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Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East

Mark Wakim*

I. Introduction

A crowd of international and regional conventions has emerged to address the problems created by globalization and international commerce.[1] States increasingly acknowledge the importance of rapid and equitable resolutions to cross-border business disputes.[2] Although it has been said that the "Islamic Middle East has not fully embraced" the modern arbitral system,[3] a more positive view contends that this attitude toward international arbitration is "pro-

1. *See* Volker Behr, *Development of a New Legal System in the People's Republic of China*, 67 LA. L. REV. 1161, 1173–74 (2007) (demonstrating the role of United Nations conventions in encouraging international commerce and globalization in the People's Republic of China); *see also* Surya Deva, *Human Rights Realization in an Era of Globalization: The Indian Experience*, 12 BUFF. HUM. RTS. L. REV. 93, 97, 132 (2006) (expressing that human rights in India were protected by international conventions during the era of globalization); Maria Angela Jardim de Santa Cruz Oliveira, *Recognition and Enforcement of United States Money Judgments in Brazil*, 19 N.Y. INT'L L. REV. 1, 1, 7 (2006) (commenting that international judicial cooperation became crucial in dealing with business-related disputes arising from the growth of globalization and international commerce in Brazil).

2. *See, e.g.*, Ernest-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade*, 27 U. PA. J. INT'L ECON. L. 273, 358 (2006) (depicting that an increasing number of businesses have resorted to international arbitration and mediation to resolve disputes); *see also* 48 C.J.S. *International Law* § 60 (2007) (noting the Charter of the United Nations calls for arbitration in resolving international disputes). Christopher R. Drohozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 233 (2006) (noting international arbitration proceedings have nearly doubled between 1993 and 2003).

3. Arthur J. Gemmell, *Commercial Arbitration in the Islamic Middle East*, 5 SANTA CLARA J. INT'L L. 169, 169 (2006). *See* Marshall J. Breger & Shelby R. Quast, *International Commercial Arbitration: A Case Study of the Areas Under Control of the Palestinian Authority,* 32 CASE W. RES. J. INT'L L. 185, 243 (2000) (stressing that some Middle Eastern countries do not always enforce international arbitration decisions); *see also* Charles N. Brower & Jeremy K. Sharpe, *International Arbitration and the Islamic World: The Third Phase*, 97 AM. J. INT'L L. 643, 656 (2003) (commenting that Middle Eastern states have only recently begun "fully to embrace arbitration's classic international manifestation").

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gressively reversing."[4] In recent years, Middle Eastern countries have increasingly valued foreign confidence in their domestic judicial systems.[5] The modernization of arbitration laws in a number of Middle Eastern countries,[6] the growing number of Arab states that have ratified the New York Convention of 1958,[7] and the establishment of arbitration centers throughout the region[8] demonstrate that international arbitration is gaining favor.[9]

"Knowing the law" is only one of the necessary requirements to understanding the nature of dispute settlement in the Middle East.[10] Failing to acknowledge the religious substructure

4. Walid John Kassir, *The Potential of Lebanon as a Neutral Place for International Arbitration*, 14 AM. REV. INT'L ARB. 545, 549 (2003). *See* Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 LOY. L.A. INT'L & COMP. L. REV. 565, 593 (2006) (explaining that Middle Eastern countries have adopted "arbitration-friendly" laws and established international arbitration centers); *see also Draft UAE Arbitration Law Requires More Sophistication to Provide Investor Security,* MIDDLE E. & N. AFR. BUS. REP., May 13, 2007, *available at* 2007 WLNR 9068263 (noting that a leading Middle Eastern law firm hosted a convention to address the progress of the New York Convention in the Middle East).

5. One Saudi official explained accession to the New York Convention of 1958 as a "curative remedy for a problem affecting Saudi foreign trade relations." *See Saudi Arabia's Decision on New York Convention Praised*, RIYADH DAILY, Feb. 8, 1994; *see also* Kassir, *supra* note 4, at 545 (reporting that Lebanon was a pioneer among the Arab and Middle Eastern countries in adopting favorable international arbitration legislation); Kristin T. Roy, Note, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?*, 18 FORDHAM INT'L L.J. 920, 936–37 (1995) (commenting that Kuwait, which highly values arbitration as a method of dispute resolution, acceded to the New York Convention in 1978).

