2011 Nian Di 90 Hao Guanyu Futiaojian Pizhun Xijie Keji Gongsi Shougou Sanxing Dianzi Youxian Gongsi Yingpan Qudongqi Yewu Fanlongduan Shencha Jueding De Gonggao (商务部公告2011年第90号?于附条件批准希捷科技公司收购三星电子有限公司硬盘驱动器业务反垄断审查决定的公告) [The Conditional Approval of the Acquisition of Seagate Technology Hard Drives Samsung Electronics Co., Ltd. Business Decisions Announcement Antitrust Review] (promulgated by Ministry of Commerce of China, effective Dec. 12, 2011), MINISTRY OF COMMERCE ANTI-MONOPOLY BUREAU, 2011 No. 73 (China), http://fldj.mofcom.gov.cn/article/ztxx/201112/20111207874274.shtml.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*

Unlike the European Union's (EU) and Federal Trade Commission's (FTC) unconditional approval of Seagate's acquisition of Samsung, MOFCOM's approval required Seagate to maintain Samsung HDD as an independent competitor. The conditions provided that Samsung maintain independent pricing and marketing without a restriction on Samsung's production volume.[24] MOFCOM also required Seagate and Samsung to set up firewalls between their marketing teams to prevent the exchange of competitively sensitive information.[25] MOFCOM also imposed the following behavioral restrictions:

- Seagate shall expand Samsung's production capacity subject to the supervision of an independent trustee;
- After the concentration, Seagate shall not substantively change the current business model or force customers to purchase exclusively from Seagate or its affiliates;
- After the concentration, Seagate shall not require TDK (China) to supply HDD heads exclusively to Seagate or its affiliates, or to restrict TDK's supply amount to other HDD producers;
- Seagate shall invest at least $700 million in R&D during each of the following three years to bring more innovative products and solutions to customers; and
- Seagate shall appoint an independent trustee to oversee Seagate's compliance of these conditions.[26]

MOFCOM's approval allows Seagate to apply for a waiver of the first two conditions after one year.[27]

D. *Western Digital/Viviti Technologies Acquisition*

After an extensive two-phase review, MOFCOM conditionally approved Western Digital's acquisition of Viviti Technologies (Viviti), Hitachi's HDD business, on March 2, 2012.[28]

Before clearing this acquisition, MOFCOM first had to define the relevant market, which it determined to be the global HDD market.[29] It investigated the HDD market conditions, procurement model, capacity utilization, product innovation, buyer bargaining power and its impact on consumers, market access difficulty, and the potential impact of this transaction on

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24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *See* Shangwubu Gonggao 2012 Nian Di 9 Hao Guanyu Fujia Xianzhixing Tiaojian Pizhun Xibu Shuju Shougou Rili Cunchu Jingyingzhe Jizhong Fanlongduan Shencha Jueding De Gonggao (商务部公告2012年第9号?于附加限制性条件批准西部数据收购日立存储经营者集中反垄断审查决定的公告) [Concerning Additional Restrictive Conditions to Approve the Acquisition of Western Digital Hitachi Storage Business Concentration Antitrust Review of the Decision Notice] (promulgated by Ministry of Commerce of China, effective June. 15, 2012), MINISTRY OF COMMERCE ANTI-MONOPOLY BUREAU, 2012 No. 35 (China), http://fldj.mofcom.gov.cn/article/ztxx/201203/20120307993758.shtml.
29. *Id.*

consumers and competitors in the global and Chinese HDD markets.[30] Through its research, MOFCOM was able to conclude that Western Digital's proposed acquisition of Viviti would heavily restrict and potentially eliminate competition in the HDD market.[31]

Applying the AML and the *Interim Provisions on the Divestiture of Assets or Business in the Concentration of Business Operators*,[32] MOFCOM imposed conditions on this deal, including the provision imposed by EU and FTC, which required Western Digital divest Viviti's 3.5-inch HDD assets to a third party under the supervising of an independent divesture trustee.[33] MOFCOM also imposed behavioral restrictions:

- Parties shall maintain Viviti in the relevant market as an independent competitor by adhering to the following provisions:
  - Western Digital must maintain Viviti's pretransaction state in R&D, production, procurement, marketing, after-sales, administration, financing, investment, HR-related matters and others;
- after the consolidation:
  - Viviti shall continue to produce with existing production lines, sell under the original brands via the original sales team following an independent and reasonable pricing mechanism;
  - the parties shall establish firewalls to avoid any exchange of competitive information between Western Digital and Viviti;
  - the parties shall not materially change the pretransaction business model;
  - the parties shall maintain independent R&D institutes, and report any R&D cooperation to the supervision trustee and subject to the pre-approval by MOFCOM. In exercising its right and fulfilling its obligation as a shareholder of Viviti, Western Digital shall be subject to the supervision of the supervision trustee and MOFCOM.
- the parties shall report their production capacity and output to the supervision trustee on a monthly basis; and
- the parties shall continue to invest in innovation.[34]

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30. *Id*.

31. *See* CHINA COMPETITION BULLETIN (Alan Fels et al. eds., 18th ed. Mar. 2012), http://www.anzsog.edu.au/magma/media/upload/ckeditor/files/Research/Publications/The%20China%20Bulletin%20Competition/China%20Competition%20Bulletin_March_2012.pdf.

32. *See* Shangwubu Gonggao 2010 Nian Di 41 Hao Guanyu Shishi Jingyingzhe Jizhong Zichan Huo Yewu Boli De Zanxing Guiding (商务部公告2010年第41号 关于实施经营者集中资产或业务剥离的暂行规定) 商务部关于实施经营者集中资产或业务剥离的暂行规定 [现行效有], Interim Provisions on the Divestiture of Assets or Business in the Concentration of Business Operators [The Implementation of the Concentration of Business Operators Divestiture of Assets of Interim Provisions] (promulgated by Ministry of Commerce of China, effective July 8, 2010), Ministry of Commerce Anti-Monopoly Bureau, 2010 No. 41 (China), http://fldj.mofcom.gov.cn/article/c/201007/20100707012000.shtml.

33. *Id.*

34. *Id.*

The "parties can apply for release of the 'maintain-independence' conditions after the elapse of 24 months from the date of the decision."[35]

E. *Google/ Motorola Acquisition*

On May 19, 2012, after an extended two-phase review, MOFCOM conditionally cleared the proposed acquisition of Motorola Mobility by Google.[36] MOFCOM's extensive two-phased examination of the impact of the proposed transaction on competition in relevant markets concluded that the acquisition would affect the market negatively by restricting competition.[37]

In order to determine the competitive impact of the proposed acquisition, MOFCOM first defined the smart mobile device and smart mobile device operating system as the relevant product markets.[38] Given the global nature of the transaction, MOFCOM examined the competition on the global smart mobile device and operating system markets, with an emphasis on the Chinese region.[39] It pointed out that unlike the highly competitive smart mobile device market, the smart mobile operating system market was highly concentrated.[40] Particularly, on the China mobile device operating system market, Google's Android had a 73.99% market share while Nokia's Symbian and Apple's iOS had 12.53% and 10.67%, respectively.[41]

In addition to the pre-acquisition market concentration, MOFCOM also identified other factors that indicated the proposal was anticompetitive. First, Original Equipment Manufacturers (OEMs), developers of Android-compatible software and end-users all depended on Android.[42] Second, high barriers existed for new operating system developers to enter into the market.[43] Finally, Android would be very likely to retain its market dominance in the foreseeable future.[44] Because of these concerns, MOFCOM imposed the following requirements on Google as a condition for its approval. Google must

1. continue its current practice to license Android in a free and open source manner;

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35. Susan Ning et al., Western Digital/Hitachi Received Conditional Nod From MOFCOM, China Law Insight, (Mar. 8, 2012), http://www.chinalawinsight.com/2012/03/articles/corporate/antitrust-competition/western-digitalhitachi-received-conditional-nod-from-mofcom/.

36. *See* Shangwubu Gonggao 2012 Nian Di 25 Hao Guanyu Fujia Xianzhixing Tiaoiin Pizhun Guge Shougou Motuoluola Yidong Jingyingzhe Jizhong Fanlongduan Shencha Jueding De Gonggao (商务部公告2012年第25号？于附加限制性条件批准谷歌收购摩托罗拉移动经营者集中反垄断审查决定的公告) [Concerning Additional Restrictive Conditions Approved Google's Acquisition of Motorola's Mobile Business Concentration Antitrust Review of the Decision Notice] (promulgated by Ministry of Commerce of China, effective May 19, 2012), Ministry of Commerce Anti-Monopoly Bureau, 2012 No. 25 (China), http://fldj.mofcom.gov.cn/article/ztxx/201205/20120508134324.shtml.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

2. treat all OEMs in a nondiscriminatory manner (this condition does not apply to apps or to OEMs that modify the Android platform);
3. fulfill Motorola's existing obligations to treat all current licensees of Motorola's patents in a Fair, Reasonable and Nondiscriminatory (FRAND) manner; and
4. appoint an independent trustee to monitor Google's adherence to the above condition.[45]

Conditions (1) and (2) apply for five years, even though Google may request that the two conditions be modified or rescinded if market conditions change.[46] Within five years from MOFCOM's decision date, every six months Google must file a report to MOFCOM and the independent trustee informing them of its adherence to the four obligations.[47]

F. *Goodrich/United Technologies Acquisition*

On June 15, 2012, after a two-phase review, MOFCOM conditionally approved the proposed acquisition of Goodrich Corporation (Goodrich) by United Technologies Corporation (UTC), both U.S.-based manufacturers of aviation equipment.[48]

In terms of product market, MOFCOM focused on the overlapping products of Goodrich and UTC, including aircraft power generators, aircraft lighting systems, secondary flight control actuation systems, and aircraft engine control systems.[49] Based on product characteristics, intended use, and the bidding practice of downstream consumers, MOFCOM treated each of these products independently in its review of the market impact.[50]

MOFCOM found the geographic market for each of the above-mentioned products to be global. In defining the geographic market, the agency relied on the fact that the suppliers sold these products to downstream consumers around the world, and consumers selected suppliers on a global basis.[51] Furthermore, the price of the relevant products was not affected by geography.[52]

MOFCOM then examined the impact of the acquisition on the global market for each of the relevant products. Factors considered by MOFCOM included the market share, the level of

45. *Id.*
46. *Id.*
47. *Id.*
48. *See* Shangwubu Gonggao 2012 Nian Di 35 Hao Guanyu Fujia Xianzhixing Tiaojiian Pizhun Lianhe Jishu Shougou Gudeliqi Jingyingzhe Jizhong Fanlongduan Shencha Jueding De Gonggao (商务部公告2012年第35号?于附加限制性条件批准联合技术收购古德里奇经营者集中反垄断审查决定的公) [Concerning Additional Restrictive Conditions to Approve the Acquisition of Goodrich, United Technologies Business Concentration Announcement Antitrust Review of the Decision] (promulgated by Ministry of Commerce of China, effective June 15, 2012), Ministry of Commerce Anti-Monopoly Bureau, 2012 No. 35 (China) http://fldj.mofcom.gov.cn/article/ztxx/201206/20120608181083.shtml.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*

market concentration, the market power, the market entry, and R&D.[53] Its analysis started from market participants and their shares in the aircraft power generator market. There were six suppliers of aircraft power generators globally, of which UTC and Goodrich had a share of 72% and 12% prior to the acquisition.[54] After the proposed transaction, the combined market share of the parties would reach 84% while the Herfindahl-Hirschman Index (HHI) would be 7158 with a delta value of 1728.[55]

In addition to the high combined market share and market concentration, MOFCOM also analyzed the entry barriers of the aircraft generator power. The agency pointed out that suppliers needed to customize products based on requirements of different aircraft platforms. Once an aircraft platform adopts a particular AC power generator, it will not change suppliers for a long period of time. Additionally, R&D of aircraft power generators requires a long development period and a substantial amount of financial investment. These factors make it difficult for new entities to enter the highly concentrated aircraft power generator market.

Based on foregoing competitive concerns, MOFCOM determined that the proposed acquisition would likely restrict or even eliminate competition in the aircraft power generator market and set forth four conditions for its approval of the proposed acquisition:

- Goodrich shall divest its electrical power system businesses (including its AC power generation system business, low-voltage DC power system business and electrical distribution system businesses located in Pitstone, U.K. and Twinsburg, U.S.A.) and 60% of its share in Aerolec, its joint venture with Thales Avionics Electrical System. UTC and Goodrich shall assign to the purchaser the tangible and intangible assets (including but not limited to production equipment, sales department, R&D department, customer service and related intellectual property) required to ensure the viability and competitiveness of the above divestiture business, in accordance with the purchaser's needs.
- Within six months after MOFCOM's approval of the acquisition, UTC shall find a purchaser for the divestiture business, and enter into a sale and purchase agreement pursuant to the *Provisional Rules on Assets or Business Divestiture in Connection with the Implementation of Concentration of Undertakings*. The above period may be extended to nine months upon application. If UTC is unable to do so, MOFCOM shall have the right to appoint a divesture trustee to find a purchaser for the divesture businesses via auction without reserving price and also enter into a sale and purchase agreement within three months.
- Before the divesture is completed, UTC and Goodrich shall fulfill their respective obligations pursuant to article 12 of the *Provisional Rules on Assets or Business Divestiture in Connection with the Implementation of Concentration of Undertakings*.
- Within one year after completion of the divestiture, UTC and Goodrich shall provide reasonable technical support to the purchaser, upon its request, to assist it in manufacturing,

53. *Id.*

54. *Id.*

55. *Id.*

assembly, testing, maintenance/repair and overhaul of the power system and provide technical training and consulting services to the purchaser's relevant personnel.[56]

MOFCOM also required that the merging parties appoint a trustee to supervise their implementation of divestiture.[57]

G. *ARM/G&D/Gemalto Joint Venture*

On December 6, 2012, MOFCOM conditionally approved the establishment of a new joint venture by ARM Holding PLC (ARM, UK), Giesecke & Devrient GmbH (G&D, Germany) and Gemalto N.V. (Gemalto, Netherlands, together with ARM, G&D, the parties).[58] The proposed joint venture would integrate R&D and popularization of the Trusted Execution Environment (TEE) solution. After the preliminary review, MOFCOM determined that the merger of business operators by the parties may eliminate or restrict competition in the TEE market. MOFCOM put forward a solution to reduce the adverse effect that this acquisition would have on the competition in the market.[59]

MOFCOM defined the relevant product market as the TEE market.[60] MOFCOM found that the vertical relationship between ARM and the joint venture may allow ARM to drive out the joint venture's competitors in the development of TEE solutions. In addition, because of ARM's strong upstream position on the authorization of intellectual property (IP) related to the multimedia application processor for consumer electronic devices, it could design IP that would intentionally degrade performance of third-party TEEs.[61] Accordingly, future entrants to the market would need significant resources as well as experience in R&D to obtain the relevant IP rights; thus, the proposed transaction would increase the difficulty of market entry for application processors.[62]

After the competitive assessment and the vast majority of consultations with MOFCOM, the parties submitted a final resolution on November 8, 2012. This occurred two days after the European Commission published its decision on the same transaction.[63] After the assessment of parties' proposed resolutions, MOFCOM concluded that the proposed resolutions would

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56. *Id*.

57. *Id*.

58. *See* Shangwubu Gonggao 2012 Nian Di 87 Hao Guanyu Fujia Xianzhixing Tiaojian Pizhun Anmou Gongsi, Jiede Gongsi He Jinyatuo Gongsi Zujian Heying Qiye Jingyingzhe Jizhong Fanlongduan Shencha Jueding De Gonggao (商务部公告 2012 年第 87 号 ?于附加限制性条件批准安谋公司、捷德公司和金雅拓公司组建合营企业经营者集中反垄断审查决定的公告) [Concerning Additional Restrictive Conditions Approved Security Plan Company, Giesecke & Devrient and Gemalto Company Formed a Joint Venture Business Concentration Antitrust Review of the Decision Notice] (promulgated by Ministry of Commerce of China, effective Dec. 6, 2012), MINISTRY OF COMMERCE ANTI-MONOPOLY BUREAU, 2012 No. 87 (China) http://fldj.mofcom.gov.cn/article/ztxx/201212/20121208469841.shtml.

59. *Id*.

60. *Id*.

61. *Id*.

62. *Id*.

63. *See* Case No Comp/M.6564-ARM/Giesecke & Devrient/ Gemalto/ JV, http://ec.europa.eu/competition/mergers/cases/decisions/m6564_20121106_20212_2779342_EN.pdf.

eliminate the negative effects that this transaction would have on the relevant market.[64] Accordingly, MOFCOM imposed two obligations on ARM as conditions for the approval:

- After the concentration, ARM should provide to other competitors, on a non-discriminatory basis, the security monitoring code, as well as other information related to its TrustZone technology that is necessary for the development of TEE solutions, including licenses, licensing standards and conditions.[65]
- ARM should not design its intellectual property intentionally in a way to degrade performance of third party TEEs.[66]

Both obligations apply for eight years, though ARM may request that the conditions be modified or rescinded if either the internal or the external market changes substantively.[67] When the conditions remain, ARM shall report annually to MOFCOM on its compliance with the conditions.[68]

H. *Glencore/Xstrata Acquisition*

MOFCOM's first decision in 2013 was its review of the acquisition of Xstrata PLC (Xstrata) by Glencore International PLC (Glencore).[69] The agency imposed behavioral and structural remedies as conditions for its clearance of the transaction following an extended two-phase review over the second filing of the case.

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64. *Id*.

65. *See* Shangwubu Gonggao 2012 Nian Di 87 Hao Guanyu Fujia Xianzhixing Tiaojian Pizhun Anmou Gongsi, Jiede Gongsi He Jinyatuo Gongsi Zujian Heying Qiye Jingyingzhe Jizhong Fanlongduan Shencha Jueding De Gonggao (商务部公告 2012 年第 87 号 ?于附加限制性条件批准安谋公司、捷德公司和金雅拓公司组建合营企业经营者集中反垄断审查决定的公告) [Concerning Additional Restrictive Conditions Approved Security Plan Company, Giesecke & Devrient and Gemalto Company Formed a Joint Venture Business Concentration Antitrust Review of the Decision Notice] (promulgated by Ministry of Commerce of China, effective Dec. 6, 2012), MINISTRY OF COMMERCE ANTI-MONOPOLY BUREAU, 2012 No. 87 (China) http://fldj.mofcom.gov.cn/article/ztxx/201212/20121208469841.shtml. (" 本次交易完成后，安谋公司将本着无歧视性原则，及时发布基于安某公司应用处理器 TrustZone 技术之上研发 TEE 所必须的安全监控代码及其他信息，包括相关许可、授权的标准及条件 ") [("The transaction is completed, the company will be based on the ARM principle of non-discrimination, the timely release of a company based security application processor TrustZone technology developed over the TEE code necessary for security monitoring and other information, including the relevant license, authorization standards and conditions.").] The author consulted the EC decision paragraph 212 (a)–(d) in technology terms translation. The MOFCOM condition (1), includes, in other words, briefly summarizes ARM's commitment (a), (b), (c) and (d). *EC decision* paragraph 212 (a)–(d).

66. *Id*. (" 安某公司不得通过对自有知识产权的特殊设计降低第三方 TEE 的性能 ") ["The security of a company shall not pass on its own intellectual property TEE special design reduces the performance of third parties."] The author consulted the EC decision paragraph 212(e) in translation. *EC decision* paragraph 212(e).

67. *Id*.

68. *Id*.

69. *See* Shangwubu Gonggao 2013 Nian Di 20 Hao Guanyu Fujia Xianzhixing Tiaojian Pizhun Jianengke Guoji Gongsi Shougou Sitelata Gongsi Jingyingzhe Jizhong Fanlongduan Shencha Jueding De Gonggao (商务部公告 2013 年第 20 号 ?于附加限制性条件批准嘉能可国际公司收购斯特拉塔公司经营者集中反垄断审查决定的公告) [Ministry of Commerce Notice No. 20 of 2013 Concerning Additional Restrictive Conditions Approved by Glencore International Acquired Business Concentration Xstrata Antitrust Review of the Decision Notice], *MOFCOM's Decision on Glencore's Acquisition of Xstrata*, MOFCOM (2013-04-16 18:06), http://www.mofcom.gov.cn/article/b/fwzl/201304/20130400091299.shtml.

Glencore is the world's largest non-ferrous metals and mineral supplier with mature distribution networks and global operations. The company supplies mineral products around the globe with strong control over the third-party market of copper concentrate, zinc concentrate and lead concentrate. Glencore does not have operations in China but only owns trading and storage business entities there. As the world's fifth largest diversified mining group and metal company, Xstrata primarily is involved in the manufacture and sale of metal products such as copper, zinc, and coal. The China market is the primary market for both parties' products.[70] Prior to the proposed acquisition, Glencore held 33.65% of Xstrata's issued and outstanding shares. The company will acquire the other 66.35% through the proposed transaction.[71]

Based on the global scope of both parties' business activities, MOFCOM considered the geographic market to be worldwide. In terms of the relevant product market, both Glencore and Xstrata have been involved in the production, supply, trade and third-party trade of various metal products such as chrome ore, zinc concentrate, zinc, lead concentrate, lead, copper concentrate, renewable copper, refined copper, nickel fines, intermediate cobalt product, refined cobalt, seaborne thermal coal, and seaborne coking coal.[72] Since both parties' imports to China primarily include copper concentrate, zinc concentrate, and lead concentrate, MOFCOM narrowed its product market definition to these three types of products.

In assessing the transaction's impact, MOFCOM analyzed six types of anticompetitive effects. First, Glencore will control Xstrata's copper mine assets through the acquisition, and its control over copper resources and copper production will increase. Second, by adding Xstrata's market share, Glencore's share of the global copper concentrate production market and supply market will increase from 1.5% to 7.6%, and its share of the global copper concentrate supply market will increase from 5.3% to 9.3%.[73] The combined market share of the global lead concentrate and zinc concentrate market will reach 6.8% and 11.2%, respectively.[74] Third, Glencore has the ability to further integrate its premerger trade business with Xstrata's advantages in the production and supply of copper concentrate. As a result of such vertical integration, Glencore will gain advantages over its competitors on the copper concentrate market. Fourth, Glencore is likely to replace Xstrata's mining supply contracts with trading contracts that are less favorable to downstream copper concentrate consumers. Fifth, market entry is difficult given the fact that copper resources are controlled by a few market participants, and the industry is capital-intensive. Finally, downstream metal product purchasers on the China market are small entities with weak bargaining power. The acquisition will further weaken their bargaining power by strengthening that of Glencore as the upstream supplier.

After discussing the anticompetitive effects with both parties and considering their proposals,[75] MOFCOM came up with both behavioral and structural remedies, which required Glenore to

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70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*

- divest all the equity it holds in Las Bambas copper mine located in Peru before September 30, 2014;
- auction all its interests in one of the four other Xstrata projects, Tampakan, Frieda River, El Pachon or Alumbrera, without a minimum price if it fails to divest its interest in the Las Bambas project;
- offer to enter into long-term supply contracts of copper concentrate products with Chinese customers for no less than the provided quantity and at an annual benchmark price; and
- offer to enter into long-term supply contracts of zinc concentrate and lead concentrate with Chinese customers under fair market terms consistent with the practice on the global markets.

Similar to its approach to previous conditional approval decisions, MOFCOM requires Glencore to appoint an independent supervising trustee to oversee Glencore's fulfilling of the above-mentioned obligations.[76]

I. *Gavilon/Marubeni Acquisition*

Following a two-phase review over the second filing of the case, MOFCOM conditionally cleared the Marubeni Corp's (Marubeni) acquisition of 100% shares of Gavilon Holdings, LLC (Gavilon) on April 22, 2013.[77] Despite the global scope of each party's business, MOFCOM limited its review to China's soybean import market and found that the proposed transaction would likely restrict competition. In order to address such competitive concerns, the agency imposed behavioral remedies, which in essence required the separation of Marubeni and Gavilon's soybean export entities subsequent to the transaction.

The acquirer, Marubeni, is a Tokyo-based trading company that has been involved in trading various products such as food, textiles, chemical products, and natural resources. Gavilon, with headquarters in Omaha, Nebraska, is the third largest grain trading company.[78] Both companies have subsidiaries in China.

Continuing its review approach in previous M&A transactions, MOFCOM started by defining the relevant product and geographic markets. Considering the business scope and business model of the parties and the characteristics of the commodities, as well as supply and demand substitution, MOFCOM found the relevant markets to be imported soybean, corn,

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76. *Id*.

77. *See* Shangwubu Gonggao 2013 Nian Di 22 Hao Guanyu Fujia Xianzhixing Tiaojian Pizhun Wanhong Gongsi, Shougou Gaohong Gongsi 100% Guquan Jingyingzhe Jizhong Fanlongduan Shencha Jueding De Gonggao (商务部公告 2013 年第 22 号 ?于附加限制性条件批准丸红公司收购高鸿公司 100% 股权经营者集中反垄断审查决定的公告) [Ministry of Commerce Notice No. 22 of 2013 concerning additional restrictive conditions approved by Marubeni Corporation acquired 100% stake in the company hung high concentration of business operators antitrust review of the decision notice] *MOFCOM's Decision on Gavilon's Acquisition of Marubeni*, MOFCOM (2013-04-24 08:57), http://www.mofcom.gov.cn/article/b/fwzl/201304/20130400100765.shtml.

78. *Id*.

soybean meal and distiller's dried grain. Based on the actual trading flows, consumption habits, transportation, and customs duties, the agency defined the relevant geographic market as China.

In assessing the deal's competitive impact, MOFCOM focused on China's heavy reliance on soybean imports. As the agency specifically pointed out in its decision, imports account for 80% of the soybean supply on the Chinese market. Prior to the acquisition, Marubeni had a strong position in China's soybean import market. Its 2012 soybean imports accounted for 18% of China's total soybean imports, while competitors such as ADM, Bunge, Cargill, Louis Dreyfus, and Toepfer International had a much smaller market share.[79]

The proposed deal, in MOFCOM's view, would substantially strengthen Marubeni's market position. In particular, Marubeni may expand its source of soybean supplies by taking advantage of Gavilon's capability in the purchase, storage, and logistics of soybeans in North America. Marubeni may also materially enhance its export of soybeans to the Chinese market by taking advantage of its existing comprehensive distribution network and client base there.

MOFCOM found market entry was difficult because it required access to the soybean supply and developed distribution channel. Additionally, there have been no new entries in the past five years.[80] The agency then concluded that it would be hard for new entrants to efficiently impose constraint on Marubeni.

MOFCOM also considered the transaction's impact on downstream soybean purchasers. In its view, soybean purchasers were mainly small enterprises with weak bargaining power, and the proposed transaction may further undermine the downstream enterprises' ability to bargain.[81]

To address the negative competitive impact of the acquisition, MOFCOM imposed behavioral remedies that in essence required the two corporations to separate their soybean export business. These conditions included the following post-acquisition behavioral commitments:

- Within six months of completion, the transaction parties have to establish two separate legal entities with independent operating teams to export and sell soybeans to China.
- The two soybean business entities will maintain independent operations in relation to human resources, procurement, marketing, sales and pricing.

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79. *Id.*

80. *Id.*

81. *See* Shangwubu Gonggao 2013 Nian Di 22 Hao Guanyu Fujia Xianzhixing Tiaojian Pizhun Wanhong Gongsi, Shougou Gaohong Gongsi 100% Guquan Jingyingzhe Jizhong Fanlongduan Shencha Jueding De Gonggao (商务部公告 2013 年第 22 号?于附加限制性条件批准丸红公司收购高鸿公司 100% 股权经营者集中反垄断审查决定的公告) [Ministry of Commerce Notice No. 22 of 2013, Notice of the Decision From the Investigation Focused on Anti-Monopoly by Operators of Business, on Additional Restrictive Conditions Permitting the Marubeni Company's Acquisition of One Hundred Percent Equity of the Gavilon Company], *MOFCOM's Decision on Gavilon's Acquisition of* Marubeni, MOFCOM (2013-04-24 08:57), http://www.mofcom.gov.cn/article/b/fwzl/201304/20130400100765.shtml.

- The Marubeni soybean subsidiary will not purchase soybean from the Gavilon soybean subsidiary except under fair market terms with the establishment of a firewall between them.
- The Marubeni soybean subsidiary and the Gavilon soybean subsidiary should not exchange competitive information, and a firewall should be established between these two subsidiaries.[82]

In order to fulfill its post-deal obligations, Marubeni must appoint an independent supervising trustee in accordance with MOFCOM's *Interim Rules on Implementing the Distribution of Assets or Business in Concentrations Between Undertakings*. These conditions will be in place for 24 months after which Marubeni may apply to MOFCOM to request release from its obligations as to separate soybean operations.[83]

III. The Significance of M&A Reviews: Lessons Learned

A. International Cooperation

As a relatively new antitrust agency, MOFCOM "has been attaching great importance to exchange and cooperation with anti-monopoly law enforcement agencies of other countries and relevant international organizations."[84] During the past years, MOFCOM has established co-operational relationships with antitrust agencies in the U.S., the EU, the UK, Australia, and Brazil, as well as neighbor countries like South Korea. Chinese agencies and the U.S. agencies signed a Memorandum of Understanding in July 2011.[85] In 2011, the U.S. anti-trust agencies and MOFCOM issued "Guidance for Case Cooperation," which provides a framework for the cooperation between the investigating agencies in reviewing the same merger cases.[86] In 2012, Chinese agencies signed bilateral cooperation agreements with agencies in five other counties.[87]

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82. *Id.*

83. *Id*.

84. *See* General 2012 Statistics From Conference Minutes of the "Anti-Monopoly Work Progress in 2012," MOFCOM (January 2013), http://english.mofcom.gov.cn/article/newsrelease/press/201301/20130108513014.html. (International exchange and cooperation, Part III of the introduction by the Director-General of the Anti-Monopoly Bureau of the Ministry of Commerce and Director of the Office of the Anti-Monopoly Commission of the State Council introduced).

85. *See id.*; "Federal Trade Commission and Department of Justice Sign Antitrust Memorandum of Understanding With Chinese Antitrust Agencies," FTC (July 27, 2011), http://www.ftc.gov/opa/2011/07/chinamou.shtm; "Dep't of Justice and FTC Sign Antitrust Memorandum of Understanding with Chinese Antitrust Agencies," U.S. Dep't of Justice (July 27, 2011), http://www.justice.gov/atr/public/press_releases/2011/273306.pdf; *see also* Christine Varney, Remarks on the Occasion of the Signing of the Memo of Understanding on Antitrust Cooperation, Ass't Att'y Gen., Antitrust Division, (July 27, 2011), http://www.justice.gov/atr/public/speeches/273347.pdf; Memorandum of Understanding on Antitrust and Antimonopoly Cooperation, U.S. Dep't of Justice (July 27, 2011), http://www.justice.gov/atr/public/international/docs/273310.pdf.

86. *See* "Guidance for Case Cooperation Between the Ministry of Commerce and the Department of Justice and Federal Trade Commission on Concentration of Undertakings (Merger) Cases," FTC (Nov. 29, 2011), http://www.ftc.gov/os/2011/11/111129mofcom.pdf.

87. *See* Conference, *supra* note 84 (United Kingdom, South Korea, European Commission, Australia and Brazil).

The cooperation ranges from policy exchanges, case investigations, and analytic framework to multiple technical supports. The relation turns even tighter when the agencies are facing the same high-profile global merger cases. While reviewing the *Western Digital/Viviti* deal, a case with a subtle relationship with another high profile acquisition filed in the same period involving the same global market,[88] MOFCOM substantively cooperated with other antitrust authorities on a bilateral basis and also coordinated compatible remedies that addressed competitive concerns in multiple jurisdictions.[89] The international cooperation is disclosed in *International Enforcement Cooperation*, an official document released by OECD.[90]

B. Alignment of Analytic Framework With the U.S. and EU Approaches

According to article 2 of the AML, the essential issue of MOFCOM's merger review is whether the proposed transactions "have or may have the effect of eliminating or restricting competition."[91] In assessing the impact of a transaction, MOFCOM's first consideration is "whether the concentration will give a business operator the ability, motive and possibility to

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88. Samsung/Seagate Acquisition, which was approved in December 2011 by MOFCOM, requested to keep Samsung hard disk as an independent competitor.

89. *See* Directorate for Financial and Enterprise Affairs Competition Committee, *International Enforcement Cooperation*, DAF/COMP/WP3/WD(2012)24, (June 8, 2012), http://www.ftc.gov/bc/international/docs/062012 International_coop_U%20S.pdf.

> In 2011 and 2012, the FTC engaged in substantive cooperation with ten non-U.S. antitrust agencies, including newer authorities, reviewing Western Digital Corporation's ('Western Digital') proposed acquisition of Viviti Technologies Ltd., formerly known as Hitachi Global Storage Technologies. The cooperating agencies included those in Australia, Canada, China, the European Union, Japan, Korea, Mexico, New Zealand, Singapore, and Turkey. The extent of cooperation with each agency varied, generally depending on the nature of the likely competitive effects in the jurisdictions, and ranged from discussions of timing and relevant market definition and theories of harm to coordination of remedies. The parties granted waivers on a jurisdiction-by-jurisdiction basis. Throughout the review, FTC staff and staff of each of the non-U.S. authorities worked together closely, on a bilateral basis, which involved significant time and resources. Cooperation included coordinating compatible remedies that addressed competitive concerns in multiple jurisdictions. Of note, only a limited number of cooperating agencies on the matter took formal remedial action.

90. *See generally id*. (The cooperation is also witnessed by Western Digital deal's time lines with MOFCOM, European Commission and the FTC. April 2, 2011, Western Digital filed with MOFCOM. August 8, 2011, Western Digital appealed in EU merger probe. Case T-452/11 about Seagate case's priority. November 23, 2011, European Commission clears Western Digital's acquisition of Hitachi's HDD business subject to conditions. November 23, 2011, European Commission opens in-depth investigations into two proposed acquisitions in the HDD sector. March 2, 2012, MOFCOM approved this deal with both structural and behavioral remedies. March 5, 2012, the FTC cleared this case with structural remedies. March 9, 2012, Western Digital acquires Hitachi GST for $4.8 billion. September 20, 2012, the General Court ordered that the case be removed from the register.) *See* Official Journal of the European Union, Oct. 15, 2011, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:305:0006:0007:EN:PDF; FTC, "Proposed Consent Agreement," 77 F.R.14523 (March 12, 2012), http://www.ftc.gov/os/fedreg/2012/03/120312westerndigitalanal.pdf; Official Journal of the European Union, Nov. 17, 2012, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:355:0038:0038:EN:PDF.

91. *See* Zhonghua Renmin Gongheguo Fan Longduan Fa (中华人民共和国反垄断法) [Anti-monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 2, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ68 (China), http://english.mofcom.gov.cn/aarticle/policyrelease/announcement/200712/20071205277972.html.

independently eliminate or restrict competition or will increase such ability, motive and possibility."[92] The fundamental review issue under MOFCOM's merger control regime is also the fundamental question of merger reviews under the U.S. and EU antitrust laws.[93] Section 7 of the Clayton Antitrust Act provides that the key issue of the U.S. merger control regime is whether a proposed transaction may substantially lessen competition or tend to create a monopoly.[94] Similarly, the essential issue under the European Commission Merger Regulation is whether a concentration will "significantly impede effective competition in the common market.[95]"

In addition to convergence on the fundamental review issue, MOFCOM's analytic framework in determining the essential issue is largely in line with the approaches of the U.S. and European Union antitrust authorities. MOFCOM's recent review of horizontal mergers indicates an approach similar to the framework set forth in the 2010 Horizontal Merger Guideline of the U.S. Department of Justice and the FTC (U.S. Horizontal Merger Guideline) and the EU Guidelines on Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings (EU Horizontal Merger Guideline). According to these two Horizontal Merger Guidelines, antitrust agencies generally start their analysis by defining the product and geographic market and identifying participants within the defined market.[96] The agencies then calculate the HHI by summing the squares of each participant's market share.[97] A high HHI indicates a high level of market concentration.[98] However, the agencies would evaluate countervailing factors such as market entry and buyer power to determine whether market concentration will lead to an anticompetitive impact.[99]

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92. *See* Guanyu Pinggu Jingyingzhe Jizhong Jingzheng Yingxiang De Zanxing Guiding [Xianxing youxiao] (?于评估经营者集中竞争影响的暂行规定[现行有效) [Focus on the assessment of the effects of competition operators Provisional Regulations [in force] Interim Provisions on Assessment of Impact of Concentration of Business Operations on Competition], 商务部公告 2011 年第 55 号 [Ministry of Commerce Notice No. 55 of 2011], Announcement No. 55 [2011] of the Ministry of Commerce, MOFCOM (Sep. 02, 2011), http://www.mofcom.gov.cn/article/b/fwzl/201109/20110907723440.shtml.

93. *See, e.g.*, 15 U.S.C. § 18 (1996); *see also* Memo from U.S. Dep't of Justice & the Fed. Trade Comm'n, Horizontal Merger Guidelines, August 19, 2010 [hereinafter 2010 U.S. Horizontal Merger Guidelines], http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

94. *See id*.

95. *See Council Regulation (EC) No. 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings* (the EC Merger Regulation), Official Journal L 24, 29.01.2004 art. 2(2), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:EN:PDF ("A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market."); *see also Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings*, 2004 O.J. (C 31) 5, art. I(1) [hereinafter E.U. Horizontal Merger Guidelines], http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:EN:PDF.

96. *See* 2010 U.S. Horizontal Merger Guidelines, *supra* note 93, §§ 4, 5.1, 5.2; *see also* E.U. Horizontal Merger Guidelines, *supra* note 95, art. 14, 15.

97. *See* 2010 U.S. Horizontal Merger Guidelines, *supra* note 93, § 5.3; *see also* E.U. Horizontal Merger Guidelines, *supra* note 95, art. 16.

98. *See id*.

99. *See* 2010 U.S. Horizontal Merger Guidelines, *supra* note 93, §§ 8, 9; *see also* E.U. Horizontal Merger Guidelines, *supra* note 95, art. 57.

MOFCOM's review of the *Goodrich/UTC* deal has reflected the same analytical framework. In its decision, MOFCOM first determined the relevant product and geographic market. The agency then calculated market share of each participant and used the HHI to assess the level of market concentration. Then it evaluated factors such as barriers to market entry, financial strength and technical resources of the merging parties, and other market players' reliance on merging firms to determine the transaction's effects on market competition.

Further, the negative effects considered by MOFCOM are similar to the competitive harm set forth under the U.S. and EU merger guidelines. As reflected in its recent decisions, MOFCOM evaluates unilateral effect[100] and coordinate effect[101] in its review of horizontal M&A transactions. For example, in both *Western Digital/Viviti* and *Goodrich/UTC*, MOFCOM evaluated whether the post-merger combined entity would be a leading power in the relevant market. The agency also discussed coordinated effects in its review of horizontal transactions. In both *Seagate/Samsung* and *Gavilon/Marubeni*, MOFCOM was concerned about the risk of post-transaction coordination between the transaction parties. The agency then required a separation of the transaction parties' business units to address the coordinated effects. The similarity of competitive harm assessment also exists in antitrust review of vertical M&A transactions. One common competitive concern that MOFCOM expressed in both *Google/Motorola* and *ARM/G&D/Gemalto* was that the transaction parties, as leading upstream market players, would likely discriminate against the competitors in the downstream market. This type of foreclosure effect is one of the primary competitive concerns in vertical transactions under the U.S. and EU merger control regimes.[102]

C. China—Focused Competitive Concerns and Remedy Decisions

In its recent review of global M&A transactions, MOFCOM's analysis shows its focus on the China market. The nation's market conditions as well as industrial policies have driven various aspects of MOFCOM's merger control decisions, including market definition, market concentration analysis, competitive harm assessment, and remedies.

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100. *See* 2010 U.S. Horizontal Merger Guidelines, *supra* note 93, § 6. *See also* E.U. Horizontal Merger Guidelines, *supra* note 95, art. 22(a). (Unilateral effect refers to the elimination of competition between two firms that results from their merger.).

101. *See* 2010 U.S. Horizontal Merger Guidelines, *supra* note 93, § 7. (Coordinated effect exists when a transaction diminishes competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers.) *See also* E.U. Horizontal Merger Guidelines, *supra* note 95, art. 22(b) (providing that horizontal mergers may significantly impede effective competition by changing the nature of competition in such a way that firms that previously were not coordinating their behavior are now significantly more likely to coordinate and raise prices or otherwise harm effective competition).

102. *See, e.g.*, Official Journal of the European Union, "Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings" (2008/C 265/07), art. 18, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:en:PDF. ("Foreclosure" describes any instance where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies' ability and/or incentive to compete. As a result of such foreclosure, the merging companies may be able to profitably increase the price charged to consumers.) *See also* Christine Varney, Ass't Att'y Gen., Antitrust Division, *Vertical Merger Enforcement Challenges at the FTC*, http://www.ftc.gov/speeches/varney/varta.shtm. ("Vertical integration can foreclose rivals from access to needed inputs or raise their costs of obtaining them.").

In terms of market definition, MOFCOM's merger review decisions have demonstrated a trend to focus on China. In its 2011 and 2012 decisions, MOFCOM often defined the geographic market to be global.[103]

The focus of MOFCOM's geographic market definition has changed to the China market. As indicated by its analysis of the most recent acquisition, MOFCOM specifically limited the relevant geographic market to the China region despite the global nature of the transaction and the worldwide scope of the merging parties' business activities.[104]

MOFCOM's market concentration assessment also reflects its focus on the China market. In the *Google/Motorola* acquisition, MOFCOM found Google's dominant position based on Android's 73.99% share of the China market, even though the agency defined the geographic market globally, and Android's market share on the global market was significantly lower.[105]

Similarly, in evaluating the acquisition's potential impact on market competition, MOFCOM emphasized the transaction's impact on various participants of the China market, including competitors, downstream entities, as well as end consumers. In horizontal mergers like the *Western Digital/Viviti* transaction, MOFCOM considered the negative impact of the transaction on end consumers and competitors. In its analysis of the transaction, MOFCOM emphasized the fact that China is one of the largest PC consumption countries and specifically addressed the competitive concerns affecting the interests of Chinese consumers. Such focus continues in the agency's most recent decisions. In both *Glencore/Xstrata* and *Gavilon/Marubeni*, MOFCOM's primary competitive concern was downstream Chinese consumers' weak bargaining power and the transactions' effect to further undermine their ability to bargain.

In vertical M&A transactions, MOFCOM's primary concern tends to be whether the postmerger upstream supplier will treat all downstream participants on the China market fairly. In the *Google/Motorola* decision, MOFCOM focused on domestic Chinese OEMs' reliance on Android. The agency found that Google was likely to favor Motorola and put domestic OEMs at a competitive disadvantage given their reliance on Android. In order to address the competitive concerns affecting these domestic OEMs, MOFCOM then imposed behavioral remedies that required Google to license Android free of charge and treat OEMs in a non-discriminatory manner. Similarly, in *ARM/G&D/Gemalto*, MOFCOM was concerned that ARM may have the incentive and ability to foreclose JV's competitors in development of TEE solutions given ARM's strong upstream position in licensing IP related to multimedia application processor for consumer electronic devices.

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103. *See, e.g.*, MOFCOM's Decision on the Western Digital and Viviti Technologies Acquisition, MOFCOM (2011).

104. *See, e.g.*, *MOFCOM's Decision on Glencore's Acquisition of Xstrata*, MOFCOM (2013-04-16 18:06), http://www.mofcom.gov.cn/article/b/fwzl/201304/20130400091299.shtml.

105. *See* MOFCOM's Decision on Google's Acquisition of Motorola Mobile [Concerning Additional Restrictive Conditions Approved Google's Acquisition of Motorola's Mobile Business Concentration Antitrust Review of the Decision Notice] (promulgated by Ministry of Commerce of China, effective May 19, 2012), Ministry of Commerce Anti-Monopoly Bureau, 2012 No. 25 (China), http://fldj.mofcom.gov.cn/article/ztxx/201205/20120508134324.shtml.

Given the territorial focus of MOFCOM's competitive concerns, remedies addressing these concerns also reflect the agency's focus on the China market, particularly downstream Chinese entities that have relied on the merging parties' product or technology supply prior to the transaction. The remedies in *Google/Motorola* included Google's continuous license of Android in a free and open source manner and treatment of all OEMs in a nondiscriminatory manner. Likewise, in *Glencore/Xstrata*, MOFCOM required Glencore to offer downstream Chinese entities long-term supply contracts of metal products for no less than the provided quantity and at an annual benchmark price.

The underlying rational for MOFCOM's territorial focus lies in the AML. According to article 27 of the AML, MOFCOM can consider a transaction's effect on Chinese consumers and other related parties such as suppliers and distributors on the China market.[106] The AML also authorizes MOFCOM to consider the development of the Chinese economy in reviewing M&A transactions along with competitive concerns such as market concentration and market entry.[107] In other words, noncompetitive concerns such as China's industry policy can also shape various aspects of MOFCOM's merger decisions.

To a certain extent, MOFCOM's focus on the China market explains the conditions it has imposed on global M&A deals when its counterparts in the U.S. and the EU unconditionally cleared the same transactions. Given the unique market condition of each jurisdiction, MOFCOM will have competitive concerns that are different from that of its U.S. and EU counterparts.[108] In addition, MOFCOM has to make sure domestic market players will not be adversely affected by the transaction. As a result, the agency has come up with remedies that are designed to address economic and industry policy concerns that are unique to its jurisdiction.

MOFCOM's territorial focus has practical implications for parties planning global M&A transactions. One important aspect is to proactively analyze the competitive impact of their deals on the China market. Even if the parties use plain vanilla filings with multiple jurisdictions, the merger filing with MOFCOM should include market-specific facts with regard to the relevant products, competitors, and different participants on the supply chain. Additionally, during the consultation and other stages of the merger review, the parties should properly address MOFCOM's concerns and propose remedial measures so that the transaction can be cleared by this agency within a relatively short period of time.

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106. *See* Zhonghua Renmin Gongheguo Fan Longduan Fa (中华人民共和国反垄断法) [Anti-monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 27(4), 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ 68 (China), http://english.mofcom.gov.cn/aarticle/policyrelease/announcement/200712/20071205277972.html.

107. Zhonghua Renmin Gongheguo Fan Longduan Fa (中华人民共和国反垄断法) [Anti-monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 27(5), 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ 68 (China), http://english.mofcom.gov.cn/aarticle/policyrelease/announcement/200712/20071205277972.html.

108. *See* Ilene Knable Gotts, *Navigating Multijurisdictional Merger Reviews: Suggestions From a Practitioner*, 61st Annual Antitrust Law Spring Meeting, Apr. 11, 2013, http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.22552.13.pdf. FN#56.2.

D. Behavioral and Structural Remedies as Conditions for MOFCOM's Approval

Another trend that has continued in the merger reviews is MOFCOM's frequent use of conditional approvals. Under the AML, MOFCOM has the authority to unconditionally clear an M&A transaction, block such a transaction, or approve the transaction subject to restrictive conditions.[109] Instead of entirely blocking or unconditionally approving the proposed M&A deals, MOFCOM has chosen to impose different types of conditions to address the competitive concerns raised in these transactions.[110] The remedies were structural (such as divestiture of certain assets), behavioral (such as non-discrimination treatment of downstream market players), or a combination of both.[111]

The conditional clearance constitutes one of the key differences between the decisions of MOFCOM and its Western counterparts on the same transactions. In contrast to the FTC and EC's unconditional clearance of the *Seagate/Samsung* transaction, MOFCOM imposed significant behavioral remedies.[112] Similarly, in the *Google/Motorola* deal, MOFCOM imposed various post-merger behavioral requirements on Google while the U.S. and EU authorities cleared the transaction unconditionally.[113] Even when all major antitrust agencies imposed conditions on the same transaction, MOFCOM's requirements tend to be more stringent. In the *Western Digital/Viviti* transaction, the FTC and the EU only required Western Digital to divest Viviti

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109. Zhonghua Renmin Gongheguo Fan Longduan Fa（中华人民共和国反垄断法）[Anti-Monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), Art. 28–29, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ 68 (China), http://english.mofcom.gov.cn/aarticle/policyrelease/announcement/200712/20071205277972.html.