6. *See* Christopher R. Drahozal, *Regulatory Competition and the Location of International Arbitration Proceedings*, 24 INT'L REV. L & ECON. 371, 371 (2004) (pointing out that the purpose behind modernizing arbitration laws was to make them more appealing to users); *see also* Amy J. Schmitz, *Consideration of "Contracting Culture" in Enforcing Arbitration Provisions*, 81 ST. JOHN'S L. REV. 123, 123 (2007) (highlighting that private dispute resolution and the technique called "partnering" have been successfully used on projects in the Middle East).

7. *See* Michael S. Greco & Ian Meredith, Feature, *Getting to Yes Abroad: Arbitration as a Tool in Effective Commercial and Political Risk Management*, BUS. L. TODAY, Apr. 16, 2007, at 23 (discussing that 138 countries, including the United Arab Emirates, have widely accepted the New York Convention); *see, e.g.,* Roy, *supra* note 5, at 936–37 (noting Syria and Kuwait have acceded to the New York Convention); *see also DIAC Keen on Curbing Commercial Disputes*, GULF NEWS, Sept. 25, 2006, *available at* 2006 WLNR 21760550 (emphasizing that after joining the New York Convention, several Middle Eastern countries established arbitration centers).

8. *See* Brower & Sharpe, *supra* note 3, at 647 (noting that Middle Eastern nations have increasingly established international and national arbitration centers); *see also* Anoosha Boralessa, *Enforcement in the United States and United Kingdom of ICSID Awards Against the Republic of Argentina: Obstacles That Transnational Corporations May Face*, 17 N.Y. INT'L L. REV. 53, 54 n.7 (2004) (recognizing that regional arbitration centers have been established in developing parts of the world); Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419, 421 (2000) (discussing that during the 1990s, regional arbitration centers were established in the capitals of numerous developing nations, including those in the Middle East).

9. *See Efforts to Increase Use of Arbitration in Middle East*, WORLD ARB. & MEDIATION REP., Aug. 1998, *at* 212 (reporting the Saudi Chamber of Commerce and Industry and the Gulf Chambers of Commerce recently met to promote arbitration in the region); *see also* U.N. Comm'n on Int'l Trade Law, *Status, 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at* http://uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (listing the countries that adopted the New York Convention).

10. *See* Gemmell, *supra* note 3, at 169 (quoting "knowing the law" is essential to understanding dispute settlement in the Middle East); *see also Doing Business in the Middle East: A Guide for U.S. Companies*, 34 CAL W. INT'L L.J. 273, 273 (2004) (emphasizing the necessity of understanding Middle Eastern values to comprehend regional economic systems); Clark B. Lombardi, *Islamic Law in the Jurisprudence of the International Court of Justice: An Analysis*, 8 CHI. J. INT'L L. 85, 85 (2007) (depicting modernist approaches to interpreting law employed by some Middle Eastern countries).

supporting commercial arbitration in that part of the world will shroud the process of dispute settlement in ambiguity and uncertainty.[11] Despite the history and tradition of arbitration in the Arab region, the practice of international dispute resolution in the Middle East, in recent history, has been summarized as a "troubled" or a "'roller coaster'-like experience."[12]

In the Islamic Middle East, religious considerations play a principal role in the acceptance and successful functioning of international commercial arbitration.[13] The "religious variable" may affect either substantive or procedural analyses. As arbitrators interpret public policy, calculate limitation periods, or determine interest awards, cultural particulars may influence the result.[14]

National laws, international conventions, and institutional arbitration rules form the backbone of the legal system governing commercial arbitration.[15] Transnational treaties function in combination with other sources of law, including the national law governing the par-

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11. *See* Fatima Akaddaf, *Application of the United Nations Convention to Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?*, 13 PACE INT'L L. REV. 1, 1 (2001) (illustrating that Islamic law is intricately woven in with *Shari`a*); *see also* Aimas Khan, *The Interaction Between Shariah and International Law in Arbitration*, 6 CHI. J. INT'L L. 791, 791 (2006) (proclaiming that salient differences exist between Western and Islamic principles of commercial law); Lombardi, *supra* note 10, at 96–98 (explaining that recognition of Islamic legal theory can strengthen decisions made by the International Court of Justice without sacrificing consistency with international law).

12. *See* Brower & Sharpe, *supra* note 3, at 643 (explaining arbitration in the "Islamic world" has had a "long and often troubled history"); Kutty, *supra* note 4, at 591 (quoting that despite its historical acceptance, "international commercial arbitration in the Islamic world in recent history can best be summarized as a troubled, or 'roller coaster'-like, experience").