110. *See* General 2012 Statistics From Conference Minutes of the "Anti-Monopoly Work Progress in 2012," MOFCOM (Jan. 2013), http://english.mofcom.gov.cn/article/newsrelease/press/201301/20130108513014.html.

> In accordance with the Anti-monopoly Law, there may be three consequences of review on concentration of undertakings: the first is prohibition, and the second is non-prohibition, including unconditional approval and approval with additional restrictive conditions. Seen from law-enforcing practices, in case problems are found by the Ministry of Commerce, a decision of approval with additional restrictive conditions is mostly adopted, and only in very few cases when no satisfactory solutions are put forward by the declaring party, the Ministry of Commerce has to make a decision of prohibition. Approval with additional restrictive conditions is equal to a commitment made by the operator to the Ministry of Commerce by putting forward with solutions to the competitive problems found in transactions upon review. We then turn the commitment made by the declaring party for the competitive problem into a restriction imposed by us on their transaction behaviors as well as a mandatory condition, which is the restrictive condition specified by law.

111. MOFCOM only imposed behavioral remedies in *Uralkali/ Silvinit*, *Seagate/Samsung*, *ARM/G&D/Gemalto*, *Google/ Motorola* and *Gavilon/Marubeni*. It imposed structural remedies in *Alpha v. Savio*. Its decisions in *Western Digital/Viviti*, *Goodrich/UTC* and *Glencore/Xstrata* involved a combination of both behavioral and structural remedies.

112. *Compare* Press Release, European Comm'n, Mergers: Commission Clears Proposed Acquisition of Samsung's HDD Business by Seagate Technology (Oct. 19, 2011), http://europa.eu/rapid/press-release_IP-11-1213_en.htm, *with* MOFCOM's Decision on Seagate Technology's Acquisition of Samsung's HDD.

113. *Compare* Press Release, Dep't of Justice, Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd. (Feb. 13, 2012), http://www.justice.gov/opa/pr/2012/February/12-at-210.html, *with* MOFCOM's Decision on Google's Acquisition of Motorola Mobile, *supra* note 104.

assets relating to the manufacture of 3.5-inch HDDs to Toshiba Corp.[114] MOFCOM went further to impose behavioral remedies, including maintaining independent R&D of each merging party and establishing firewalls.[115]

The above-mentioned conditions or remedies indicate MOFCOM's willingness to independently analyze global M&A transactions and also highlight the increasingly important role played by the Chinese agency in global M&A activities. On the other hand, the conditional clearance of M&A transactions has certain downsides.[116] Among other things, when behavioral remedies are imposed, MOFCOM or the transaction parties will have to appoint a trustee who will continuously monitor merging firms' post-merger activities for a relatively long period of time (five years in *Google/ Motorola* and eight years in *Glencore/Xstrata*).[117] The continuous supervision by MOFCOM and the appointed trustee will probably impose substantial burden not only on the agency but also on all the merging parties. Further, in three acquisitions,[118] MOFCOM required the acquirer to operate the target's business separately until the agency reevaluated the competitive impact of the transaction. This type of hold-separate behavioral remedy essentially prevents the acquirer from exercising control over the target's business and contradicts the primary purpose of the transaction.

G. Review Procedure

According to Articles 25 and 26 of the AML, the MOFCOM review process has three phases. Upon the acceptance of the parties' completed application, MOFCOM starts its 30-day preliminary review (so-called Phase 1 review) and decides whether further investigation is necessary.[119] Without MOFCOM's approval of the application, the concentration may not be

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114. Press Release, European Comm'n, Mergers: Commission Clears Western Digital's Acquisition of Hitachi's Hard Disk Drive Business Subject to Conditions (Nov. 23, 2011), http://europa.eu/rapid/press-release_IP-11-1395_en.htm. *See also* Federal Trade Commission, Statement of the Federal Trade Commission Concerning Western Digital Corporation/Viviti Technologies Ltd. and Seagate Technology LLC/Hard Disk Drive Assets of Samsung Electronics Co. Ltd., http://ftc.gov/os/caselist/1110122/120305westerndigitalstmt.pdf.

115. Susan Ning et al., Western Digital/Hitachi Received Conditional Nod From MOFCOM, China Law Insight, (Mar. 8, 2012), http://www.chinalawinsight.com/2012/03/articles/corporate/antitrust-competition/western-digitalhitachi-received-conditional-nod-from-mofcom/..

116. Press Release, Ministry of Commerce People's Republic of China, Anti-monopoly Work Progress in 2012 (Jan. 5, 2013), http://english.mofcom.gov.cn/article/newsrelease/press/201301/20130108513014.shtml ("New regulations are being formulated with the purpose of solving all kinds of problems that may be encountered throughout the process from the proposal, negotiation, evaluation and determination of such restrictive conditions to the implementation of supervision.").

117. *See* Shangwubu Guanyu《Jingyingzhe Jizhong Fujia Xianzhixing Tiaojian De Guiding (Zhengqiu Yijian Gao)》Gongkai Zhengqiu Yijian（商务部关于《经营者集中附加限制性条件的规定（征求意见稿）》公开征求意见） *Rules on Attaching Restrictive Conditions to Concentrations between Undertakings (Draft for Comments)* (Mar. 27, 2013) (hereinafter Restrictive Conditions Draft Rules), art. 4, http://tfs.mofcom.gov.cn/article/as/201303/20130300068492.shtml (providing that monitoring trustees are responsible for monitoring the parties' compliance with their structural or behavioral remedy obligations, and divestiture trustees are responsible for executing a divestiture during a trustee-divestiture period).

118. The three acquisitions are *Seagate/Samsung*, *Western Digital/Hitachi*, and *Marubeni/Gavilon*.

119. Zhonghua Renmin Gongheguo Fan Longduan Fa（中华人民共和国反垄断法）[Anti-monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), Arts. 25–26, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ 68 (China), http://english.mofcom.gov.cn/aarticle/policyrelease/announcement/200712/20071205277972.html.Zhonghua.

implemented. However, if the Phase 1 review period passes without any notice to the parties, the declared concentration will be deemed approved.[120] If MOFCOM decides to conduct further investigation, it will notify the parties in a private written form, which will trigger a 90-day investigation period (Phase 2 review).[121] Within the Phase 2 review period, MOFCOM decides whether substantive issues exist. Accordingly, it will issue a clearance of the case or a prohibition of the concentration. When Phase 2 passes, MOFCOM can extend the Phase 2 review period for another 60 days (extended Phase 2 review) for cause, i.e., the parties' consent, inaccurate or missing materials, or changed circumstances.[122] MOFCOM issues public announcements of any prohibited transactions and conditional approvals.

Since 2008, MOFCOM settled majority of cases over 30 days, which exceeded the average review periods of other regions and countries where summary procedure is adopted to handle cases without obvious adverse effects to the market competition.[123] MOFCOM has been concerned about the length of its reviewing period and has been working on simplified procedures applicable to simple cases that do not raise substantive issues. In 2012, MOFCOM made further efforts for the supporting legislation of the Provisions on the Summary Procedure Applicable for Concentration of Undertakings Cases.[124] From April 3 to May 2, 2013, MOFCOM published a draft of the provisions for public comments.[125] The succinct draft provides a detailed definition of "simple cases" and MOFCOM's discretion in interpretation.[126] A transaction is a "simple case" if (1) all parties to the transaction have a combined market share below 15% in the relevant market; (2) the parties to the transaction have a vertical relationship and have a combined market share below 25% in each level of the vertical market; (3) the parties to the transaction do not have a vertical relationship but have a market share below 25% in all relevant markets; (4) the parties are establishing a joint venture out of China, and the joint venture does not engage in any business activities in China; (5) the target is a foreign company and does not engage in any business activities in China; and (6) the transaction is between a joint venture and its parents, and one or several parents take sole control over the joint venture after the transaction.[127] This definition is subject to six exceptions. A transaction cannot be considered as a simple case if (1) through the transaction, a joint venture parent takes sole control over the joint venture and the parent and the joint venture are competitors in the relevant market; (2) it is difficult to define the relevant market; (3) the concentration has negative impact on

120. *Id*.

121. *Id*., at art. 26.

122. *Id*.

123. General 2012 Statistics From Conference Minutes of the "Anti-Monopoly Work Progress in 2012," MOFCOM (January 2013), http://english.mofcom.gov.cn/article/newsrelease/press/201301/20130108513014.html. (International exchange and cooperation, Part III of the introduction by the Director-General of the Anti-Monopoly Bureau of the Ministry of Commerce and Director of the Office of the Anti-Monopoly Commission of the State Council introduced).

124. *Id*.

125. *See* Shangwubu Guanyu Jingyingzhe Jizhong Jianyi Anjian Shiyong Biaozhun De Zanxing Guiding (商务部《关于经营者集中简易案件使用标准的暂行规定(征求意见稿)》公开征求意见) [*A Draft for Comments on the Interim Provisions for the Standard of Simple Cases Applicable to Concentrations of Business Operators*] Ministry of Commerce of China (Apr. 3, 2013), http://fldj.mofcom.gov.cn/article/zcfb/201304/20130400076870.shtml.

126. *Id*.

127. *Id*., at art. 2. (The interpretation is provided by authors. It is not an official version.)

market entry and technological development; (4) the concentration has negative impact on consumers and relevant business operators; (5) the concentration has negative impact on national economic development; (6) MOFCOM determines that the concentration has negative impacts on market competitions.[128] So far, MOFCOM has still applied the same review process to all concentrations. While we are expecting the standard of "simple cases" will finally turn into law in 2013, we may still expect MOFCOM to publicize the summary review procedure for simple cases or cross-reference with existing procedural provisions.

The review periods for complex cases are even longer. Among the nine significant cases discussed above, three cases were cleared in Phase 2; four cases were cleared after an extended two-phase review, while the other two cases were cleared after a second filing of the cases.[129] Both cases conditionally cleared in 2013 had exhausted all three stages of statutory review period while parties were working on remedy proposals. Interestingly, in both cases, applicants withdrew their initial filing at the end of the statutory period and re-filed a second application for approval followed by the clearance.[130]

IV. Conclusion

The AML along with regulations and interim provisions promulgated by MOFCOM thereunder established the merger control regime governing global M&A transactions that are connected with China's economy. As a relatively new antitrust agency, MOFCOM has continued to develop its review framework, seek cooperation with other antitrust agencies, shorten review periods, and provide more guidance to firms seeking to merge or acquire other entities. MOFCOM's review of major global M&A activities in recent years reflects the similarity of its approach to that of the U.S. and EU authorities but also highlights its own characteristics, particularly its China-focused competitive impact analysis and frequent use of conditional approval. Firms involved in global M&A transactions need to think ahead as to the transactions' impact on the China market and address any competitive concerns before MOFCOM's final decision. The early resolution of any anticompetitive concern would shorten the review period, reduce the conditions or remedies MOFCOM may impose, and also minimize the burdens and costs in connection with performing post-merger obligations.

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128. *Id.*at art. 3. (The interpretation is provided by authors. It is not an official version.)

129. *See supra* Part II.

130. *See MOFCOM's Decision on Glencore's Acquisition of Xstrata*, MOFCOM (2013-04-16 18:06), http://www.mofcom.gov.cn/article/b/fwzl/201304/20130400091299.shtml.; *see also MOFCOM's Decision on Gavilon's Acquisition of Marubeni*, MOFCOM (2013-04-24 08:57), http://www.mofcom.gov.cn/article/b/fwzl/201304/201304 00100765.shtml.

Inconsistent Application: Enforcing International Arbitral Awards in National Courts

Mia Levi*

I. Introduction

In an increasingly interconnected world where trade, technology and communication between international parties are growing exponentially, the international community needs a consistent method of resolving disputes to ensure that any award granted will have international recognition. Most international arbitration forums provide numerous options for these parties. Choice of dispute settlement forums, procedural rules, language of the proceedings, and the ability to enforce any award are all means through which parties can demonstrate some control over an arbitral proceeding. This potential for enforcement in multiple jurisdictions is a valuable tool because it allows the prevailing party to collect on its award and, when it cannot, to bring judicial pressure to compel compensation. The far-reaching presence of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)[1] and the willingness of most national courts to give it force make resolving international disputes through arbitration very desirable.[2]

Some parties may encounter problems when attempting to enforce an award in a country different from the seat of the arbitration. If arbitral awards cannot be adequately enforced, parties will not be able to ensure that they can recover the damages awarded through their successful claims. Continuously varying results in efforts to enforce international arbitral awards in national courts may undermine the role of arbitration in transnational disputes and challenge the integrity of the arbitral process as a whole.

II. Arbitral Authority

The ability to enforce international arbitral awards in national courts arises from a series of international treaties that allow arbitral awards rendered by international tribunals to be enforced in all of the signatory countries. Awards rendered by the International Centre for Settlement of Investment Disputes (ICSID) are governed by the Convention on the Settlement of

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1. There are currently 24 signatories and 149 parties to the Convention. *See* United Nations Treaty Collection, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (New York Convention), last visited Oct. 2, 2013.

2. *See generally* John D. Feerick, *Toward a More Peaceful World—The New York Convention*, *in* ADR AND THE LAW 20 (American Arbitration Association, 1997).

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Investment Disputes Between States and Nationals of Other States (ICSID Convention),[3] while the New York Convention governs most other international arbitrations.[4]

The New York Convention, signed in 1958, has been the standard governing authority in a majority of proceedings for recognition and enforcement proceedings arising out of international arbitrations. After more than half a century since the New York Convention came into effect, foreign national courts have been applying the New York Convention to enforce arbitral awards as if the award had been granted within their own territories. Indeed, this is one of the most unique and useful aspects of the New York Convention.[5] Domestic courts thus theoretically review awards based on uniform provisions of the treaty to determine enforceability.[6]

On the other hand, the ICSID Convention contains its own internal appeals process, requiring parties seeking to vacate or nullify awards to appeal directly through ICSID itself.[7] An ICSID award is treated "as if it were a final judgment of a court in that State" and, therefore, parties seeking enforcement before a national court must conform to this principle. This means that ICSID awards cannot be challenged on public policy or procedural grounds,[8] but it does not suggest that other defenses such as sovereign immunity are barred.

Most arbitral awards, however, are voluntarily complied with and therefore do not require judicial enforcement.[9] Enforcement of international arbitral awards based on these conventions should be a relatively straightforward procedure. However, an examination of the application of the conventions shows that most parties may successfully use defenses to enforcement (such as public policy or sovereign immunity), and States incorporate their own laws to produce a varied outcome from state to state.

III. Grounds for Setting Aside Foreign Arbitral Awards

Under Article V of the New York Convention, vacatur is permitted in certain circumstances. A party may move to vacate an award if it can show any of the following:

> (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid

3. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25(1), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA-chap02.htm [ICSID Convention].

4. *See* New York Convention, *supra* note 1, art. V(1).

5. *See* M. Sornarajah, International Commercial Arbitration: The Problem of State Contracts 238 (1990).

6. *See* New York Convention, *supra* note 1, arts. III–V. (Note that, in the United States, for example, the Convention has been incorporated into federal law under Chapter II of the Federal Arbitration Act.) *See* 9 U.S.C. § 201 (2006).

7. *See* ICSID Convention, *supra* note 3, art. 52.

8. *See* Giuliana Cane, *The Enforcement of ICSID Awards: Revolutionary or Ineffective?*, 15 AM. REV. INT'L ARB. 439, 444 (2004) ("[T]here is no exception (not even on the grounds of public policy) to the final and binding character of an ICSID award." (quoting Nassib G. Ziadé, *Some Recent Decisions in ICSID Cases*, 6 ICSID REV. FOREIGN INVESTMENT L.J. 514, 523 (1991))).

9. *See generally* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, COMMENTARY & MATERIALS 460 (Kluwer 1996).

> under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.[10]

Additionally, a national court itself may refuse to enforce an award if it finds that, under its own laws, the subject matter of the case is not arbitrable, or the recognition of the award would be contrary to the public policy of the State.[11]

While Article V identifies explicit grounds for refusal of recognition and enforcement of international arbitral awards, those grounds are not as evident in practice. To begin, the broad language of the "public policy" exception is not uniformly applied. Moreover, when States' interests are at stake, they may invoke their sovereign immunity as a defense. On the other hand, some States will even enforce arbitral awards that have been set aside at the seat.

A. Public Policy Defense

The public policy defense against enforcement may be the most open-ended of grounds for refusal of enforcement of international awards. Article V(2)(b) of the New York Convention states:

> (2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (b) the recognition or enforcement of the award would be contrary to the public policy of that country.[12]

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10. New York Convention, *supra* note 1, art. V(1).

11. *See id.* at art. V(2).

12. *Id.* at art. V(2)(b).

Most States, rather than define public policy in their statutes, have simply codified the exact text of Article 34(2)(b) of the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law) into their arbitration statutes without further clarification on the matter.[13] The UNCITRAL Model Law, however, merely rephrases the language in Article V.[14] This leaves the interpretation up to the State courts themselves.

In the United States, the public policy defense is interpreted more narrowly. As the U.S. Court of Appeals for the Second Circuit observed in *Parsons & Whittemore Overseas Co. v. RAKTA* (*RAKTA*), arbitral awards should be denied enforcement only when they "would violate the forum state's most basic notions of morality and justice."[15] In this case, the International Chamber of Commerce ruled in favor of an award against an American corporation that had breached its contract with an Egyptian corporation when Egypt ordered all Americans from its borders (unless they applied for special visas). The argument of public policy was based on the American corporation's decision to abandon construction of a project in Egypt when American-Egyptian relations were severed. The Second Circuit affirmed the district court's decision in refusing to deny enforcement of the award. The court also held that denying enforcement because of Egypt's strained relations with and hostility toward the United States in recent years would be incorrect, as it would create a "major loophole in the [New York] Convention's mechanism for enforcement."[16] The court noted that to use public policy as a device to protect national political interests would undermine the purpose of the New York Convention.[17]

Other jurisdictions, however, permit their courts to refuse enforcement based on a different understanding of the concept of "contrary to public policy." The requirements vary. In Russia, the Arbitrazh Procedural Code requires only that the award go against "fundamental principles of Russian law,"[18] allowing courts broad discretion in deciding whether the award would go against an established rule in Russian law. In Switzerland, it means that an award "shocks in an unbearable way the sense of justice as it stands in Switzerland and violates fundamental rules of the Swiss legal system."[19] The courts in Ireland find that "contrary to public policy" requires "a breach of the most basic notions of morality and justice" only where there is

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13. *See* David A. R. Williams, *Review: Arbitration and Dispute Resolution*, 2004 N.Z. L. REV. 87, 100 (2004).

14. *See* United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration (1985), http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visited Oct. 2, 2013). The UNCITRAL Model Law simply rephrases the language of the Convention: "if the court finds that . . . the award is in conflict with the public policy of this State." *Id.* at art. 34(2)(b).

15. 508 F.2d. 969, 974 (2d Cir. 1974).

16. *Id.*

17. *See id.*

18. Boris Karabelnikov & Dominic Pellew, *Enforcement of International Arbitral Awards in Russia: Still a Mixed Picture*, 19 ICC INT'L CT. ARB. BULL. 1, 71, n.18 (2008) ("The wording 'fundamental principles of Russian law' is used in the Arbitrazh Procedural Code (APC) as the equivalent criterion to 'public policy' with respect to international awards issued in Russia. Thus, the wording is viewed by most specialists as being identical in substance to public policy.").

19. Christoph Müller, *Notion of Public Policy, in* INTERNATIONAL ARBITRATION—A GUIDE TO THE COMPLETE SWISS CASE LAW (UNREPORTED AND REPORTED), United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2b)(2) (June 10, 1958).

illegality, clear injury to the public good, or would be offensive to the public.[20] Adding explicit language requiring illegality, injury, or public offense implies that harm must be delineated before the defense may be applied. In South Korean courts, the interpretation is even more narrowly limited, following the language of "against good moral and social order"[21] but applying the defense only in matters of international trade. Finally, some jurisdictions go so far as to differentiate international public policy from the local State's public policy, marking the latter as all but irrelevant when evaluating a foreign arbitral award.[22] These inconsistencies in the scope of and deference to public policy from State to State allow States to invoke Article V in an entirely non-uniform manner.

B. Sovereign Immunity Defenses Against Enforcement

The principle of sovereign immunity comes from customary international law, which holds that "every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."[23] With the growing prevalence of international commercial arbitration, absolute sovereign immunity under such contexts is lost, but States have held on to the principle and may continue to apply sovereign immunity as a defense where they feel another State's court may be too far-reaching.

Each State's public policy in turn affects whether state agencies or state-owned corporations' activities are part of that State's public policy. Thus, the application of the sovereign immunity exception is implemented under Article V of the New York Convention in varying ways across member States. If the arbitral tribunal's authority is derived from consent of the parties and/or from those parties' national governments, then a court's refusal to execute and enforce an otherwise valid arbitral award for reasons of sovereign immunity nullifies the jurisdiction of the arbitral tribunal altogether. Moreover, the ICSID Convention allows for an even broader application of the sovereign immunity defense, relying on the national sovereign immunity laws of the forum state when allowing or denying enforcement against a foreign sovereign's assets.[24] Indeed, Article 55 of the ICSID Convention states that "[n]othing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity."[25]

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20. Brostrom Tankers AB v. Factorias Vulcano SA, [2004] IEHC 198, 2003 44 SP (H. Ct.) (Ire.).

21. Supreme Court Case No. 2006da20290 (May 28, 2009) (S. Korea), http://library.scourt.go.kr/jsp/html/w04_01r.jsp?seqno=295.

22. Tamil Nadu Electricity Board v. ST-CMS Electric Co. Private Ltd, [2007] EWHC 1713 (QB), 1 A.L.R. INT'L 795 (Eng.) (holding that the public policy of India, the seat of the original arbitration, was neither "here nor there," and that in the context of an international treaty, international public policy was influential and differed from its domestic public policy).

23. Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

24. *See* Sergia Carias-Borjas, *Recognition and Enforcement of ICSID Awards*, 2 AM. REV. INT'L ARB. 354, 357 (1991).

25. ICSID Convention, *supra* note 3, art. 55. Note that Article 54(3) of the ICSID Convention provides that "[e]xecution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought." *Id.* at art. 54(3).

Western courts are facing an ongoing dilemma as to how far sovereign immunity may be extended and are becoming increasingly uncomfortable enforcing foreign arbitral awards when issues of sovereign immunity are involved.[26]

In the United States, the Foreign Sovereign Immunities Act (FSIA) creates exceptions to sovereign immunity and establishes a limited range of exceptional circumstances under which U.S. courts may assert personal jurisdiction over a foreign sovereignty.[27] Unfortunately, interpreting the FSIA to determine when such circumstances have occurred has generated some inconsistent holdings amongst U.S. courts.[28] For example, some U.S. courts interpret "commercial activity" to encompass a range of foreign state assets that may arise from commercial activity, even if the State itself was not using the assets to engage in commercial acts.[29] Other U.S. courts have held that the foreign states needed to personally engage those assets in commercial activity in order for those assets to fall under the commercial activity exception.[30]

In the United Kingdom, sovereign immunity is governed by the 1978 State Immunity Act (SIA), where immunity is permitted for non-state entities, as long as their actions are "in the exercise of sovereign authority," and if the State itself would be granted immunity in the same situation.[31]

French law, on the other hand, has not promulgated laws or enacted legislation regarding sovereign immunity but instead has developed the principle through its courts' jurisprudence.

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26. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 446 (1964) (White, J., dissenting):

> Our act of state doctrine . . . precludes a challenge to the validity of foreign law on the ordinary conflict of laws ground of repugnancy to the public policy of the forum. Against the objection that the foreign act violates domestic public policy, it has been said that the foreign law provides the rule of decision where the *lex loci* rule would so indicate, in American courts.

27. *See* 28 U.S.C. § 1605(a). A foreign sovereign can be tried under the following circumstances: (1) overt or implicit waiver of immunity, (2) commercial activities in the United States, (3) illegally acquired assets in the United States, (4) property acquired by gift or succession in the United States, (5) damages in tort resulting from actions that take place in the United States, and (6) arbitral awards valid under U.S. law or international conventions. *Id.* § 1605(a)(1)–(6).

28. *See* George K. Foster, *Collecting From Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for Its Reform*, 25 ARIZ. J. INTL. & COMP. L. 665, 672–84 (2008).

29. *See id.* at 681–82 (citing Alejandre v. Republic of Cuba, 42 F. Supp. 2d 1317, 1339–41 (S.D. Fla. 1999) (alteration in original) (finding that, despite there being no evidence the Cuban government used the assets in question for commercial activity, the amounts owed by U.S. companies to the Cuban state-owned telephone company were sufficient grounds for establishing commercial activity in the United States and withholding sovereign immunity), *vacated on other grounds sub nom*. Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc., 183 F.3d 1277 (11th Cir. 1999)).

30. *See, e.g.,* Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd., 475 F.3d 1080, 1091 (9th Cir. 2007) (holding that commercial activity for the purposes of attachment requires the assets be "put into action, put into service, availed or employed *for* a commercial activity, not *in connection* with a commercial activity or *in relation* to a commercial activity" (alteration in original)).

31. State Immunity Act, 1978, c. 33, § 13(5) (Eng.).

Generally, in France, assets will have the protection of sovereign immunity unless there is a private "commercial nexus" between the assets and the activity resulting in the arbitral award.[32]

C. Enforcement of Awards That Have Been Set Aside at the Seat

Nations differ on their views when it comes to the importance of the seat of the arbitration. The long-held dominant view is that the seat of arbitration acts as the forum or, in other words, the law of the seat governs the arbitration agreement, formation and composition of the arbitral tribunal, procedure of the hearings, and form of the award. Under this view, the seat essentially anchors the arbitration to the law of the State in which it takes place. Under the second view, the seat is merely chosen for the convenience of its location. Also, rather than drawing power from the local laws, "arbitrators have much broader discretion in determining the substantive law rules applicable to the dispute."[33]

When examining cases that have been set aside at the seat, states are divided on the importance of the seat. The first view is still the most prevalent, and, under such circumstances, when an award is set aside at the seat, other States will refuse to enforce the award in their own jurisdictions. These States stand on the second leg of Article V(1)(e), providing for refusal of recognition when the award has been set aside or suspended by a court in the country of origin. Nations, however, have begun turning to the second view and allowing enforcement of awards which have previously been set aside. These countries consider that Article V of the New York Convention does not go far enough in protecting international commerce, and Article V may be an obstacle to the creation of truly international awards.[34]

The French approach to enforcing and recognizing arbitral awards has been to use its own local standard for enforcement, as it is considered more advantageous than enforcement of awards under the New York Convention.[35] "The first case that started France's movement away from the New York Convention and to the systematic enforcement of annulled awards under local standards was the *Norsolor* case."[36] In a dispute arising from the termination of a contract between a French company and a Turkish corporation, the arbitrators applied the law of merchants, or *lex Mercatoria*, to the merits, due to the absence of a choice of law provision by the parties.[37] The award was initially recognized in Austria and France but then partially set aside by the Vienna Court of Appeals on the grounds that it was based on transnational rules. The Paris Court of Appeal later revisited this decision and refused to recognize the nullified deci-

32. *See Cour de cassation [Cass.] [supreme court for judicial matters]* 1e civ., Mar. 14, 1984, BULL. CIV. I (Fr.), *translated in* 23 I.L.M. 1062 (1984).

33. Emmanuel Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin*, 14 ICSID REV. 16, 18 (1999).

34. See Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)*, 9 ICC INT'L CT. ARB. BULL. 14, 19 (1998).

35. Christopher Koch, *The Enforcement of Awards Annulled in Their Place of Origin: The French and U.S. Experience*, 26 J. INT'L ARB. 267, 269 (2009).

36. *Id.* at 270.

37. *See* 1983 REV. ARB. 514.

sion.[38] Since then, many cases have followed suit not only in France but also in other arbitration-friendly jurisdictions, such as the United States.[39]

Indeed, it looked as if even Russia—a jurisdiction not known for its friendliness toward arbitration—would follow the growing number of countries applying this principle. In an application to enforce a vacated ICC award in Russia, the arbitrazh court in *Ciments Français v. Sibirskiy Cement* allowed the recognition and enforcement of the vacated award. The court stated that in case of discrepancy, where even though Section 1(i) of Article 36 of the Russian Law on International Commercial Arbitration gives a court presented with an application for enforcement the power to decline such enforcement if an award has been vacated at the seat of arbitration, the Arbitrazh Procedure Code allows provisions of international treaties to prevail over these domestic laws so long as they are ratified by the Russian Federation.[40] Unfortunately for proponents of this theory, the decision of the Russian court has since been successfully appealed.[41] The applicable law in Russia provides that a court presented with an application for recognition and enforcement may decline to do so if an award has been vacated at the seat of arbitration.[42] Nevertheless, this underscores the idea that States are still unsure whether awards set aside at the seat should or should not be enforced in their jurisdiction.

IV. Case Studies: Country-Specific Issues With Recognition and Enforcement

The issue of unequal enforcement of arbitral awards is not limited to simply a few overreaching topics. Many States incorporate their own laws into the arbitral proceedings, and this in turn weighs in on the enforcement proceedings. A glance at a few countries across the globe indicates how this factor creates additional problems in enforcement of arbitral awards.

A. United States

The principal sources of authority in the United States are the Federal Arbitration Act (FAA),[43] the New York Convention, and the 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention).[44] Under the New York Convention, the

38. Gaillard, *supra* note 33, at 20.

39. *See*, *e.g.*, Hilmarton Case, ICC Award No. 5622, 1993 REV. ARB. 327; XIX Y.B. Com. Arb. 105 (1994); *see also* Chromalloy Aeroservices Inc. v. Arab Republic of Egypt, 939 F. Supp. 907, 915 (D.D.C. 1996).

40. Arbitrazh Court of Kemerovo Oblast, decision of July 20, 2011, Case No. A27-781/2011 (Russ.).

41. Federal Arbitrazh Court for the West Siberian District, decision of Dec. 5, 2011, Case No. A27–781/2011 (Russ.).

42. *See Federal'nyi Zakon RF o Mezhdunarodnom Kommercheskom Arbitrazhe [Federal Law of the Russian Federation on International Commercial Arbitration]*, SOBRNIE AKTOV PRESIDENTA I PRAVITELSTVA ROSSSIISKOI FEDERATSII [SAPP] [Collection of Acts of the President and Government of the Russian Federation], July 7, 1993, No. 5338-1.

43. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006).

44. Inter-American Convention on International Commercial Arbitration, 9 U.S.C. § 301, 14 I.L.M. 336 (1975) *et seq.* (Panama Convention). Fifteen nations have ratified the Convention including the United States. These include Argentina, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela. Four other governments, Bolivia, Brazil, the Dominican Republic and Nicaragua, have signed the Convention but have not yet ratified it. For a current list of signatory and ratifying countries of the Inter-American Convention, see http://www.oas.org/juridico/english/sigs/b-35.html.

United States has declared itself bound to recognize and enforce only those foreign awards rendered in another signatory state of the New York Convention.[45] Section 305 of the FAA states that if a majority of parties to an arbitration agreement are from countries that have ratified the Panama Convention and are members of the Organization of American States (OAS), then the Panama Convention will apply;[46] otherwise, the New York Convention applies.[47] The Panama Convention incorporates sections 202, 203, 204, 205, and 207 of the New York Convention, thus making enforcement under either convention follow the same general procedure.[48] Furthermore, the text of Article 5 of the Panama Convention is almost exactly the same as Article V of the New York Convention.

Article V(1)(b) of the New York Convention allows for refusal to enforce arbitral awards if notice of the arbitrator or arbitration proceedings is improper, or if the party was otherwise unable to present its case.[49] As opposed to countries that apply this as a strict requirement, U.S. courts have narrowly construed the due process defense and have instead taken into account the overall arbitration result and whether the defendant received a fair hearing.[50]

Consistently, with the pro-arbitration stance in the United States, judicial review of awards is not permitted under the FAA. There has been much controversy recently over whether this also covers an arbitrator's deliberate misapplication of the law, otherwise known as "manifest disregard of the law" (or the doctrine of manifest disregard). The doctrine of manifest disregard of the law was traditionally not considered a defense in foreign awards,[51] that is, until 1997, when it became permissible after the Second Circuit upheld the doctrine as a means of vacatur in *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, a non-domestic case governed by the New York Convention.[52]

Nevertheless, in 2008 the U.S. Supreme Court held in *Hall Street Associates, L.L.C. v. Mattel, Inc.* that the premise behind manifest disregard was not grounds for review of an arbi-

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45. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I(3), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, http://www.uncitral.org/pdf/1958NYConvention.pdf [New York Convention] ("When signing, ratifying or acceding to this Convention, . . . any State may on the basis of reciprocity declare that it will apply the Convention to the Recognition and Enforcement of awards made only in the territory of another Contracting State.").

46. *See* 9 U.S.C. § 305(1).

47. *See id.* at § 305(2).

48. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, COMMENTARY & MATERIALS 319 (1994).

49. *See, e.g.,* Richard Sheinis & Chad Wingate, *Defenses to the Enforcement of International Arbitration Awards in the United States*, *in* FOR THE DEFENSE 74, 76 (2010).

50. *Id*. at 76.

51. *See, e.g.*, M & C Corp. v. Erwin Behr GMBH & Co., KG, 87 F.3d 844, 851 (6th Cir. 1996) (concluding that the convention's exclusive grounds for relief "do not include miscalculations of fact or manifest disregard of the law"); Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial, 745 F. Supp. 172, 181–82 (S.D.N.Y. 1990) (refusing to apply a "manifest disregard of law" standard on a motion to vacate a foreign arbitration award); *see also* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 265 (1981) ("[T]he grounds mentioned in Article V are exhaustive.").

52. Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 25 (2d Cir. 1997).

tral award.[53] Since then, jurisdictions have interpreted the decision in *Hall Street* in many ways.[54] Courts disagree as to whether manifest disregard of the law is a valid ground for non-enforcement of an arbitral award. Some courts have held that it is permissible when joined with other reasons.[55] This confusion may encourage parties into "forum shopping" to find jurisdictions where they may attempt to invoke the defense as a last resort.

B. China

While international arbitration agreements are usually enforced in Chinese courts within the framework of the New York Convention, the New York Convention does not completely govern the enforcement of international arbitration agreements. Rather, it leaves numerous issues under the domain of domestic Chinese law. These issues include choice of law provisions that govern the arbitration agreement at the enforcement stage, the referral to arbitration at the case-filing stage, and a time limit for invoking the arbitration agreement at the post-filing stage.

A Chinese People's Court may, on its own motion, refuse to enforce an award if it determines that enforcement would be contrary to the social and public interest of China.[56]

The procedural issues, however, are not uniformly decided. For example, in *Chengdu Zhongshan Knives Development Institutional v. Chengdu Zhongshan Ruibo Knives Co. Ltd*,[57] the court found that part of the arbitral award dealt with matters that were outside of the scope of the arbitration agreement and, as a result, denied enforcement of the entire award. In *Hong Kong Huaxing Development Co. v. Xiamen Dongfeng Rubber Manufacturing Co.*,[58] the court also found that part of the award dealt with matters that fell beyond the scope of the arbitration agreement but then severed that part from the award and effectively enforced the arbitral award.[59]

When a party attempts to enforce a foreign arbitral award in China, an Intermediary People's Court may either confirm the award or submit the matter to the High People's Court before ruling on the refusal of recognition and enforcement. If the High People's Court approves the refusal of recognition and enforcement, that court must submit its opinion to the Supreme People's Court. Then, the People's Court may finally issue a ruling confirming the

53. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 584–85 (2008).

54. *See* White Springs v. Glawson, 660 F.3d 1277 (11th Cir. 2011) (holding that manifest disregard is not a ground to vacate an award); ST Microelectronics v. Credit Suisse Sec., 648 F.3d 68 (2d Cir. 2011) (deciding not to follow *Hall St.*); T.Co. Metals v. Dempsey Pipe, 592 F.3d 329 (2d Cir. 2010) (following *Hall St.* but claiming that the doctrine of manifest disregard was still alive).

55. *See, e.g.*, Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 358 (5th Cir. 2009) (deciding manifest disregard of the law is no longer an "independent, nonstatutory ground" for setting aside an arbitration award).

56. *See* JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA 177–78 (Kluwer Law International 3rd ed. 2012).

57. *See* DEJUN CHENG, MICHAEL MOSER & WANG SHENGCHANG, INTERNATIONAL ARBITRATION IN THE PEOPLE'S REPUBLIC OF CHINA, COMMENTARY, CASES & MATERIALS, 130–31 (Butterworths Asia 2d ed., 2000).

58. *See* 4 Selected Cases of the People's Courts 136 (1994).

59. *See id.*

refusal of recognition and enforcement. This process is essentially an "automatic appeal," meant to make a refusal to recognize and enforce a foreign arbitral award more difficult and, thus, consistent with the guidelines of the New York Convention.[60]

C. Russian Federation

In the Russian Federation, proceedings for the enforcement of foreign arbitral awards must first go to the arbitrazh court at the place where the defendant or his assets are located. While the decision of the arbitrazh court is not appealable on the merits, a party may move to refer the decision to a higher arbitrazh court at the cassation level for errors of law or procedure. A party may further request for the Supreme Arbitrazh Court to review the decisions; however, this is at the discretion of the court. In such a case, the Presidium of the Supreme Arbitrazh Court carries out the review and may either approve or set aside the previous judgments by means of referring the case back to the initial court for a new decision.[61]

Strict procedural rules make enforcing arbitral awards in Russia a challenge to the unsuspecting party. The 2002 Federation Code of Arbitrazh Procedure grants local arbitrazh courts sole jurisdiction over the enforcement of foreign arbitral awards.[62] Procedurally, the Russian rules are very formal. Courts have refused to accept informal evidence such as non-notarized e-mails and documents, and even testimony or evidence offered by witnesses.[63]

In *Forever Maritime Ltd. v. Vneshneeconomicheskoe ob'edinenie Machineimport*, the Arbitrazh Court of Moscow denied enforcement of an ad hoc arbitration award rendered in London because of improper notice. Although the respondent had ample notice of the commencement of the arbitration proceedings and had appointed the arbitrator, the party was not informed that the tribunal had proceeded to resolve the case without the appearance of the parties at an oral hearing.[64] This was confirmed by the Federal Arbitrazh Court and finally by the Presidium of the Supreme Arbitrazh Court of the Russian Federation.[65] The courts rejected

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60. *See* Xiaohong Xia, *Implementation of the New York Convention in China*, 1 INT'L COM. ARB. BRF. 20, 23 (2011) (stating that "the aim of the automatic appeal system is to implement the New York Convention strictly and the system requires the People's Courts to apply the New York Convention correctly, representing a step towards a uniform interpretation of the New York Convention").

61. *See* Boris Karabelnikov & Dominic Pellew, *Enforcement of International Arbitral Awards in Russia: Still a Mixed Picture*, 19 ICC INT'L CT. ARB. BULL. 1, 67 (2008).

62. *See* Vladimir Khvalei & Jonas Benedictsson, *Recognition and Enforcement of Foreign Arbitral Awards in the Russian Federation*, STOCKHOLM INT'L ARB. REV. 23, 25 (2005).

63. *See, e.g.*, Maxim Kulkov, *Russian Federation*: *Enforcement of International Arbitration Awards in Russia* (June 21, 2007), http://www.mondaq.com/article.asp?articleid=48601.

64. *See, e.g.*, *Recent Developments in International Dispute Resolution Around the World*, 17 INT'L DISP. RESOL. 1, 8 (White & Case L.L.P., N.Y., Dec. 2004) (citing Decision of the Presidium of the High Commercial Court of the Russian Federation, dated June 22, 2004, in Case No. 3253/04; Decision of the Federal Commercial Court of the City of Moscow, dated Dec. 15, 2003, in Case No. KG-A-40/9235-03) (stating that under Article V(1)(b) of the New York Convention, which was successfully invoked in three out of nine cases, in two of the three cases, the court improperly shifted the burden of proving improper notice from the defendant to the enforcing party).

65. Forever Maritime Ltd. (Malta) v. State Unitary Enter. Foreign Trade Enter. Mashinoimport (Russ.), Presidium of the Supreme Arbitrazh Court of the Russian Federation, 3253/04, Jun. 22 2004 *in* 33 Y.B. COMM. ARB. 650, 653 (2008).

copies of correspondence between the parties proving proper notification because the translation of those letters into Russian was not notarized.[66] Despite the fact that Article V(1)(b) of the New York Convention, and the equivalent provisions of the UNCITRAL Model Law, require defendants to prove improper notice, the burden of proving proper notice has effectively been transferred to the claimant through the history of Russian arbitration enforcement proceedings.[67]

In another case of procedural nit-picking, *Sokofl Star Shipping Co., Inc. v. Technopomexport*, the arbitrazh court refused enforcement simply because the plaintiff was referred to as "Sokofl Star Shipping Co. *Ltd.*" instead of "Sokofl Star Shipping Co. *Inc.*"[68] Finally, in an extreme example, the Federal Arbitrazh Court of the Western Siberian Region denied enforcement of an award based on the premise that the party seeking enforcement had failed to prove the actual existence of the ICC Rules of Arbitration, even though the court itself made references to the same rules.[69]

Russian courts have expanded the category on what disputes are nonarbitral claims, albeit in a rather inconsistent manner. Article 248 of the Arbitrazh Procedural Code contains a list of five disputes involving foreign parties that are reserved exclusively to the jurisdiction of the arbitrazh courts. These are disputes (1) relating to state-owned property; (2) relating to real estate located in Russia; (3) connected to registration or issuance of patents, trademarks, industrial models, or other intellectual property; (4) concerning applications to invalidate entries in state registers; and (5) relating to the creation, liquidation, or registration of legal entities in Russia, or challenging the validity of the decisions made by those legal entities.[70] The arbitrazh courts are not unified in how they apply this article to enforcement proceedings. Some courts treat these as entirely nonarbitral matters, while others merely consider the article as prohibiting their resolution in foreign State courts.[71] If a party seeks to enforce an award and the arbi-

66. *See, e.g.*, *Recognition and Enforcement of Arbitral Awards in Russia* (White & Case L.L.P., New York, N.Y.), Sept. 2010, at 3, 7 [*Recognition and Enforcement*] (stating that all documents must be translated into Russian and should be notarized or otherwise legalized if originating from abroad).

67. *See, e.g.*, Federal Arbitrazh Court for the North Caucasus Region, decision of Apr. 18, 2005, Case No. F081372/2005 (enforcement refused against a Russian party that had participated in all but the final hearing, as there was an "absence of documents proving proper notification"); *see also* Federal Arbitrazh Court for the Moscow Region, decision of May 15, 2008, Case No. KG-A40/3758-08-P (denying enforcement where the hard-copy of notice with precise venue reached defendant only five days before the hearing, insufficient time to obtain a British visa, even though defendant had been given ample prior notice of the date of hearing and its location in London, and in fact never applied for the visa). Notably, it is common practice for written pleadings to be deliberately withheld from opponents, and tactics such as mailing empty envelopes to opposing counsel to create false proof of courier receipts are not unheard of. It explains why arbitrazh court judges accept that similar tactics may be employed in international arbitration and sheds light on the strict adherence to such procedural issues. Boris Karabelnikov & Dominic Pellew, *Enforcement of International Arbitral Awards in Russia: Still a Mixed Picture*, 19 ICC INT'L CT. ARB. BULL. 1, 69 (2008).

68. *See* Sokofl Star Shipping Co. Inc. v. GPVO Technopromexport, Moscow District Court, Apr. 11, 1997, 23 Y.B. COMM. ARB. 742, 743–44 (1998).

69. *See Recognition and Enforcement of Arbitral Awards in Russia* (White & Case L.L.P., New York, N.Y.), Sept. 2010, at 3, 7 (citing Federal Arbitrazh Court of the Western Siberian Region, resolution of Jan. 26, 2006, Case No. F04-9972/2005 (19029-A81-28)).

70. *See* ARBITRAZHNO-PROTSESSUALNYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [Code of Arbitration Procedure] art. 248 (Russ.) (2002).

71. Karabelnikov, *supra* note 61, at 76.

trazh court falls under the prior category, it will refuse to enforce the award on public policy grounds under the New York Convention.

The Supreme Arbitrazh Court has attempted to unify the application by providing guidelines, such as the "Informal Letter No. 96," published in early 2006, which provided an overview of the recognition and enforcement of arbitral awards.[72] In this letter, the Supreme Arbitrazh Court endorsed the latter view. Subsequent court decisions on the state level, however, have simply ignored the methodology in this letter and continued to apply Article 248 as governing nonarbitral matters.[73] Because there is no formalized principle of stare decisis in Russian law, the provincial-level arbitrazh courts do not have to adhere to other provincial-level decisions. Only cases that make it up to the Supreme Arbitrazh Court hold any kind of precedential value, and even then, the courts do not always strictly adhere to the decisions.[74] Thus, inconsistency is rampant.

Apart from inconsistency, Russian protectionism in the execution of arbitral awards makes it difficult for parties to seek enforcement of certain awards, despite Russia's status as a signatory to the New York Convention. In Russia, there is no legislation that distinguishes between national public policy and international public policy, and no uniform interpretation exists for the concept of public policy.[75] The trend, however, is toward protecting the assets of the state and its own laws and regulations. Indeed, even if the award itself is not against public policy as the Russian courts perceive it, if the result of the enforcement of the award creates a situation contrary to the undefined idea of public policy, enforcement may be denied.[76] For instance, in *United World Ltd. Inc. v. Krasny Yakor*, the arbitrazh court denied enforcement because it would lead to the bankruptcy of a state-owned company and, consequently, adversely affect the regional economy and the Russian Federation as a whole.[77]

Finally, Russian courts have held their own domestic proceedings as holding the utmost importance. Courts in Russia have refused to enforce foreign arbitral awards which are rendered concurrent to domestic proceedings, and which would invalidate the award if applied. For example, in *O&Y Investments Ltd. v. OAO Bummash*, the Arbitrazh Court of the Ural District refused to enforce the award because another arbitrazh court had already deemed the award invalid, and to enforce it would "contradict the principle that judicial acts of the Russian Federation are 'mandatory in nature.'"[78]

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72. *See id.* at 67.

73. *See id.*

74. *See id.*

75. *See* Diana V. Tapola, *Enforcement of Foreign Arbitral Awards: Application of the Public Policy Rule in Russia*, 22 ARB. INT'L 151, 152 (2006).

76. *Id.* at 160.

77. Vladimir Khvalei & Jonas Benedictsson, *Recognition and Enforcement of Foreign Arbitral Awards in the Russian Federation*, STOCKHOLM INT'L ARB. REV. 23, 41 (2005) (discussing United World Ltd. v. Krasny Yakor (Pan. v. Russ.), Federal Arbitrazh Court of the Volgo-Vyatsky Region, Feb. 17, 2003, Case No. A43-10716/02-27-10 (Russ.)).

78. *Recognition and Enforcement*, *supra* note 66 (discussing O&Y Investments Ltd. v. OAO Bummash, Federal Arbitrazh Court of the Ural District, Oct. 12, 2005, Case No. 09-211-/05-C6 (Russ.)).

D. Venezuela

As of December 2012, Venezuela, Ecuador, and Bolivia have withdrawn from the ICSID Convention, and the governments of Nicaragua and Cuba have threatened to do so as well.[79] The frustrations toward the ICSID felt by these Latin American States was encapsulated by the President of Ecuador in a 2007 where he stated, "Ecuador handed over its sovereignty when it signed international accords binding it to . . . [the] ICSID."[80] There is a developing undercurrent of protectionism in Latin America in general, and the region as a whole is wary of foreign states encroaching upon its sovereignty. Extending a foreign state's jurisdiction over potential local matters is well beyond the scope of what many countries in Latin America would find acceptable.

In Venezuela, a strong wave of protectionist measures has changed the landscape of its arbitration over the past few decades. For instance, the Venezuelan government has taken a majority control over key oil projects located along the Orinoco River basin.[81] It is not limited, however, to that small area because Venezuela also unilaterally transformed 32 oil contracts into joint ventures operated by the Venezuelan government.[82] This will allow the government to step in and claim sovereign immunity over many companies and projects throughout the State.

The Venezuelan courts do not hesitate to bring the highest levels of judicial intervention to enforcement proceedings. In *Four Seasons Hotels & Resorts v. Consorcio Barr*, the Superior Court ordered the other Venezuelan tribunals and administrative authorities to refrain from enforcing any arbitral award rendered in an arbitration involving the same parties until a decision on the merits of a pending constitutional injunction was rendered.[83]

V. Solutions and Prospects for Change

A. Trend Toward Uniformity and Enforcement

Fortunately, there is hope for parties entering into arbitration agreements. There is a trend toward more uniformity in the strict enforcement of arbitral awards. For example, the idea of anti-enforcement injunctions to prevent enforcement of arbitral awards, while considered by several nations, is being overturned by those same courts.

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79. *See* Leon E. Trakman, *The ICSID Under Siege*, 45 CORNELL INT'L L.J. 604, 604 (2012); *see also Venezuela Withdraws From the World Bank's International Centre for Settlement of Investment Disputes*, 1, 3 (Milbank, Tweed, Hadley, & McCloy, LLP, Jan. 30, 2012) (discussing which countries have threatened to withdraw from the ICSID Convention).

80. Ignacio A. Vincentelli, *The Uncertain Future of ICSID in Latin America*, 16 L. & BUS. REV. AM. 409, 422 (2010) (quoting Gabriela Molina, *Ecuador Wary of World Bank Arbitration in Occidental Case*, USA TODAY (May 11, 2008), http://usatoday30.usatoday.com/money/ economy/2008-05-11-3404362337_x.htm)).

81. *See* Alejandro Vallejo, *Expansion of International Arbitration in Latin America*, 22 MEALEY'S INT'L ARB. REP. 1, 3 (2007).

82. *See id.*

83. Four Seasons Hotel & Resorts, B.V. v. Consorcio Barr, S.A., 533 F.3d 1349, 1350 n.1 (11th Cir. 2008) (stating that the Superior Court "held void certain injunctions in the partial award on the ground that enforcing those injunctions in Venezuela would violate Consorcio's rights under the Venezuelan Constitution" (citing Superior Court March 26, 2003, Opinion, No. 4467 at 14)).

Anti-enforcement injunctions seemed as though they were picking up steam to become a valid defense to enforcement, at least in the eyes of the courts. An early example of an anti-enforcement injunction was granted in *Ellerman Lines Ltd. v. Read*.[84] Here, an English company sought an injunction in the English court to restrain the defendant, a U.S. company, from proceeding with its claim in the United States or from making any further claims outside the jurisdiction of the English court. The King's Bench held that "[t]he fact that a British subject has actually obtained judgment in a foreign Court does not prevent an English Court from granting an injunction restraining its enforcement."[85] With the spread of international arbitration and the adoption of the New York Convention, injunctions were no longer the only legitimate means to deny enforcement of foreign arbitral awards. Somehow, however, the principle of anti-enforcement injunctions did not disappear. Parties have still moved for anti-enforcement injunctions of foreign decisions; however, they have not been successful. For example, English courts have refused anti-enforcement injunctions in *ED&F Man v. Haryanto*[86] and *The Eastern Trader*.[87]

In the United States, the court in *Chevron Corp. v. Donziger* seemed to be upholding anti-enforcement injunctions supporting a motion for a stay pending other relief.[88] This decision seemed to imply that anti-enforcement injunctions may still be a viable method for halting proceedings, possibly even indefinitely. The decision, however, was later reversed, and the writ of *certiorari* was denied.[89] In spite of its reversal, the decision shows potential that courts will not allow anti-enforcement injunctions to stall the arbitration process.

In line with the trend toward uniformity, the United Nations has released the Convention on Jurisdictional Immunities of States and Their Property (UNCJISP).[90] It has not yet become effective because the UNCJISP is still missing two of the necessary 30 signatory States.[91] There is hope, however, as both France and Spain signed on in 2011, meaning that more states may sign on in the near future. The ratification of the UNCJISP would create a more unified approach to sovereign immunity-based applications for non-recognition.[92]

Moreover, despite the difficulties encountered in some Latin American States, there are also trends toward improvement. In 2012, Colombia enacted a new arbitration statute covering

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84. [1928] 2 K.B. 144, 144 (Eng.).

85. *Id.* (quoting the headnote).

86. (No.2) [1991] 1 Lloyd's Rep 429.

87. Industrial Maritime Carriers (Bahamas) v. Sinoca Int'l Inc. (The Eastern Trader) [1996] 2 Lloyd's Rep, 585.

88. Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 660 (S.D.N.Y. 2011).

89. Chevron Corp. v. Naranjo, 667 F.3d 232, 234 (2d Cir.), *cert. denied,* 133 S. Ct 423, 184 L. Ed. 2d 288 (2012).

90. UN General Assembly Res. 59/38, Dec. 2, 2004 (adopted without a vote), http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf.

91. *Id.* As of December 2012, only 28 States have signed on to the UNCJISP. Until there are 30 signatories, the convention will not be able to enter into force.

92. UN Treaty Collection, "Status of United Nations Convention on Jurisdictional Immunities of States and Their Property," http://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en.

both national and international arbitrations.[93] Notably, recognition and enforcement of awards by foreign tribunals will now be governed by the statute and other international conventions rather than the local civil procedure rules. Moreover, as in the New York Convention, the grounds for refusing enforcement are limited to those in the statute. Finally, the statute implements a streamlined process for recognition of foreign awards, under which the non-appealable procedure takes a total of 30 days.[94] Colombia is not the only Latin American State leaning toward greater enforcement. Costa Rica recently enacted Law No. 8937 on International Commercial Arbitration,[95] using the 2006 UNCITRAL Model Law as a framework although not adopting it in its totality.[96]

B. Limiting Judicial Review and Other Proposed Changes to the New York Convention

Such varied judicial review by national courts will undermine the role of arbitration in resolving international disputes. Judicial review of the merits of an award runs the risk of impinging upon international arbitration as an effective forum for resolving foreign disputes. The goals of arbitration will be best served by ensuring the finality of arbitration awards because it will be consistent with the agreement between the parties to arbitrate.[97] A step in the right direction may be a limitation on the depth and scope of judicial review or, at least, a governing set of guidelines.

VI. Conclusion

There is an increasing trend in the judicial review of the merits of arbitral awards by State courts. As the local courts examine the arbitral awards, they inevitably input their own laws and norms onto the enforcement of such awards. This lack of consistency in the enforcement process may encourage forum shopping by encouraging defendants to implement preemptive tactics for avoiding payments on awards simply by moving their assets into States where enforcement proceedings are more likely to benefit them.

Allowing State courts to re-examine the arbitration proceedings and inject their own laws into the enforcement process effectively rejects the original meaning of the arbitration agreement. It no longer empowers parties to structure the proceedings according to their agreement but returns them to a forum reminiscent of that of their local State court and does not guarantee the validity of awards rendered across borders.

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93. *See* JAN PAULSSON, INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1–36 (Kluwer Law International, 2013). On July 12, 2012, Colombia enacted the National and International Arbitration Statute, which entered into force three months later. While the recently enacted statute is a step in a positive direction, Colombia will likely still have more issues to straighten out, as it has omitted any express provisions for enforcement of ICSID awards as if they were final judgments of the State court, as in accordance with Article 54 of the ICSID Convention. *See id.*

94. *See id.*

95. *See* Law No. 8937 on International Commercial Arbitration, adopted May 25, 2011.

96. Eduardo Silva Romero, *La Nouvelle Loi Costaricienne sur l'abritrage Commercial International du 25 Mai 2011*, REVUE DE L'ARBITRAGE, 2011, Issue 3, pp. 843–50.

97. Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?*, 61 DISP. RESOL. J. 16, 25 (2007).

It remains to be seen whether a solution needs to be made at the State level in ordering States to clarify their rules and procedures, or if something can be created in the international sphere, possibly through changes to the series of conventions which govern the enforcement today, or even in addition to them.

Kiobel v. Royal Dutch Petroleum Co.

133 S. Ct. 1659 (2013)

The U.S. Supreme Court found that the Alien Tort Statute does not grant Nigerian human rights victims the ability to bring their case in U.S. courts based on extraterritoriality.

I. Introduction

The Alien Tort Statute (ATS) allows district courts to exercise jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[1] It allows aliens to bring claims for damages in federal courts for violations of human rights that are committed either in the United States or abroad.[2] However, the ways in which the statute can be invoked are limited because it is a jurisdictional statute, which addresses the power of courts to adjudicate certain claims but does not create statutory causes of action for aliens.[3]

Though the statute was originally enacted in 1789,[4] it remained dormant for over two centuries.[5] However, the interpretation and application of the ATS has recently become the subject of numerous circuit court decisions.[6] The proliferation of litigation involving the ATS began when plaintiffs started suing not just private individuals and state actors, but also corporations that aided and abetted the violations of human rights norms. These lawsuits allowed courts to continue refining their analysis of the extent of the statute. For instance, nearly a decade ago, the Supreme Court considered the scope of the ATS in *Sosa v. Alvarez-Machain*, holding that there is a "very limited category" of claims that federal courts can hear.[7] The Court stated that ATS claims should be centered on universally recognized and clearly defined norms of international human rights law.[8] It also warned courts to exercise caution when considering which federal common-law actions to recognize under the ATS.[9]

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1. 28 U.S.C.A. § 1350.
2. *See id*.
3. Sosa v. Alvarez-Machain, 542 U.S. 692, 713–14 (2004); *see also* Nicola Carpenter, *Sosa v. Alvarez-Machain*, 18 N. Y. INT'L L. REV. 2 (2005).
4. Ch. 20, § 9, 1 Stat. 73 (1789).
5. Mirela Hristova, *The Alien Tort Statute: A Vehicle for Implementing the United Nations Guiding Principles for Business and Human Rights and Promoting Corporate Social Responsibility*, 47 U.S.F. L. Rev. 89, 95 (2012) (stating that the ATS had not really been used until 1980, when the Second Circuit held in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), that a Paraguayan citizen could not be liable under ATS for tortious acts committed in Paraguay because the statute applies only to state actors).
6. *See id*. at 95–106 (citing to cases from the Seventh, Ninth, Eleventh and D.C. Circuits, which have all allowed corporate liability under the ATS, but have placed various procedural limitations on plaintiffs' ability to bring their claims for transnational harms into federal courts).
7. *Alvarez-Machain*, 542 U.S. at 712.
8. *See id*. at 725.
9. *See id*. at 725–30.

In *Kiobel v. Royal Dutch Petroleum Co.*,[10] the Supreme Court was presented with another opportunity to limit the scope of the statute. After granting *certiorari* on the issue of whether corporations could be held liable under the ATS, the Court ordered supplemental briefing on whether courts may recognize a cause of action under the ATS for violations of the law of nations occurring within the territory of a foreign sovereign.[11] The Court affirmed the judgment of the Court of Appeals, which dismissed the entire complaint and held that the law of nations does not recognize corporate liability.[12] The Supreme Court here held that principles underlying presumptions against extraterritoriality constrain courts exercising their power under the ATS.[13] In addition, it found that where all or most of the relevant conduct, namely violations of law of nations, took place in a foreign country, the ATS does not apply.[14]

II. Facts and Procedure

The petitioners were a group of residents of Ogoniland, Nigeria, now residing in the United States where they have been granted political asylum.[15] Respondents Royal Dutch Petroleum Company and Shell Transport and Trading Company were holding companies incorporated in the Netherlands and England, respectively.[16] The other respondent, Shell Petroleum Development Company of Nigeria, Ltd. (SPDC), was their joint subsidiary and was incorporated in Nigeria.[17]

During the late twentieth century, SPDC engaged in oil exploration and production in Nigeria.[18] In response to the negative effects these practices had on their land, residents of Ogoniland began protesting against the companies.[19] Thereafter, respondents called on the Nigerian government to help them deal with the growing demonstrations.[20] Petitioners alleged that throughout the early 1990s, the Nigerian military and police forces committed violent crimes against the Ogoni people, including beating, raping and killing residents, as well as destroying their property.[21] According to the complaint, respondents aided and abetted these crimes by providing the Nigerian forces with food, transportation, compensation, and staging areas to carry out their attacks.[22]

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10. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).
11. *Id*. at 1663.
12. *Id*. (citing Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010)). *See* Lyndsay R. Harlin, *Kiobel v. Royal Dutch Petroleum Co.,* 24 N. Y. INT'L L. REV. 1 (2011).
13. *Kiobel*, 133 S. Ct. at 1665.
14. *Id*. at 1669.
15. *Id*. at 1662–63.
16. *Id*. at 1662.
17. *Id*.
18. *Id*.
19. *Kiobel*, 133 S. Ct. at 1662.
20. *Id*.
21. *Id*.
22. *Id*. at 1662–63.

After the attacks, petitioners moved to the United States, were granted political asylum, and became legal residents of the country.[23] Subsequently, they filed a class action suit in the U.S. District Court for the Southern District of New York, alleging jurisdiction under the ATS and requesting relief under customary international law.[24] In 2006, the District Court dismissed petitioners' claims that respondents aided and abetted the Nigerian government in committing extrajudicial killings; violations of rights to life, liberty, security and association; forced exile; and property destruction.[25] However, the District Court allowed claims of aiding and abetting crimes against humanity, torture and cruel treatment, and arbitrary arrest and detention.[26] After the case was certified for interlocutory appeal by the District Court, the Second Circuit dismissed all of the claims, holding that the ATS does not serve as a basis for finding liability on the part of corporations.[27]

The Supreme Court granted *certiorari* and heard oral arguments for the case on February 28, 2012.[28] However, about a week later, the Court ordered supplemental briefs and re-arguments for the additional issue of whether and under what circumstances the ATS allows U.S. courts to hear tort claims based on actions that did not occur within the territory of a sovereign other than the United States.[29]

III. Discussion

Chief Justice Roberts delivered the opinion of the Court. In looking at the extent to which the ATS applies to torts committed in foreign territories, the Supreme Court first examined the history of the statute. The statute was enacted not to provide causes of action for international law violations, but rather to provide district courts with jurisdiction to hear certain claims.[30] The stakes for both parties were important. Petitioners were personally seeking redress in U.S. courts under the ATS for their suffering, but they were also representing other victims of human rights violations who may be similarly situated. On the other side, what was at stake for the respondent corporations is sovereignty of the relations between the companies themselves and the foreign country.

A. Presumption Against Extraterritoriality

According to the majority, what was at issue in this case was whether the presumption against extraterritoriality applies to the facts at hand. The petitioner argues that the presumption does not apply to jurisdictional statutes like the ATS.[31] The respondent companies

23. *Id*. at 1663.
24. *Id*.
25. *Kiobel*, 133 S. Ct. at 1663.
26. *Id.*
27. *Id*.
28. *Id.*
29. *Id.*
30. *Id*.
31. *Kiobel*, 133 S. Ct. at 1665.

claimed that, because of the presumption, claims under the statute do not reach foreign conduct.[32]

The Supreme Court defined the presumption against extraterritoriality as a canon of statutory interpretation that states, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none,"[33] because United States law governs domestically but not globally.[34] The overarching purpose of this presumption is to determine whether a congressional act regulating conduct applies to foreign territories.[35] The Supreme Court explained that this helps to prevent any conflicts between U.S. laws and those of other nations.[36] The Court articulated its concerns about the danger of judicial interference in the conduct of foreign policy, particularly because it is wary of encroaching on the discretion that the legislative and executive branches generally exercise when they manage foreign matters.[37] The Court also stated that these concerns are still important to consider, even though *Sosa* limited federal courts to recognizing causes of action only for alleged violations of international law norms that are "specific, universal and obligatory."[38]

B. History, Text, and Purposes of the Statute

In the alternative, petitioners claimed that even if there is a presumption against extraterritorial application of a statute, the text, history, and purposes of this particular statute rebut that presumption.[39]

However, the text of the statute, in accordance with its plain, ordinary meaning, does not suggest that Congress intended the statute to have extraterritorial scope for the causes of actions recognized under it. Petitioners contended that the nature of the ATS is analogous to that of the Transitory Torts Doctrine, which states that causes arising in a foreign territory may be considered to have happened domestically.[40] The Supreme Court rejected this argument, stating that nothing in the statutory text indicates that causes of action may be recognized under the ATS when the conduct occurs outside the United States.[41]

The history of the enactment of the statute also supports the presumption against extraterritoriality. When the statute was passed, the three main offenses against the law of nations were

32. *Id.* at 1664.

33. *Id.* (citing Morrison v. National Australia Bank, 130 S. Ct. 2689 (2010)). Justice Alito's concurring opinion in *Kiobel* stated that a cause of action falls outside the scope of presumption only if the relevant event takes place in the United States.

34. *Id.* (citing Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007)).

35. *Id.*

36. *Id.*

37. *Kiobel*, 133 S. Ct. at 1664.

38. *Id.* at 1665.

39. *Id.*

40. *Id.* at 1665–66.

41. *Id.* at 1666.

violations of safe conduct, infringement on the rights of ambassadors, and piracy.[42] The first two involved conduct occurring within the forum nation, as opposed to abroad, and thus had no extraterritorial application.[43] The third offense, piracy, typically occurs on the high seas, not within a particular territorial jurisdiction.[44] Petitioners believed that because the ATS provides jurisdiction for actions against pirates, Congress also intended the statute to apply to global conduct.[45] But the Supreme Court found that this was an insufficient basis for such a conclusion.[46]

Lastly, there is nothing in the ATS that implies or suggests that the purpose of the statute was to make the United States a forum for the enforcement of international norms.[47] Although the Supreme Court recognized that the United States may serve as a forum for adjudicating claims in which foreign officials were injured in this country, it failed to see how causes of action for foreign conduct should be settled in that same forum.[48] If Congress had intended the statute to have extraterritorial jurisdiction, the statute would have been more specific in including the relevant language.[49]

IV. Justice Breyer's Concurring Opinion

Justice Breyer agreed with the Court's ultimate conclusion but disagreed with its reasoning. The most significant departure from the Court's rationale was that Justice Breyer, joined by three other Justices, believed that the presumption against extraterritoriality does not apply to the ATS.[50] They stated that there were insufficient connections between the parties and their conduct and the United States.[51] They saw ATS jurisdiction as limited to three situations: (1) when the tort occurred on American soil, (2) when the defendant is an American national, or (3) when the defendant's conduct substantially and adversely affects an important national interest.[52]

The concurrence does not believe that discussion of the presumption against extraterritoriality is appropriate when determining the extent to which this jurisdictional statute opens federal courts' doors.[53] While the majority emphasized that piracy occurs on the high seas, the acts that constitute piracy take place on a ship, and a ship is like land, in that it falls within the

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42. *Id*.
43. *Kiobel*, 133 S. Ct. at 1666.
44. *Id*. at 1667.
45. *Id*.
46. *Id*.
47. *Id*. at 1668.
48. *Id*. at 1668–69.
49. *Kiobel*, 133 S. Ct. at 1669.
50. *Id*. at 1671.
51. *Id*.
52. *Id*.
53. *Id*. at 1672.

jurisdiction of the nation whose flag it flies.[54] Therefore, the high seas should be treated as foreign soil for the purpose of extraterritorial application.[55]

In response to the history, text, and purposes of the statute, the concurrence suggested that the statute should be used as a "weapon" in the "war" against the modern-day pirates, those who commit heinous actions against mankind.[56] The concurrence acknowledges that in *Filartiga v. Pena-Irala*[57] and *In re Estate of Marcos, Human Rights Litigation,*[58] two lower U.S. courts recognized jurisdiction based on the globally shared concern of not providing a safe harbor for enemies of mankind.[59] Ultimately, the concurring Justices agreed with the majority that there was no jurisdiction in this matter because the defendants were two foreign corporations that have a minimal and indirect presence in the United States, the plaintiffs were nationals of other countries, and the relevant conduct took place abroad.[60]

V. Conclusion

In affirming the judgment of the Court of Appeals, the Supreme Court limited human rights litigation by essentially saying that the Alien Tort Statute does not provide an avenue of justice for victims of human rights violations seeking redress from the individuals or corporations responsible for the abuses. Though the Court explained that such victims cannot turn to U.S. courts as a last resort when there is a weak connection to the United States, there remains the possibility that individuals and companies still may be liable in the future for their violations of international law norms.

Kristin Lee

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54. *Id*.
55. *Kiobel*, 133 S. Ct. at 1672–73.
56. *Id*. at 1674.
57. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
58. In re Estate of Marcos Human Rights Litig., 978 F.2d 493 (9th Cir. 1992).
59. *Kiobel*, 133 S. Ct. at 1675.
60. *Id*. at 1677–78.

Starshinova v. Batratchenko

931 F. Supp. 2d 478 (S.D.N.Y. 2013)

The U.S.D.C. for the S.D.N.Y. held that extraterritoriality barred Russian investors alleging fraud regarding investments sold to them outside the U.S. because neither the Securities Exchange Act nor the Commodities Exchange Act applied to investments that were not listed on a domestic stock exchange.

I. Holding

In *Starshinova v. Batratchenko,*[1] the U.S. District Court for the Southern District of New York held that neither the Securities Exchange Act,[2] nor the Commodities Exchange Act,[3] applied extraterritorially. The court relied on the long-standing principle that congressional legislation applies only within U.S. territory unless an implied contrary intent appears on the face of the statute.[4] The court granted the defendants' motion for summary judgment because it found no evidence of congressional intent that either statute applied extraterritorially.[5] The court dismissed the plaintiffs' state law claims because no federal claims remained to which they could be supplemental.[6]

II. Facts and Procedure

The plaintiffs, Tamara Starshinova, Marina Vasilyanskaya, and Rafail Tzentziper, are all Russian citizens who purchased fund shares in an investment program managed and controlled by Oleg Batratchenko (Batratchenko).[7] In addition to themselves, the plaintiffs represented the 551 individuals whom the plaintiffs "served as 'freelance financial consultants' [to] and solicited to invest more than $20 million" in Batratchenko's investment funds.[8] Batratchenko, a U.S. citizen residing in Moscow, is a co-founder, owner, operator, and manager of various investment programs (collectively, the defendants).[9] These programs invested in domestic and foreign stocks, commodities, and real estate.[10] Batratchenko promised the plaintiffs that the investment programs would yield stable returns of 20 to 25% regardless of market conditions.[11]

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1. 931 F. Supp. 2d 478 (S.D.N.Y. 2013).
2. 17 C.F.R. § 240.
3. 17 C.F.R. § 1.1.
4. *Starshinova*, 931 F. Supp. 2d 478, at 484–85.
5. *Id.* at 485–87.
6. *Id.* at 488.
7. *Id.* at 480.
8. *Id.* at 480–82.
9. *Id.* at 480.
10. *Starshinova*, 931 F. Supp. 2d 478, at 481.
11. *Id.*

Following the "worldwide economic crisis" in 2008, the defendants sent letters to the plaintiffs promising that their New York residential investment returns would not be affected.[12] These letters reassured the plaintiffs that their investments would not be impacted unless the residential real estate market experienced a threefold decline.[13] However, in 2009, the defendants announced that the SEC had frozen one of the investment programs and that redemption or removal of funds from that program had become more difficult as a result of U.S. financial reform.[14] The plaintiffs tried to redeem their assets from the remaining program funds after they received reports that the program's value fell by 50%.[15] In response, the defendants made no payments to the plaintiffs.[16] In 2010, the defendants issued a letter stating that they could not release the funds because they were tied up in real estate and other illiquid investments.[17]

On December 23, 2011, the plaintiffs first filed suit against the defendants. On May 25, 2012, the plaintiffs filed an amended complaint, alleging violations of the Commodities Exchange Act (CEA) (count I) and the Securities Exchange Act (SEA) (counts II and III).[18] The plaintiffs sought a declaratory judgment and claimed that the defendants owed them millions of dollars in damages on each count (count XI).[19] On June 11, 2012, the defendants moved to dismiss the amended complaint.[20] The plaintiffs filed their opposition memorandum on July 25, 2012.

III. Court's Analysis

A. Standard of Review

The District Court reviewed the motion to dismiss under the Federal Rule of Civil Procedure 12(b)(6).[21] On a motion to dismiss, plaintiffs are required to plead facts that are sufficient to state a claim upon which the court can grant relief.[22] Under Rule 12(b)(6), the court must accept all of the facts presented in the complaint as true and view the facts in the manner most favorable to the plaintiffs.[23] The plaintiffs filed their action in federal court alleging that subject-matter jurisdiction, 28 U.S.C. § 1331, and supplemental jurisdiction, 28 U.S.C. § 1367,

12. *Id.* at 482.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Starshinova*, 931 F. Supp. 2d 478, at 482.

17. *Id.*

18. *Id.* The complaint makes additional claims that are dismissed without discussion because the court dismissed all federal claims and therefore has no supplemental jurisdiction over the state claims. The complaint includes state law claims for breach of contract (count IV), common law fraud (count V), breach of fiduciary duty (count VI), unjust enrichment (count VII), constructive trust (count VIII), accounting (count IX), and negligence (count X).

19. *Id.*

20. *Id.*

21. *Id.* at 482–83.

22. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

23. *Id.*

were proper.[24] The plaintiffs argued that supplemental jurisdiction was proper because the state claims arose as part of the same claim or controversy as the federal claims.[25]

B. Claims Under the Securities Exchange Act

The court dismissed the plaintiffs' claim brought under the SEA because the complaint did not allege that the plaintiffs incurred irrevocable liability within the United States.[26] Although the plaintiffs alleged that the defendants violated Rule 10(b),[27] Rule 10b-5,[28] and section 20(a) of the SEA,[29] the court relied on the *Morrison*[30] test and the *Absolute Activist*[31] test to hold that section 10(b) does not apply extraterritorially.[32]

In *Morrison v. National Australian Bank*, the Supreme Court held that there was no indication that section 10(b) was intended to govern foreign transactions.[33] The Court held that if a security is bought or sold and is listed on a domestic exchange, then the transaction is within the scope of section 10(b).[34] Under *Absolute Activist Value Master Fund Ltd. v. Ficeto*, the court held that the location of the broker, the identity of the parties, and the nature of the securities are irrelevant.[35] If a security is not listed on a domestic exchange, then a plaintiff must allege that "irrevocable liability was incurred or title was transferred within the United States."[36] Therefore, the only consideration for an unlisted security transaction is whether the parties became "'bound to effectuate a transaction'—either to take and pay for, or to deliver, a security—in the United States."[37]

The District Court held that under *Morrison* and *Absolute Activist*, the plaintiffs did not state specific, concrete instances of irrevocable liability, or that the securities' titles were trans-

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24. 28 U.S.C. § 1367.

25. *Starshinova*, 931 F. Supp. 2d 478, at 483.

26. *Id.*

27. 15 U.S.C. § 78j(b). "Section 10(b) makes it unlawful, in connection with the purchase or sale of any security, to use or employ 'any manipulative or deceptive device or contrivance in contravention of' the rules that the [SEC] deems 'necessary or appropriate in the public interest or for the protection of investors." *Starshinova*, 931 F. Supp. 2d 478, at 482 (quoting 15 U.S.C. § 78j(b)).

28. 17 C.F.R. § 240.10b-5. "Rule 10b-5 . . . makes it unlawful, in connection with the purchase or sale of any security, to 'employ any device, scheme or artifice to defraud,' to make any material misrepresentation or omission, or to engage in 'any act, practice, or course of business' operating as a fraud or deceit." *Starshinova*, 931 F. Supp. 2d 478, at 482 (quoting 17 C.F.R. § 240.10b-5).

29. 15 U.S.C. § 78t. "Section 20(a) imposes joint and several liability on '[e]very person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder…unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation.'" *Starshinova*, 931 F. Supp. 2d 478, at 482 (quoting 15 U.S.C. § 78t).

30. Morrison v. National Australian Bank, 130 S. Ct. 2869 (2010).

31. Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60 (2d Cir. 2012).

32. *Starshinova*, 931 F. Supp. 2d 478, at 484.

33. 130 S. Ct. at 2883.

34. *Id.* at 2884–85.

35. *Absolute Activist*, 677 F.3d at 68–69.

36. *Id.* at 68.

37. *Starshinova*, 931 F. Supp. 2d 478, at 484 (quoting *Absolute Activist*, 677 F.3d at 68–69).

ferred within the United States.[38] The court found that the complaint alleged only that the U.S. courts had jurisdiction because the corporation's place of business was located within New York.[39] The complaint did not allege that the securities were approved or accepted in New York. The court dismissed counts II and III because the plaintiffs' "allegations [were] insufficient to support a 'plausible inference' that Defendants incurred irrevocable liability in the [United States]."[40]

C. Claims Under Section 4*o* of the Commodities Exchange Act

The court held that the *Morrison* reasoning applied to the CEA.[41] The court relied on the long-standing principle that if congressional action "gives no clear indication of an extraterritorial application, it has none."[42] The court found that the provisions of section 4(b) that do mention extraterritoriality support the conclusion that the statute does not apply extraterritorially.[43] The CEA restricts the jurisdiction of the Commodity Futures Trading Commission (CFTC) to persons "located in the United States," and, in section 6(b), "'[n]o rule or regulation may be adopted' under [§ 6(b)] that requires the CFTC to approve any rules or contracts proposed by a foreign commodities board, or which governs in any way' any rule or contract for a foreign board."[44]

The court reasoned that because the scope of CEA § 4*o* is the same as that of SEA § 10(b), § 4*o* "must apply to transactions involving domestic exchanges or to domestic purchases and sales where either party has 'incurred irrevocable liability within the United States.'"[45] The plaintiffs' CEA claim relied on the same facts that were alleged in the SEA claim.[46] The court concluded that the CEA claims must be barred once the *Morrison* test was applied because the SEA claims were also barred.[47] After applying the *Morrison* test, the court concluded that the CEA claims were also barred.[48] It was not that the SEA claims were barred, but rather because the irrevocable liability incurred by the plaintiffs was sustained abroad.[49] Thus, the court barred the CEA claims.[50]

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38. *Id.* at 484.
39. *Id.*
40. *Id.* at 488.
41. *Id.* at 485.
42. *Id.* at 485 (quoting *Morrison,* 130 S. Ct. at 2878).
43. *Starshinova*, 931 F. Supp. 2d 478, at 486.
44. *Id.*
45. *Id.* at 487 (quoting *Absolute Activist*, 677 F.3d at 68).
46. *Id.*
47. *Id.*
48. *Id.*
49. *Starshinova*, 931 F. Supp. 2d 478, at 487.
50. *Id.*

D. Standing Under the Commodities Exchange Act

Lastly, the court held that the plaintiffs did not have standing because the plaintiffs' claim did not fall within section 22(b) of the CEA, which outlines the four necessary provisions for a private suit under the statute.[51] A plaintiff must (a) have received trading advice from defendants for a fee; (b) have traded through defendants or deposited money with defendants in connection with a commodities trade; (c) have purchased from, sold to, or placed an order with the defendants for a commodity; or (d) have engaged in certain market manipulation activities in connection with the purchase or sale of a commodity contract.[52] The only allegation in the plaintiffs' amended complaint that involved commodities was that the plaintiffs invested in funds that may have invested in commodities.[53] The plaintiffs did not allege that the defendants helped them invest in commodities.[54] Rather, they alleged only that the defendants managed funds that *may* have invested in commodities.[55] Furthermore, the plaintiffs did not allege that they hired the defendants to purchase or sell commodities for them.[56] Even if the CEA applied extraterritorially, the plaintiffs' complaint failed under the Federal Rules of Civil Procedure 12(b)(1) on standing.[57]

IV. Conclusion

The U.S. District Court for the Southern District of New York granted the defendants' motion to dismiss. The court's holding maintains the long-standing presumption that congressional legislation should not apply extraterritorially without a strong indication from Congress that this was its intent. Judge Woods reinforced the importance of this presumption by concluding that the CEA did not apply extraterritorially. Since the CEA did not apply extraterritorially on the face of the statute, Judge Woods analyzed the case through the *Morrison* and *Absolute Activist* rationale that restricts U.S. court jurisdiction to claims where "irrevocable liability was incurred or title was transferred within the United States."[58] The court correctly held that the plaintiffs' amended complaint failed under both tests. Judge Woods's application of the *Morrison* and the *Absolute Activist* rationale to the CEA is the first of its kind. This is an important holding because it clarifies the scope of the CEA without compromising congressional intent.

Chelsea Marmor

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51. *Id.*
52. *Id.* at 487.
53. *Id.*
54. *Id.*
55. *Starshinova*, 931 F. Supp. 2d 478, at 488.
56. *Id.*
57. *Id.*
58. *Absolute Activist*, 677 F.3d at 68.

Corporación Mexicana de Mantenimiento Integral v. PEMEX-Exploración y Producción

2013 WL 4517225, 2013 U.S. Dist. LEXIS 121951 (S.D.N.Y. 2013)

The U.S.D.C. for the S.D.N.Y. held it had discretion to disregard a Mexican appellate court's decision to vacate an arbitration award because the decision violated the basic notions of justice by applying a law not in effect when the parties contracted.

I. Holding

In *Corporación Mexicana de Mantenimiento Integral v. PEMEX-Exploración y Producción*,[1] the court held that the Mexican Eleventh Collegiate Court violated basic notions of fairness by applying a law that was not in effect at the time of the parties' contract and, thus, the award in favor of the plaintiff was confirmed.[2] The court found that the law at the time of the parties' contracting gave the plaintiffs the "settled expectation" that its dispute could be arbitrated based on the defendant's actions.[3] The court also found that the Mexican court's attempt to apply a new law retroactively was unfair and favored a state enterprise over a private party.[4]

II. Facts and Procedure

In October 1997, PEMEX-Exploración y Producción (PEP), a Mexican state-owned oil company, and Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. (COMMISA), a subsidiary of an American company, entered a contract for COMMISA to build and install offshore natural gas platforms in the Gulf of Mexico.[5] The contract provided that the agreement was to be governed by Mexican law,[6] and that any disputes should be resolved by arbitration in Mexico City in accordance with the Conciliation and Arbitration Regulations of the International Chamber of Commerce (ICC).[7] Furthermore, the parties agreed on a clause that allowed PEP to rescind the contract if COMMISA failed to comply with certain obligations,[8] as well as a clause requiring COMMISA to obtain a performance bond guaranteeing its contractual obligations.[9]

In March 2004, each party charged the other with breaching certain contractual obligations.[10] COMMISA made a demand for arbitration with the ICC on December 1, 2004, and

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1. 10 CIV. 206 AKH, 2013 WL 4517225, 2013 U.S. Dist. LEXIS 121951 (S.D.N.Y. 2013).
2. *Id.* at 56.
3. *Id.* at 50.
4. *Id.* at 51.
5. *Id.* at 5.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 8.

two weeks later PEP gave notice that it was terminating the contract by administrative rescission.[11] On December 23, 2004, COMMISA initiated an "indirect *amparo*" proceeding to challenge PEP's rescission in the Mexican Fourteenth District Court on Administrative Matters for the Federal District.[12] COMMISA alleged that PEP's administrative rescission was untimely and based on statutes that were not only unconstitutional but also inapplicable to the dispute.[13] The Fourteenth Circuit held that the administrative rescission by PEP was not an act of public authority, and that an *amparo* action was not the proper way to challenge the rescission; thus, it dismissed COMMISA's petition.[14] COMMISA appealed the decision to the Sixth Collegiate Court, which reversed the lower court's decision, holding that PEP's rescission was an act of public authority, and that an *amparo* proceeding was proper.[15] However, the Sixth Collegiate Court referred the issues of the rescission statutes' constitutionality to the Mexican Supreme Court.[16]

The Mexican Supreme Court held that the rescission was constitutional, and that Mexico's district courts had a "special privilege" to hear contract disputes arising from administrative rescission.[17] The Mexican high court did not rule on the issue of arbitrability[18] and remanded the case to the Sixth Collegiate Court to consider COMMISA's unconstitutionality claims.[19] The Sixth Collegiate Court found that PEP properly followed the rescission statutes, and that it was a timely rescission.[20] COMMISA's petition for an *amparo* against PEP was dismissed.[21]

While the *amparo* court proceedings were unfolding, an ICC Tribunal was formed pursuant to COMMISA's earlier demand for arbitration of the dispute.[22] The arbitral panel rejected PEP's argument that the panel lacked jurisdiction in light of the Mexican court decision.[23] After a hearing in Mexico City, the ICC Tribunal found for COMMISA on most counts and awarded COMMISA what is now approximately a $400 million award (the Award).[24]

COMMISA filed a petition to confirm the Award in the U.S.D.C. for the Southern District of N.Y. on January 11, 2010.[25] PEP then moved to dismiss the petition or, alternatively, for a stay pending resolution of its efforts to nullify the Award in Mexico.[26] The district court

11. *Id.*
12. *Corporación Mexicana*, 2013 WL 4517225 at 8.
13. *Id.*
14. *Id.* at 9.
15. *Id.* at 10.
16. *Id.*
17. *Id.*
18. *Id.* at 11.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 12.
23. *Corporación Mexicana,* 2013 WL 4517225 at 13.
24. *Id.* at 18.
25. *Id.* at 19.
26. *Id.*

ruled that PEP had sufficient contacts with New York to be subject to jurisdiction in the Southern District of New York, and that the case should not be dismissed for forum non conveniens or stayed in light of the proceedings in the Mexican courts.[27] COMMISA's petition to confirm the Award was granted, and judgment was entered on November 2, 2010.[28]

However, in Mexico, PEP made an attempt to nullify the Award through the Mexican court system.[29] In August 2011, after numerous failed appeals in the Mexican court system, PEP finally succeeded when the Mexican Eleventh Collegiate Court found that administrative rescissions were designed to settle private disputes, and it would be "absurd" if "a private party in its capacity as [a] subject [could] hear, try, and rule [on] acts of authority."[30] The Mexican court found that arbitrators could not resolve a matter of public policy, such as PEP's administrative rescission of the contract, because the rescission was "issued to safeguard the finances of the state."[31]

The Mexican court relied partly on a Mexican statute that came into effect after the parties had entered into the contract.[32] The new statute, enacted in 2009, created a special court to act as the exclusive forum for administrative rescission disputes, changed the statute of limitations to raise such disputes from ten years to 45 days, and made such rescission disputes nonarbitrable.[33] The law did not address whether it applied to administrative rescissions that were issued prior to its enactment.[34] The Mexican court stated that it was not applying the law retroactively but, rather, was using it as a "guiding principle."[35]

In reaching this decision, the Mexican court also cited a Mexican Supreme Court decision that did not involve arbitration.[36] That decision had described administrative rescissions as "acts of authority."[37] The court held that since PEP's administrative rescission and COMMISA's breach of contract claims were "intertwined and inseparable," and since the arbitration panel lacked jurisdiction to hear the issues arising from the administrative rescission, the arbitration panel was barred from hearing the breach of contract claim as well.[38]

After PEP appealed to the U.S. Court of Appeals for the Second Circuit, the case was remanded to the district court, and the judgment the district court had issued was vacated.[39] The Court of Appeals ordered the district judge to "address in the first instance whether

27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 23.
31. *Id.*
32. *Id.* at 52.
33. *Id.* at 15.
34. *Corporación Mexicana,* 2013 WL 4517225 at 17.
35. *Id.* at 24.
36. *Id.*
37. *Id.*
38. *Id.* at 25.
39. *Id.* at 29.

enforcement of the award should be denied because it has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made."[40] Basing his discretion on the Panama Convention[41] and the Federal Arbitration Act,[42] the district court judge reconfirmed the Award and found that a foreign country's nullification of an award was invalid.[43] The district court also based its discretion on *TermoRio SA E.S.P. v. Electranta S.P.*,[44] in which the D.C. Circuit Court held that if a foreign judgment "violated any basic notion of justice in which we subscribe," then it "need not be followed."[45]

III. Discussion

The main issue in this case is whether a court may "confirm an arbitration award that has been nullified by a competent authority of the state in which the arbitration was held."[46] Article 5 of the Panama Convention states that "recognition and execution of [the arbitral award] may be refused" if the award has been nullified by a "competent authority" of the state in which the arbitration was conducted.[47] The district court found that it did have discretion, albeit narrow discretion, to refuse to recognize the nullification of an arbitration award.[48]

The district court found that the basic notions of justice were violated when the Mexican court vacated the original Award. The court emphasized how unfair it was to apply retroactively a law that would deny COMMISA an opportunity to have its claims heard, when the law was not in existence at the time COMMISA entered into the contract with PEP.[49] COMMISA initiated the arbitration in 2004.[50] It was not until 2009, when section 98 of the Law of Public Works and Related Services came into effect, that PEP could argue that the dispute could not be arbitrated.[51] Section 98 provided that administrative rescissions and early termination of contracts "may not be subject to arbitration proceedings."[52] The Eleventh Collegiate Court said that the purpose of the law was "to protect the economy and public expenditure by abandoning the practices that were aimed at granting more participation to private parties than to

40. *Id.* (see Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter New York Convention]). Adoption and implementation of the New York Convention by the United States is found at 9 U.S.C. § 201 (1982).

41. 9 U.S.C. § 305.

42. 9 U.S.C. § 301.

43. *Corporación Mexicana,* 2013 WL 4517225 at 56.

44. 487 F.3d 928 (D.C. Cir. 2007) (stating that an award could be confirmed, notwithstanding an annulment, if the foreign ruling of annulment was contrary to public policy "to the extent that it is repugnant to fundamental notions of what is decent and just in the US.").

45. *Id.*

46. *Corporación Mexicana*, 2013 WL 4517225, at 44–45.

47. *Id.* at 45.

48. *Id.*

49. *Id.* at 4.

50. *Id.* at 12.

51. *Id.* at 77.

52. *Id.*

the State."[53] Thus, the Mexican court held that it would be against public policy to subject PEP to a dispute-resolution procedure that would have been governed by private parties.[54] Although the Mexican court stated that this law was being used only as a "guiding principle," the Mexican Supreme Court decision on which it claimed to be basing its ruling did not mention any type of arbitration.[55] Thus, it became evident to the district court that the Eleventh Collegiate Court made its decision based on the new section 98 law, not the 1994 Mexican Supreme Court decision.[56]

In a 1994 case, the U.S. Supreme Court held that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[57] COMMISA had the "settled expectation" that its claims could be arbitrated.[58] The retroactive application of section 98 would have been unfair to COMMISA because it entered into the contract with the expectation of having the ability to pursue arbitration, if needed. Had COMMISA unjustly been denied the right to arbitration, people and businesses alike would have no confidence in the legal system, and the legal consequences of actions would be unknown.

The district court also stressed that COMMISA had a reasonable expectation that its dispute with PEP would be arbitrated based on PEP's own agreements.[59] PEP went so far as to sign two different agreements that had stated that disputes related to the gas platforms contract would be arbitrated.[60] The North American Free Trade Agreement (NAFTA)[61] provides that arbitration may be used to settle disputes between private parties and a nation in cases where state enterprises have contracted in the public interest.[62] As a signatory to NAFTA, Mexico is subject to arbitration in cases like the one at issue. The district court stated that Mexico's agreement to engage in arbitration pursuant to NAFTA suggests that Mexican instrumentalities were also subject to arbitration.[63]

The district court also recognized that had the Eleventh Collegiate Court's nullification been enforced, COMMISA would have been left without a remedy to litigate the merits of the dispute because the statute of limitations would have expired.[64] In a June 2006 decision, the Mexican Supreme Court stated that there were no restrictions against a private party that filed an administrative dispute proceeding within the relevant time periods seeking judicial recourse if it had been adversely affected by the termination of an administrative contract for public

53. *Id.* at 24.

54. *Id.* at 49.

55. *Id.*

56. *Id.*

57. Landgraf v. USI Film Products, 511 U.S. 244, 265–66 (1994).

58. *Corporación Mexicana*, 2013 WL 4517225, at 50.

59. *Id.* at 56.

60. *Id.* at 4.

61. *See* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993), art. 1116.

62. *Corporación Mexicana*, 2013 WL 4517225 at 47.

63. *Id.*

64. *Id.* at 52.

works to which it was a party.[65] However, the Eleventh Collegiate Court justified its nullification by stating that "the case should have been contested by filing a federal ordinary administrative action before a District Judge in Administrative Matters."[66] The U.S. district court, however, properly noted that this option was no longer available to COMMISA by the time the Eleventh Collegiate Court had issued its opinion.[67]

Article 14 (VII) of the Organic Law of the Federal Court in Tax and Administrative Matters granted the tax and administrative court jurisdiction over public works cases involving Mexican state entities such as PEP.[68] The statute made the tax and administrative court the exclusive forum for public work cases and also provided a short 45-day statute of limitations.[69] The district courts for administrative matters, which have a statute of limitations of ten years, could not hear disputes over public works such as this one.[70] COMMISA then filed suit in the tax and administrative court, arguing that the ten-year statute of limitations should apply, but the case was dismissed a month later.[71] The U.S. district court held that this lack of remedy available to COMMISA was unjust because COMMISA had been found liable to PEP for damages, even though there had not been a full hearing on the merits outside arbitration, but simply because PEP issued an administrative rescission.[72]

IV. Conclusion

The U.S.D.C. rightfully exercised its discretion to confirm the arbitration award after the Mexican courts unfairly nullified the award, violating basic notions of justice. The district court properly confirmed the award, because had the Mexican court decision been upheld, COMMISA would have been dealt a grave injustice. As international business continues to expand throughout the globe, businesses must select jurisdictions whose laws and judiciaries will preserve fairness and adhere to the decisions of arbitrators. The ex post facto application of a law that would favor a state enterprise over a private party does not adhere to basic notions of fairness. Here, the district court judge preserved the basic notion of fairness and confirmed the Award that was rightfully arbitrated according to the agreement.

John Coster

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65. *Id.*
66. *Id.* at 53.
67. *Id.*
68. *Id.* at 15.
69. *Id.*
70. *Id.*
71. *Id.* at 54.
72. *Id.*

Onrubia de Beeck v. Lopez Costa

39 Misc. 3d 347, 959 N.Y.S.2d 628 (Sup. Ct., N.Y. Co. 2013)

The Plaintiff's claims for fraud, unjust enrichment, and breach of fiduciary duty against an Argentine therapist each presented a choice of law issue. The court applied an interest-analysis approach[1] to decide which of three jurisdictions' law should apply: New York's, Argentina's, or the British Virgin Islands'.

I. Holding

In *Onrubia de Beeck v. Lopez Costa*,[2] the Supreme Court, New York County, held that there was no meaningful conflict between New York and Argentine law regarding the Plaintiff's claims of fraud, unjust enrichment, and breach of fiduciary duty.[3] Accordingly, New York law was ruled applicable to Plaintiff's claims against her former Argentine psychotherapist, and the court entered default judgments against Defendant therapist on each of those claims. Although the court held British Virgin Islands law applicable to the issue of ownership of bearer shares apparently claimed by both the Plaintiff and the Defendant, it also held that, before the requested declaratory judgment can be granted, an evidentiary inquest hearing, at which the Plaintiff must establish that she is the rightful owner of the bearer shares, is required.

II. Facts and Procedural History

This action arose from events that took place in Argentina. The Plaintiff Maria del Carmen Onrubia de Beeck (Onrubia de Beeck or Plaintiff) was a patient of the Defendant Gaspar Roberto Lopez Costa (Lopez Costa or Defendant), an Argentine psychotherapist.[4]

Onrubia de Beeck alleges that Lopez Costa both violated her trust and defrauded her of more than $7 million (USD). First, around 1988, "under the guise of therapy [for what Lopez Costa diagnosed as sexual repression], [Lopez Costa] began having sexual intercourse with [Onrubia Beeck]" despite their doctor-patient relationship.[5] As Onrubia de Beeck would later learn, Lopez Costa also engaged in sexual intercourse with Plaintiff's daughter.[6]

Lopez Costa continued to take advantage of Onrubia de Beeck under the guise of therapy. Beginning in the early 1990s, Lopez Costa convinced Onrubia de Beeck to give him large sums of her money so that he might invest it on her behalf.[7] Lopez Costa claimed that this would

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1. *See generally* JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE § 23:7 (2d ed. 2013) (summarizing the Brainerd Currie interest analysis as one which selects the most appropriate of conflicting laws based on an analysis of "the policies behind the laws of all the interested jurisdictions," applying then the law of "the forum state [which bears] a true interest" in the issue of controversy).
2. Onrubia de Beeck v. Lopez Costa, 39 Misc. 3d 347, 959 N.Y.S.2d 628 (Sup. Ct., N.Y. Co. 2013).
3. *See Onrubia de Beeck*, 39 Misc. 3d at 358.
4. *See id.* at 350.
5. *Id*. at 351.
6. *See id.* at 354.
7. *See id.* at 351.

allow Onrubia de Beeck to "[assert] her independence from her wealthy family."[8] From about 1992 through 2004, Onrubia de Beeck periodically handed over hundreds of thousands of dollars to Lopez Costa. The Plaintiff estimates that she gave the Defendant $7,579,500.[9]

Using the monies he obtained from Onrubia de Beeck, the Defendant formed several companies and erected four apartment buildings. The Defendant also used funds obtained from Onrubia de Beeck to form Williamsport Capital Ltd. (Williamsport), a company incorporated in the British Virgin Islands, with an account at the Israeli Discount Bank (IDB) in New York, whose bearer shares are the subject of controversy in the Plaintiff's action.[10] Lopez Costa deeded to Onrubia de Beeck the four apartment houses and remitted to her the earnings of the Williamsport bearer shares, allegedly in an effort to "hide assets from his estranged wife."[11] Onrubia de Beeck finally became suspicious of Lopez Costa's scheme in late 2004, when he sought to obtain her signature for "a back-dated document meant to establish a two million dollar debt."[12] In January 2005, Onrubia de Beeck attempted to seize control of the funds represented by the Williamsport bearer shares. However, IDB, in the face of Lopez Costa's conflicting claim, would not acknowledge her ownership of the shares without a court order.[13] The Plaintiff thus brought this action in New York state court, seeking judgments on her claims of fraud, breach of fiduciary duty, and unjust enrichment, and also declaratory judgment as to her rightful ownership of the Williamsport bearer shares.[14]

III. Discussion

A. The Claims

The Plaintiff brought this action seeking two things from the court: (1) a declaratory judgment finding that she is the rightful owner of the Williamsport bearer shares; and (2) judgments on her (original) five claims "for fraud, breach of fiduciary duty, unjust enrichment, constructive trust and an accounting seeking over ten million dollars in damages."[15] However, the Plaintiff agreed to waive her constructive trust and accounting claims and the court presently adjudicated her right to a declaratory judgment and her three claims for fraud, breach of fiduciary duty, and unjust enrichment.[16]

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8. *Id*. at 351.
9. *See id*. at 352.
10. *See id*. at 353.
11. *Id*. at 354.
12. *Id*. at 352.
13. *See id*. at 354.
14. *Id*. The apartment houses, whose sale eventually yielded $290,154 to Onrubia de Beeck; the Williamsport bearer shares, worth over $2.5 million, and sporadic deposits of cash by the Defendant into the Plaintiff's account reduced the damages request to its current sum of $7,579,500.
15. *Id.* at 349.
16. *See id.*

B. Default Judgment

1. Declaratory Judgment (Regarding Ownership of Bearer Shares)

Because Lopez Costa was an absentee defendant, the court sought to enter default judgments "based solely upon the pleadings and affidavits."[17] Yet, although the Plaintiff presented all of the evidence at her disposal to show that she indeed was defrauded out of millions of dollars by Lopez Costa, the court refused to grant a declaratory judgment regarding ownership of the Williamsport bearer shares. An evidentiary inquest hearing was ordered, not because of the lack of evidence, which may have been an issue, but because of New York's judicial practice of withholding default declaratory judgments.[18] Specifically, "[d]efault declaratory judgments, 'will not be granted on the default and pleadings alone' but require that the 'plaintiff establish a right to a declaration against… a defendant.'"[19] Therefore, on this issue regarding the Williamsport bearer shares, it was held that the Plaintiff must establish her rightful ownership of the shares in a separate evidentiary inquest hearing.[20]

2. Fraud, Breach of Fiduciary Duty, and Unjust Enrichment

The absentee Defendant, although saved by a New York judicial policy from a likely adverse default judgment on the issue of the Williamsport bearer shares, was not so fortunate as to escape default judgment regarding the Plaintiff's additional claims of fraud, breach of fiduciary duty, and unjust enrichment. With regard to these claims, the court adhered to Rule 3215 of the Civil Practice Law and Rules, which allows a court to "grant a default judgment where a party fails to appear."[21]

Under this rule, courts have held that a plaintiff seeking default judgment need only present "prima facie proof of [each] cause of action."[22] Courts also have held, under the CPLR, that a defaulting defendant "admits all factual allegations of the complaint and all reasonable inferences therefrom."[23] The burden of proof of the facts asserted is satisfied by a "mere verified complaint."[24] The court thus held that the Plaintiff may receive the default judgments she seeks regarding each individual claim of fraud, breach of fiduciary duty, and unjust enrichment.[25]

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17. *Id*. at 355.
18. *See id*. (quoting Tannenbaum v. Allstate Insurance Co., 66 A.D.2d 683, 684, 411 N.Y.S.2d 29 (1st Dep't 1978)) (noting that "New York courts 'rarely, if ever' grant declaratory judgments on default 'with no inquiry by the court as to the merits.'").
19. *Id*. at 355 (quoting Levy v. Blue Cross & Blue Shield, 124 A.D.2d 900, 902, 508 N.Y.S.2d 660 (3d Dep't 1986)).
20. *See id*.
21. *Id*. at 357.
22. *Id*. (quoting Silberstein v. Presbyterian Hosp. in City of N.Y., 95 A.D.2d 773, 463 N.Y.S.2d 254 (2d Dep't 1983)).
23. *Id*.
24. *Id.* (quoting State of New York v. Williams, 26 Misc. 3d 743, 751, 890 N.Y.S.2d 789 (Sup. Ct., Albany Co. 2009)).
25. *See id*. at 357–62.

C. Choice of Law

An overarching issue spanning this entire action concerns which jurisdiction's law the court should apply to each claim. At its broadest, this action potentially implicates the laws of three jurisdictions: (1) New York, where the action was brought; (2) Argentina, where the claims arose;[26] and (3) the British Virgin Islands (BVI), where the company whose bearer shares are at issue was incorporated.[27]

1. Ownership of Bearer Shares

The court noted that each jurisdiction potentially implicated had enough nexus to the present claim to demand application of its law to the issue of the ownership of the Williamsport bearer shares: (1) Williamsport was incorporated in BVI, and the bearer shares were first issued there;[28] (2) the Plaintiff received the bearer shares from the defendant in Argentina;[29] and (3) IDB, the bank where Williamsport held its account, was located in New York.[30] Here too, however, as with the question of declaratory judgment, the court looked to New York judicial policy, which states that "in determining questions of the 'incidents of shares,' New York courts generally look to the laws of the state of incorporation."[31] The court also observed that Argentine law also bears a policy of deference to the state of incorporation.[32] In this case, that state was BVI.

The court also found that, because bearer shares are not used in either place, neither New York nor Argentine law directly addresses the issue of ownership.[33] On the other hand, BVI law directly and explicitly addresses bearer-share ownership, as it allows its jurisdiction's companies to issue bearer shares and places restrictions on the very item at issue: "how bearer shares . . . may be held and transferred."[34] Thus, the court found that because BVI has a strong and clear interest in the regulation of its companies and their bearer shares, applying its law to the present issue is appropriate.[35]

However, in light of the recent change of BVI law regarding bearer shares ownership,[36] the choice to follow BVI law was not the most favorable to the Plaintiff. Before 2004, BVI law presumed the actual possessor of bearer shares to be the owner.[37] Since 2007, when the expert on

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26. *See id.* at 351–52.
27. *See id.* at 353.
28. *Id.*
29. *See id.* at 354.
30. *See id.* at 353.
31. *Id.*
32. *See id.* at 356.
33. *See id.*
34. *Id.*
35. *See id.*
36. *See* British Virgin Islands Business Companies Act (2004) (amended 2005), http://www.bvifsc.vg/Portals/2/BVI_Business_Companies_Act_2004_Revised_1_1_06.pdf.
37. *See Onrubia de Beeck*, 39 Misc. 3d at 357.

BVI law provided his affidavit, new regulations have come into effect, requiring the remittal of pre-2004 bearer shares to an authorized custodian or, alternatively, their conversion to or exchange for registered shares.[38] "[T]he consequence of failing to do so includes the immobilization of the shares."[39] These strict BVI regulations do not bode well for the Plaintiff. However, the Plaintiff loses nothing in the instant case, because it has already been determined that this matter must be adjudicated within the forum of an evidentiary inquest hearing.[40]

2. Fraud

The Plaintiff's three claims raised the choice-of-law question because they were being brought in New York, while the events that gave rise to them occurred in Argentina. This choice-of-law issue was resolved by reference to the standard procedure of determining "whether there is an actual conflict between the laws of the jurisdictions involved."[41] The court would find a conflict between New York and Argentine law only if there were "relevant substantive differences that could have a significant impact on the outcome of the case."[42] As to each of her claims, the court found that no meaningful conflict existed between the two jurisdictions' laws.[43] The court thus held that New York law should apply to each.[44]

The court noted five elements that must be shown to establish a prima facie case for fraud. There must be "(1) a material misrepresentation or omission of fact (2) made by defendant with knowledge of its falsity (3) and intent to defraud; (4) reasonable reliance on the part of the plaintiff; and (5) resulting damage to plaintiff."[45] On the other hand, to seek compensation for fraud under Argentine law, a plaintiff need only show two things: namely, (1) that he suffered damages caused by fraud, defined under Argentine law as "a willful misleading not attributable to [him]"; and (2) that the defendant acted fraudulently.[46] The Argentine law on establishing fraud is notably missing the requirement of reliance, whereas both intent and reliance are required under New York law. However, because the Plaintiff has already satisfied the "more rigid" requirements under New York law, the differences between Argentine and New York law present no meaningful conflict.[47] Therefore, New York law was applied to her claim for fraud.[48]

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38. *See id.*
39. *Id.* at 358.
40. *Id.* at 355.
41. *Id.* (quoting In re Allstate Ins. Co. (Stolarz-New Jersey Mfrs. Ins. Co.), 81 N.Y.2d 219, 223, 597 N.Y.S.2d 904 (1993)).
42. *Id.* (quoting Finance One Public Co. Ltd. v. Lehman Brothers Special Financing, Inc., 414 F.3d 325, 332 (2d Cir. 2005)).
43. *See id.* at 358.
44. *See id.*
45. *Id.* (quoting Crigger v. Fahnestock & Co., Inc., 443 F.3d 230, 234 (2d Cir. 2006)).
46. *Id.* at 358.
47. *See id.* at 359.
48. *See id.*

After applying New York law to her fraud claim, the court held that the Plaintiff was entitled to judgment in her favor, because in reliance on the Defendant's purposeful misrepresentations, she transferred millions of dollars to him.[49]

3. Unjust Enrichment

The court noted that under New York law a case for unjust enrichment is established where the plaintiff bestows a benefit upon the defendant without the defendant adequately compensating the plaintiff for it.[50] In the same way, under Argentine law, in order to establish a case for unjust enrichment, a plaintiff must show "[1] the enrichment of one of the parties; [2] the impoverishment of the other party, who seeks the restitution of his assets to the original state of affairs; [3] that the impoverishment of a party is due to the unjust enrichment of the other; [4] absence of a legitimate cause for the enrichment of the relevant party."[51] Although outlined with greater specificity, the Argentine law appears to be very similar in its requirements to New York law regarding unjust enrichment.[52] Thus, the court held that New York law was applicable to the plaintiff's claim for unjust enrichment.[53]

Under New York law, the "essential inquiry" regarding unjust enrichment is "whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered."[54] The court found that in light of the Defendant's deceitful scheme in which he defrauded the Plaintiff of millions of dollars, the Plaintiff deserved a default judgment in her favor.[55] The Plaintiff requested judgment for unjust enrichment as it related to the professional fees she paid to the Defendant in addition to the monies she paid him for false investments.[56] The court, however, would not grant judgment based on those fees because "without supportive authority, it would be inappropriate to stretch the law of unjust enrichment to cover the therapy fees."[57]

4. Breach of Fiduciary Duty

The court listed the elements of breach of fiduciary duty under New York law. That is, "[1] the existence of a fiduciary relationship between plaintiff and defendant, [2] misconduct by the defendant, and [3] damages that were directly caused by the defendant's misconduct."[58] Furthermore, in order to establish the existence of a fiduciary relationship, the plaintiff must

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49. *See id.*
50. *See id.*
51. *Id.*
52. *Id.*
53. *See id.*
54. *Id.* (quoting Sperry v. Crompton Corp., 8 N.Y.3d 204, 863 N.E.2d 1012 (2007)).
55. *See id.* at 360.
56. *See id.*
57. *Id.*
58. *Id.* (quoting Kurtzman v. Bergstol, 40 A.D.3d 588, 590, 835 N.Y.S.2d 644 (2d Dep't 2007)).

show that the defendant was under a duty to act for the benefit of the plaintiff "'upon matters within the scope of the relation.'"[59]

The court found Argentine law to be similar.[60] Under that law, the plaintiff must prove "'the existence of the fiduciary duty and its breach by the defendant'; that the defendant should have, but did not act within the limits of the fiduciary relationship; and that as a result plaintiff suffered 'actual and specific damages.'"[61] Also, similar to New York law, in order to show the existence of a fiduciary relationship, the plaintiff must show that the defendant was under a duty to act for the benefit of the plaintiff.[62] Because there is no meaningful conflict between the two jurisdictions' laws regarding breach of fiduciary duty, the court held that New York law is applicable to the claim.[63]

Applying New York law, the court deemed it reasonable to grant default judgment in favor of the Plaintiff. The Defendant, as a psychologist, had a fiduciary duty to the Plaintiff, his patient. He breached his fiduciary duty to the Plaintiff by defrauding her of millions and entering into an inappropriate sexual relationship with her and her daughter.[64]

The Plaintiff further demanded recovery of the professional fees she paid to the Defendant under the theory that "[under ethics rules of the trade in Argentina] a psychologist who begins a sexual or business relationship with a patient 'can no longer be considered a psychologist' and does not have a right to receive payment for his services."[65] Because of this creative argument, the court questioned why the Plaintiff did not bring this claim under the more appropriate theory of malpractice, rather than breach of fiduciary duty.[66] Although the court agreed that she could recover her fees for therapy, based on the fact that the Defendant breached his fiduciary duty toward her, it would not allow her to recover her investment money on the same theory.[67] However, the court noted that in either case the Plaintiff was going to recover her investment monies through her claims for fraud and unjust enrichment.

D. Damages

As for damages, the Plaintiff sought recovery of false investment payments, professional fees, personal expenses, and other various sums given to the Defendant. In support of her claim for damages, she submitted documentary evidence outlining the various sums of monies she paid to the Defendant over the years. Included in her support is the Expert Financial Report of a public accountant specializing in the field of forensic accounting.[68] The report outlines trans-

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59. *Id*. (quoting EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170 (2005)).
60. *See id*.
61. *Id*.
62. *See id*. at 361.
63. *See id*.
64. *Id*. at 351–54.
65. *Id.* at 361.
66. *See id*.
67. *See id*. at 362.
68. *See id*. at 352.

actions executed between the Plaintiff's and the Defendant's bank accounts. The report shows that the Plaintiff provided "a total of $4,997,000 to [the Defendant] for investments . . . , paid $1,358,150 in professional fees, and wrote checks for personal expenses in the amount of $1,020,000."[69] Missing from the report, however, is an accounting for the years between 1992 and 1994 (inclusive), and 1998 and 1999, referred to as "gap years."[70] For the gap years, the Plaintiff alleges over $3 million in damages, represented by investments, professional fees, and personal expenses.

The court held that when a plaintiff requests damages for claims under default judgments, "providing an affidavit merely stating the amount of damages requested is insufficient."[71] Rather, in addition to such an affidavit, the plaintiff must present documentary evidence supportive of her claim.[72] Thus, the court held that only a portion of the damages requested were conclusively proven, and that portion would be granted without further need for proof at a future inquest hearing. However, without sufficient documentary evidence, the Plaintiff cannot recover the more than $3 million in damages for the gap-year transactions. In summary, the court held that it could not provide millions of dollars in damages "based solely on [the] supposition [of an expert]."[73]

Lastly, the court allowed the plaintiff to collect prejudgment interest (at 9%) on her damages, as is proper "in cases of fraud, unjust enrichment and breach of fiduciary duty… where a defendant wrongly held a plaintiff's money."[74] In her Expert Financial Report submitted to the court, the Plaintiff calculated this 9% prejudgment interest "as of the last day of the year of loss."[75] The court noted that, although this was the correct way to calculate the damages, the Plaintiff would also be required to submit an updated affidavit "calculating prejudgment interest to date," which accounts for monies already awarded and other offsets.[76]

IV. Conclusion

Because "there [was] no 'meaningful conflict' between New York's and Argentina's laws of fraud, unjust enrichment, or fiduciary duty which would have [had] a substantive impact on this case," the court applied New York law to each claim.[77] The court deviated from application of New York law only where it would have made a substantial difference in the claim's outcome; specifically, on the question of who owned the bearer shares of the corporation. For this issue, the court applied neither New York law nor Argentine law, but the law of the incorporating jurisdiction, the British Virgin Islands.

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69. *Id.*
70. *Id.* at 352.
71. *Id.* at 362.
72. *See id.*
73. *Id.* at 364.
74. *Id.* at 365.
75. *Id.* at 366.
76. *Id.*
77. *Id.* at 358.

The court decided that all of the Plaintiff's claims, except for the matter of bearer shares ownership, may be disposed of by default judgment because of the Defendant's absence. BVI law was applied to resolve the bearer shares ownership issue, yet New York judicial policy saved the Defendant from a total adverse judgment in this case. It was held that Onrubia de Beeck must first establish a "right to declaration" at an evidentiary inquest hearing before a declaratory judgment may be granted.

Eugene Ubawike, Jr.

Thai-Lao Lignite (Thailand) Co., Ltd. v. Laos

924 F. Supp. 2d 508 (S.D.N.Y. 2013)

The U.S.D.C. for the S.D.N.Y. held that the stringent standard for the attachment of a sovereign's property did not apply to discovery of the sovereign's assets: discovery may be ordered broadly in order to enforce a valid judgment.

I. Holding

In *Thai-Lao Lignite (Thailand) Co. v. Laos*,[1] the District Court held that the immunity claimed by the Laotian government under the Foreign Sovereign Immunities Act (FSIA)[2] did not bar post-judgment discovery proceedings relating to the accounts of the Respondent.[3] The District Court also held, however, not only that the Central Bank's property held for its own account was immune from attachment under the FSIA, but also that the specific details of accounts held by it were immune from both attachment and discovery. Other property in the name of the Respondent, also held by the Central Bank, was subject to minimally intrusive discovery.[4]

II. Facts and Procedural History

In 1994, Thai-Lao Lignite (Thailand) Co., Ltd., a company in the business of investing in and operating mining and power generation projects, and its subsidiary Hongsa Lignite (Lao PDR) Co., Ltd. (collectively, the Petitioners), entered into mining contracts with the government of the Lao People's Democratic Republic (Respondent).[5] The dispute between the parties arose from a Project Development Agreement (the PDA), which entitled the Petitioners to exclusive rights to mine coal in the Hongsa region of Laos.[6] After several disagreements about financial issues, the relationship between the parties broke down, leading the Respondent to terminate the PDA.[7] Pursuant to the PDA, the parties participated in arbitration conducted by the International Chamber of Commerce Court of International Arbitration.[8] The arbitral panel concluded that the Respondent had breached the PDA and awarded the Petitioners damages in the amount of $56,210,000.[9] In 2011, the Southern District of New York affirmed the panel's decision[10] in accordance with the United Nations Convention on the Recognition and

1. 924 F. Supp. 2d 508 (S.D.N.Y. 2013).
2. Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1330.
3. 924 F. Supp. 2d at 519, 521.
4. *Id.* at 522.
5. Thai-Lao Lignite (Thailand) Co., Ltd. v. Laos, No. 10 Civ. 5256(KMV) 2011 WL 3516154, at *1 (S.D.N.Y. Aug. 3, 2011), *aff'd*, No. 11 Civ. 3536, 2012 WL 2866275 (2d Cir. Nov. 13, 2012).
6. *Id.* at *2.
7. *Id.* at *4.
8. *Id.* at *6.
9. *Id.* at *6–*7.
10. *Id.* at *21.

Enforcement of Foreign Arbitral Awards (New York Convention),[11] as implemented by Section 201 of the Federal Arbitration Act.[12]

The Respondent objected to discovery orders issued on May 29, July 20, and July 31, 2012, which denied the Respondent's request for a stay.[13] The Respondent also objected to the order issued on November 26, 2012, denying its request for a protective order, and the December 12, 2012, order, denying its request for a stay.[14] Additionally, the request to intervene by the Bank of the Lao People's Democratic Republic (the Lao Bank) was granted, and the Lao Bank objected to the July 20 Order and to a discovery order issued on August 1, 2012.[15]

In a conference held on May 17, 2012, Magistrate Judge Freeman held that information or assets located outside the United States were not automatically immune from discovery, and the Petitioners could request such information so long as it had a nexus to the U.S. assets.[16] In the May 29 Order, Judge Freeman directed the Respondent to produce all documents concerning payments made in U.S. dollars where a U.S. bank was involved in the transaction.[17] The Respondent also was ordered to disclose information regarding the Lao Bank's U.S. accounts, any access the Respondent had to those accounts, and any payments made from those accounts. The Petitioners disproved the Respondent's repeated denials of lack of documentation for the payments and information to the accounts. The Petitioners provided Judge Freeman with a Laotian statute governing the relationship between the Respondent's assets and the Lao Bank, a newspaper article that identified the Respondent's royalties from one hydropower project, and transaction reports of ongoing royalty payments processed in a New York bank.[18]

Concerns regarding incomplete submissions given by the Respondent were addressed at the July 18, 2012, conference. The Respondent asserted that it did not have possession, custody or control of any documentation concerning the accounts.[19] However, Judge Freeman did not believe that none of the Respondent's personnel had access to, authority over, or awareness of its funds.[20] The July 20 Order required the Respondent to provide either the account records or a signed affidavit from specified Lao Government officials describing the relationship that would support the Respondent's contention.[21] The Respondent's only compliance with the discovery orders was a notarized letter from its U.S. counsel, stating that he could not acquire the requested records because the Lao Bank refused to provide them to him.[22] Never-

11. New York, June 10, 1958, 21 U.S.T. 2517, entered into force June 7, 1959, entered into force for the United States Dec. 29, 1970, entered into force for Laos Sept. 15, 1998.

12. 9 U.S.C. § 201 (1970).

13. *Thai-Lao Lignite,* 924 F. Supp. 2d at 511.

14. *Id.* at 514.

15. *Id.*

16. *Id.* at 513.

17. *Id.* at 513–14.

18. *Id.* at 514–15.

19. *Id.* at 514.

20. *Id.* at 515.

21. *Id.*

22. *Id.* at 516.

theless, in the August 1 Order, Judge Freeman denied the Respondent's request for a stay to produce the information.[23]

The Respondent did produce other documentation related to accounts used by Laos's U.S. Embassy and Mission, which exposed questionable transactions.[24] In order to clarify the discrepancies, the Petitioners served upon the Respondent two deposition notices for both the Embassy and the Mission.[25] The court denied the Respondent's request for protective orders to prevent the depositions.[26] Ultimately, Judge Freeman held that Petitioners should be permitted to verify the Respondent's answers by questioning a witness with knowledge through a deposition.[27]

Judge Freeman, unpersuaded by the Respondent's argument that the accounts were immune from discovery, denied the Respondent's request for a stay in the November 26 Order.[28]

Subsequently, the Respondent filed Rule 72(a)[29] objections to the November 26 Order and continued to refuse to schedule the depositions.[30] Judge Freeman reminded the Respondent that an objection is not equivalent to a stay and eventually depositions were scheduled.[31]

III. Discussion

A. Standard of Review

A magistrate judge's ruling on a discovery dispute may be set aside only if the District Court determines the ruling to be "clearly erroneous or contrary to law."[32] Judges are afforded broad discretion, and reversal is proper only when that discretion is abused.[33] A judge's ruling is clearly erroneous if the District Court has a firm conviction that a mistake has been committed.[34] Further, a ruling is contrary to law if it fails to apply or misapplies relevant statutes, case law or rules of procedure.[35] The party that seeks to overturn the decision carries a heavy burden.[36]

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23. *Id.*
24. *Id.* at 524.
25. *Id.* at 525.
26. *Id.*
27. *Id.*
28. *Id.*
29. FED. R. CIV. P. 72(a).
30. *Thai-Lao Lignite,* 924 F. Supp. 2d at 525.
31. *Id.* at 526.
32. *Id.* at 511 (citing 28 U.S.C. § 636(b)(1)(A)).
33. *Id.*
34. *Id.* at 512.
35. *Id.*
36. *Id.*

B. Respondent's Objections to the May 29, July 20, and July 31 Orders

In response to the May 29 and July 20 Orders, the Respondent argued "(1) the Orders violated the principle that discovery in FSIA cases should be ordered circumspectly; (2) property immune from attachment is also immune from discovery; and (3) Respondent cannot be responsible for producing materials from a sovereign instrumentality."[37] The Respondent's objections to the July 31 Order, denying its request for a stay, are based on the same contentions.[38] Fundamentally, the District Court ruled that the stringent standard provided by the FSIA for attachment of sovereign property is not applicable to mere discovery.[39] Following Rule 72(a) of the Federal Rules of Civil Procedure, the District Court did not consider the Respondent's untimely objection to the May 29 Order.[40]

The District Court found no clear error in the July 20 Order demanding further discovery.[41] The Respondent contended that Judge Freeman's ruling violated the FSIA attachment and discovery immunity principles, in that the Petitioners did not identify property that could potentially be attached.[42] However, the District Court addressed the Respondent's complex issues of foreign sovereign immunities and particular property attachments by following the Second Circuit's ruling in *EM, Ltd. v. Republic of Argentina.*[43] There, the Second Circuit held that the ability to order discovery in a post-judgment decision is not derived from the ability to attach the property in question, but from its power to conduct proceedings and enforce judgments within its jurisdiction.[44] Further, the District Court rejected the Respondent's argument that the July 20 Order was directed at independent entities.[45] The court acknowledged the Petitioners' request for the Respondent to provide information regarding its own assets, notwithstanding that the information would ultimately come from a third party.[46] Lastly, the District Court agreed that the Respondent's reply to the request was incomplete and, practically speaking, an account holder does have some access to and authority over the funds and should produce that documentation.[47]

The Respondent argued that complying with the obligations of the July 31 Order would cause substantial harm, because assets subject to discovery were protected by sovereign immunity. Again, the District Court expressed the irrelevance of whether the property would ultimately be attachable, because the only issue at this stage was whether the property was immune

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37. *Id.* at 516–17.
38. *Id.* at 520.
39. *Id.* at 519.
40. *Id*.
41. *Id.* at 520.
42. *Id*. at 518.
43. 695 F.3d 201 (2d Cir. 2012).
44. *Thai Lao Lignite,* 924 F. Supp. 2d at 518–19.
45. *Id.*
46. *Id.*
47. *Id.* at 520.

from discovery.[48] The District Court stated that the only harm that would occur would be further delays of the discovery proceedings.[49]

C. The Lao Bank's Objections to the July 20 Order and August 1 Order

The Lao Bank's intervention was limited to objections to the July 20 Order and the August 1 Order, paragraphs 2 through 4.[50] The July 20 Order required the Respondent to produce information concerning hydropower payments passed through the Lao Bank's U.S. branches and account information or an affidavit explaining why the information was unavailable.[51] The August 1 Order approved the Petitioners' request for information about the Respondent's assets within the Lao Bank.[52] The Lao Bank's contentions centered on two arguments: (1) immunity from discovery based on various sovereign-immunity principles; and (2) that the property to which those principles were to be applied belonged to the Lao Bank and not to the Lao Government.[53] The District Court presumed the Lao Bank's immunity under the FSIA for certain assets but found that assets held in the Respondent's name were not immune from discovery.[54]

The Lao Bank must be treated as an independent government instrumentality because it had not waived its sovereign immunity.[55] The Petitioners had not yet proved (1) that the Lao Bank was so controlled by the Lao Government that a principal/agent relationship had been created (alter ego theory) or (2) that by recognizing the Lao Bank as its own entity, fraud or injustice would occur, so the Lao Bank was presumed a separate entity, entitled to immunity protections under the FSIA. [56] Moreover, because the lower court had not established jurisdiction over the Lao Bank, it must narrow the discovery scope so as not to infringe on the Lao Bank's immunity.[57] Additionally, as long as the Lao Bank's funds were used for central banking functions, they would be immune from attachment.[58] Consequently, the District Court concluded that the specific details of accounts held by the Lao Bank were immune from discovery as well as attachment.[59]

As to the Lao Bank's second argument for the application of sovereign immunity principles, the District Court held that Judge Freeman's rulings were not contrary to law or clearly erroneous.[60] The Petitioners provided evidence that the Lao Bank was obligated by law to act as

48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 521.
54. *Id.* at 522–24.
55. *Id.* at 522.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 523.
60. *Id.* at 524.

custodian for the Lao Government's assets abroad and thus that they were entitled to discovery regarding the Respondent's accounts, even though they might be held in the name of the Lao Bank.[61] Additionally, the declaration by Oth Phonhxiengdy, the Deputy Director General of the Banking Operations Department of the Lao Bank, was found inconclusive in establishing that the property belonged to the Lao Bank and not the Respondent.[62] The District Court also rejected the Respondent's objection to the August 1 Order, because the requested information was specifically in reference to the Respondent's accounts.[63] Overall, the District Court reasoned that, although the request for documents imposed a modest burden, it was a "reasonable, even minimal, discovery burden."[64]

IV. Conclusion

In balancing the concerns of the Petitioners' right for discovery and the Respondent's immunity, the District Court affirmed Judge Freeman's May 29, July 20, July 31, August 1, November 26, and December 17 Orders.[65] The primary holding focused on the distinctions between the immunity standards applicable to attachment and to discovery.[66]

The District Court did not address the Respondent's untimely objection to the May 29 Order.[67] In regard to the July 20 and July 31 Orders, the District Court found that the Respondent's argument of immunity was unavailing, because the Respondent was applying the incorrect standard to Orders of discovery.[68] It also found that the Petitioners had not requested information from an independent institution, but directly from the Respondent and the Respondent had not fulfilled its obligation under the Orders.[69] In regard to the Respondent's objection to the November 26 and December 17 Orders, the court reemphasized the EM holding, that property's immunity from attachment does not prevent the property from being discoverable.[70] Further, the Petitioners have the right to depose witnesses who have direct information concerning the property in question.[71] Finally, the District Court affirmed the denial of a discovery stay in the December 17 Order, because the proceedings had already been delayed substantially.[72] The Respondent was required to fulfill its discovery obligations similar to any other defendant in post-judgment proceedings.[73]

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61. *Id.* at 523–24.
62. *Id.* at 523.
63. *Id.* at 524.
64. *Id.*
65. *Id.* at 528.
66. *Id.* at 519, 527.
67. *Id.* at 518.
68. *Id.* at 519, 527.
69. *Id.* at 516, 519.
70. *Id.* at 527.
71. *Id.*
72. *Id.* at 527–28.
73. *Id.*

Consistent with its holding for the Respondent, the District Court permitted the Lao Bank's assertion that some of its assets were immune from attachment and discovery.[74] However, the scope of discovery should only be narrowed, not eliminated.[75] The District Court stated that the burden on the Lao Bank to comply with the discovery requests was reasonable overall.[76]

Alycia Torres

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74. *Id*. at 522–23.

75. *Id.*

76. *Id*. at 524.

Valentini v. Citigroup, Inc.

2013 U.S. Dist. LEXIS 116473, 2013 WL 4407065 (S.D.N.Y. Aug. 16, 2013)

The U.S.D.C. for the S.D.N.Y. granted Defendants' motions for sanctions and security for costs in part and granted Defendants' motion to amend their Answer, holding that Plaintiffs, a Brazilian company, were negligent in failing to comply with discovery orders.

I. Holding

In *Valentini v. Citigroup, Inc.*,[1] the U.S. District Court for the Southern District of New York held that imposition of Rule 37[2] sanctions was warranted where Defendants satisfied their burden of showing "(1) that the party having control over the evidence had an obligation to timely produce it; (2) that the party that failed to timely produce the evidence had 'a culpable state of mind'; and (3) that the missing evidence is 'relevant' to the party's claim or defense such that a reasonable trier of fact could find it would support that claim or defense."[3] The Court also held that it was appropriate to require Plaintiff Windsor International Co. (Windsor) to post a bond, pursuant to Local Rule 54.2,[4] as security for costs because Windsor had shown that it might be unable to pay Defendants' costs and attorney fees under the indemnification provision of its agreement with Citibank.[5]

The court found that Plaintiffs failed to establish bad faith or undue prejudice and granted Defendants' motion for leave to amend their Answer to add an affirmative defense challenging Windsor's standing.[6] The court further granted Defendants' motion for leave to amend their Answer to assert a counterclaim for indemnification against Windsor for legal fees and expenses.[7]

II. Facts and Procedural History

Plaintiff Bernardo Valentini is a Brazilian businessman.[8] Plaintiff Windsor International Co. (Windsor) is a foreign trust he established in 2007 to manage his family's investments. Between September 2006 and September 2008, Valentini, in his own name or on behalf of Windsor, purchased almost two-dozen structured notes from Citicorp Financial Services Corporation (CFSC) and Citi Private Bank (CPB) for a face value of over $130 million.[9] Valentini

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1. 2013 U.S. Dist. LEXIS 116473, 2013 WL 4407065 (S.D.N.Y. Aug. 16, 2013).
2. FED. R. CIV. P. 37.
3. *Valentini*, 2013 U.S. Dist. LEXIS 116473, at *7 (indirectly quoting Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002)).
4. S&E D NY USDC Civil LR 54.2.
5. *Valentini*, 2013 U.S. Dist. LEXIS 116473, at *17–*19.
6. *Id*. at *25.
7. *Id*. at *29.
8. Valentini v. Citigroup, Inc., 837 F. Supp. 2d 304, 310 (S.D.N.Y. 2011).
9. *Id*. at 310–11.

initially profited from his investments in the notes.[10] However, in mid-July 2007, Valentini suffered his first loss, when he sold stocks for two airline companies at a loss of $1,660,000.[11] After this incident, Valentini continued to lose money until he was $9 million in debt.[12] On September 18, 2008, in response to continued decline in the value of the trust's investments, Citibank liquidated Windsor's entire investment portfolio of notes (face value $31 million) to satisfy the debt.[13]

On February 28, 2011, Valentini and Windsor filed suit against Citigroup, Inc. (Citigroup), Citigroup Global Markets Inc. (CGMI), Citicorp Financial Services Corporation (CFSC), now known as Citi International Financial Services, LLC, Citibank, N.A. (Citibank), and Citi Private Bank (CPB).[14]

Pursuant to the court-ordered case management plan, Defendants served Plaintiffs with their First Request for Production of Documents on December 19, 2012.[15] After Plaintiffs failed to produce the requested documents, Defendants repeated their request in letters dated March 20, April 3, and May 2, 2013.[16] Still, Plaintiffs did not respond to these letters.[17] Subsequently, Defendants informed the court of Plaintiffs' discovery deficiencies at an April 29, 2013 status conference, and by Order dated April 30, 2013 (the April 30th Order), the court directed the parties to complete all outstanding document production by May 17, 2013.[18] Again, Plaintiffs neglected their discovery obligations when they failed to comply with the April 30 Order.[19] At a status conference on June 13, 2013, Plaintiffs' counsel informed the court that they had recently discovered that Valentini withheld numerous documents that should have been produced to Defendants.[20] The court was also informed that Windsor had not produced any documents in response to Defendants' discovery requests because the Windsor trust had been inexplicably "revoked" and Valentini no longer had control over the documents.[21]

As a result of Plaintiffs' repeated failure to produce discovery materials, in violation of the April 30 Order and the Discovery Protocol, Defendants filed a motion for sanctions.[22] Defendants also moved to amend the Answer under FRCP 15(a)(2) to include: (1) an affirmative defense that Windsor lacked capacity and standing to maintain the lawsuit; and (2) a counter-

10. *Id*. at 311.
11. *Id.*
12. *Id*. at 312.
13. *Id*.
14. *Id.* at 310.
15. *Valentini*, 2013 U.S. Dist. LEXIS 116473, at *2.
16. *Id*.
17. *Id*. at *4.
18. *Id*.
19. *Id*.
20. *Id*.
21. *Id*. at *5.
22. *Id.*

claim for indemnification against Windsor for legal fees and expenses.[23] Plaintiffs opposed Defendants' motions on grounds of delay and futility.[24]

III. Discussion

A. Sanctions

Where, as here, a party alleges that the opposing party failed to disclose documents it was required to produce, the moving party bears the burden of showing that its adversary failed to timely disclose information required by Rule 26 of the Federal Rules of Civil Procedure.[25] Defendants satisfied this burden by showing that Plaintiffs had an obligation to timely produce the documents, Plaintiffs had a culpable state of mind in failing to do so, and that the documents were relevant to Defendants' claim or defense.[26]

In regard to Plaintiffs' obligation to timely produce documents, the court concluded that the Plaintiffs "clearly had an obligation to produce the requested materials."[27] The requested documents were well within the scope of permissible discovery.[28] Additionally, Plaintiffs had the court's April 30 Order directing the parties to complete all document production by May 17, 2013.[29]

The court further noted that Plaintiffs had a culpable state of mind when they failed to timely produce evidence.[30] Plaintiffs and their counsel were at least negligent in failing to properly search for and produce responsive documents in a timely and thorough manner.[31] Plaintiffs argued that they were not sophisticated users of the U.S. court system and misunderstood the discovery process. However, because Plaintiffs availed themselves of the U.S. court system, Valentini and Windsor had no credible excuse for their blatant disregard of the court's discovery process.[32] Further, Plaintiffs are represented by competent U.S. counsel, who was required to advise Plaintiffs of their discovery obligations.[33] The court also concluded that the requested documents are relevant because they bear on the central allegations in the complaint.[34]

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23. *Id*.
24. *Id*. at *6.
25. *Id*.
26. *Id*. at *7.
27. *Valentini*, 2013 U.S. Dist. LEXIS 116473, at *7.
28. *Id*.
29. *Id*.
30. *Id*.
31. *Id*. at *7–*8.
32. *Id*. at *8.
33. *Id*. The court also noted that it appeared that Plaintiffs' counsel did not travel to Brazil to meet with Valentini to discuss his obligations to produce responsive documents until June, nearly seven months after the requests were made, and nearly two and a half years after Plaintiffs commenced this action.
34. *Id*. at *10.

After the court found that Defendants had satisfied their burden, it determined the appropriate sanctions to impose. Federal Rule of Civil Procedure 37 permits a court to impose a variety of sanctions for discovery-related abuses.[35] In determining sanctions, the court considered "(1) the willfulness of the non-compliant party or the reason for noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of noncompliance[;] and (4) whether the non-compliant party has been warned of the consequences of . . . noncompliance."[36] The court found that the appropriate sanction for Valentini's noncompliance with his discovery obligation was to pay the attorney fees and costs that Defendants incurred as a result of Plaintiffs' delay in disclosing the relevant materials.[37] There was no evidence to suggest that Valentini's failure to comply was the result of willfulness or maliciousness or that Defendants had been significantly prejudiced by the delay.[38] The same sanctions were also imposed on Windsor.[39] However, there was a strong argument for imposing additional and more severe sanctions against Windsor because it had failed to produce a single document from its files.[40] Conversely, Windsor had not been explicitly warned that its conduct might result in the dismissal of its action.[41] Thus, the court ordered the parties each to file a brief, addressing whether more severe sanctions should be imposed on Windsor.[42]

B. Securities for Cost

Defendants also sought the imposition of security for costs pursuant to Local Rule 54.2.[43] The primary purpose of Rule 54.2 is to ensure that the prevailing party will be able to collect the costs and fees owed to it in situations where the opposing party is unlikely or unwilling to pay.[44] The District Court here determined that it was appropriate for Windsor to post a bond, pursuant to Rule 54.2, as security for costs.[45] In doing so, the court considered "(1) the party's ability to pay; (2) whether the party is present within the United States; (3) the party's compliance with past court orders; (4) the extent and scope of discovery; (5) the legal costs expected to be incurred; and (6) the merit of the underlying claims."[46] The court reasoned that the first five factors weighed in favor of requiring Windsor to post security for costs.[47] The sixth factor was not weighed heavily in the analysis because it was not clear which party would prevail on the

35. FED. R. CIV. P. 37.

36. *Valentini*, 2013 U.S. Dist. LEXIS 116473, at *10–*11 (quoting Agiwal v. Mid. Island Morg. Corp., 555 F.3d 298, 302–03 (2d Cir. 2009)).

37. *Id*. at *12.

38. *Id*.

39. *Id*. at *13.

40. *Id*. at *14.

41. *Id*.

42. *Id*. at *15.

43. *Id*. at *15–*16.

44. *Id*. at *16 (citing Kensington Int'l Ltd. v. Congo, 2005 U.S. Dist. LEXIS 4331 (S.D.N.Y. Mar. 21, 2005)).

45. *Id*. at *19.

46. *Id*. at *16 (citing *Kensington Int'l Ltd.*, 2005 U.S. Dist. LEXIS 4331).

47. *Id*. at *17–*19.

merits.[48] The District Court ordered Defendants to submit a memorandum of law addressing the amount of the bond that Windsor should be required to post.[49]

C. Motion to Amend

After determining that sanctions and securities for costs were appropriate, the District Court also granted Defendants' motion for leave to amend their Answer to add an affirmative defense challenging Windsor's standing[50] and to assert a counterclaim for indemnification against Windsor for legal fees and expenses.[51] Defendants asserted that Windsor did not have standing to bring the action because the caption of the Complaint listed "Windsor International Investment Co., f/k/a Windsor International Investment Corp." as a plaintiff.[52] However, Defendants submitted documents establishing that the entity listed in the caption was struck from the Bahamian Register of International Business Companies (the Register) in January 2011.[53] Once a company has been struck from the Register, it may not legally commence or defend any legal proceedings.[54] In response, Valentini explained that he had reincorporated Windsor in Panama and changed the name of the corporation from "Windsor International Investment Corp." to "Windsor International Business Corp."[55] Additionally, Plaintiffs argued that Defendants' proposed affirmative defense was untimely because Defendants were on notice, as early as December 2010, regarding Windsor's name change and could have and should have included it in the Answer Defendants filed on February 28, 2012.[56] Plaintiffs also argued that the proposed affirmative defense was futile because Defendants treated Windsor as a valid company and thus Defendants should be estopped from denying Windsor's corporate existence.[57]

The District Court rejected Plaintiffs' argument. The court stated that, because standing is jurisdictional, it could not be waived.[58] However, even if the issue were not jurisdictional, the court would grant Defendants' leave to amend because Defendants' delay was not unreasonable and Plaintiffs' conclusory assertion that Defendants treated Windsor as a valid company is insufficient to carry their burden of showing futility.[59]

Valentini and Windsor also opposed Defendants' proposed counterclaim on grounds of delay and futility. There is a Structured Notes Master Agreement (SNMA) between Windsor and Citibank that requires Windsor to indemnify Defendants from any loss, liability, cost,

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48. *Id*. at *18.
49. *Id*. at *19.
50. *Id*. at *25.
51. *Id*. at *29.
52. *Id*. at *21.
53. *Id*.
54. BAHAMIAN INTERNATIONAL BUSINESS COMPANIES ACT of 2000 § 167(1)(a)–(c).
55. *Valentini*, 2013 U.S. Dist. LEXIS 116473, at *22.
56. *Id*.
57. *Id*. at *24.
58. *Id*. at *22.
59. *Id*. at *23–*25.

claim, action, demand or expense incurred by Defendants in the action.[60] Specifically, Plaintiffs argued that Defendants have known about the SNMA's contractual indemnification provision since it was signed by Windsor in 2007 and that Defendants have failed to demonstrate a good-faith basis for their delay in asserting their proposed counterclaim.[61] Plaintiffs also argued that the proposed counterclaim is futile because the SNMA's indemnification clause does not contain any language that could be construed to show intent to create an all-encompassing indemnification.[62] Yet, the court granted Defendants' motion for leave to amend their Answer because Plaintiffs would not suffer any prejudice from the court allowing the amendment.[63] Additionally, the record was insufficiently developed for the court to resolve the indemnification issue at the time of the action.[64]

IV. Conclusion

The District Court for the Southern District of New York correctly followed the Federal Rules of Civil Procedure in granting Defendants' motions for sanctions and awarding fees and costs where the opposing party had been non-compliant. Plaintiffs could not blame their blatant disregard of the court's discovery process on their lack of knowledge when they knowingly availed themselves of the U.S. court system and were represented by competent U.S. Counsel. The District Court properly asserted its authority in imposing sanctions on Valentini and Windsor.

The court also found that it was appropriate for Plaintiff Windsor to post a bond as security for costs pursuant to Local Rule 54.2 to ensure Defendants would be able to collect the costs and fees awarded to it. Further, the District Court granted Defendants' motion for leave to amend their Answer to add an affirmative defense challenging Windsor's standing and to assert a counterclaim for indemnification because the delay was not unreasonable and the counterclaim did not prejudice Valentini or Windsor.

Christine Shyu

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60. *Id.* at *16–*17.

61. *Id.* at *26–*27.

62. *Id.* at *27.

63. *Id.*

64. *Id.* at *28.