13. *See* T.S. Twibell, *Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) Under Shari`a (Islamic Law): Will Article 78 of the CISG Be Enforced When the Forum Is in an Islamic State?*, 9 INT'L LEGAL PERSP. 25, 32 (1997) (assessing that the "unique intermingling of religion and law" in some Middle Eastern countries can vary the application of an international convention); *see also* Joseph V. Montville, *Nonviolence and Peace Building in Islam: Theory and Practice*, 21 J.L. & RELIGION 463, 466 (2005–06) (explaining that according to Islam the person most likely to mediate a dispute is one with "moral probity and religious piety").

14. Kutty, *supra* note 4, at 567. *See* M. McCary, *Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective: The Failure of a Lawyer Properly to Understand the Sense of Different Legal Concepts or to Adapt to Different Modes of Practice in Various Parts of the World Can Cause Negotiations to Collapse, Contracts to Be Drafted Incorrectly, Transactions to Go Awry, or for that Matter Can Endanger the Long-Term Viability of a Valuable Foreign Investment,* 35 TEX. INT'L L.J. 289, 306–07, 319 (2000) (describing the significance of religious and cultural traditions in the practice of Islamic law); *see also* Roy, *supra* note 5, at 942, 945–46 (explaining that the civil courts of Saudi Arabia's Islam-based legal system are required to abide by *Hanbali* interpretations of religious texts in their adjudication).

15. Kutty, *supra* note 4, at 571. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 3 (Kluwer Law Int'l 2001) (acknowledging international conventions, national arbitration legislation, and institutional arbitration rules impact the administration of commercial arbitration); *see also* Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 849 (1961) (discussing the role of administrative groups in providing rules, facilities, and arbitrators for commercial arbitration).

ties' capacity to arbitrate, the law controlling the arbitral proceedings, the law applying to the arbitration agreement, and the law governing the substantive issues in the dispute.[16] The potential for gaps and inconsistencies between the legal systems of nations and regions in both substance and procedure is therefore clearly present.[17]

Given the great geopolitical and economic significance of the Middle East, lawyers outside the region's borders must obtain an insight into the area's sources of law.[18] Islamic law is one of the three major legal systems,[19] and it is remarkable that there has been little examination of its footing in the Middle East.[20] Islamic law and *Shari`a* are no longer fields reserved for Middle East specialists, Arabists, and comparative law experts.[21]

The next section of this article sets forth a brief overview of Islamic law, selected Islamic legal definitions, and a gloss on Middle Eastern legal institutions. That discussion briefly defines terms used throughout the article. Part III provides both the historical and the modern background of arbitration in the Middle East. Part IV gives a perspective on the international,

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16. *See* Alessandra Casella, *On Market Integration and the Development of Institutions: The Case of International Commercial Arbitration*, 40 EUR. ECON. REV. 155, 162 (1996) (demonstrating the importance of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in legitimizing the practice of international arbitration); *see also* Ranee K.L. Panjabi, *Economic Globalization: The Challenge for Arbitrators*, 28 VAND. J. TRANSNAT'L L. 173 (1995) (outlining the various levels of law international arbitrators must apply); Jane L. Volz & Roger S. Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867, 872–73 (1996) (listing numerous sources of law governing international commercial arbitration).

17. *See* Kutty, *supra* note 4, at 571 (highlighting the many sources of law governing commercial arbitration that can be a source of discord between nations); *see also* BORN, *supra* note 15, at 3 (stating arbitration rules exist to fill in potential gaps, strengthening the enforceability of arbitral decisions); PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 48–49 (7th ed., Routledge 1997) (suggesting that legal principles common to most nations should be applied to fill in the gaps in international law).

18. *See* McCary, *supra* note 14, at 306–19 (reminding lawyers practicing in the Middle East to mind the principles and practical implications of *Shari`a*). *See generally* MALANCZUK, *supra* note 17, at 48–49 (commenting that arbitrators' use of principles drawn from their own countries' legal system without assessing acceptance by other countries is undesirable).

19. *See*, *e.g.,* Twibell, *supra* note 13, at 33 (noting that Roman law, common law, and Islamic law are the world's three major legal systems). *See* Hamid M. Khan, Note, *Nothing Is Written: Fundamentalism, Revivalism, Reformism and the Fate of Islamic Law,* 24 MICH. J. INT'L L. 273, 277 (2002) (comparing Islamic law to Roman civil law and English common law and noting its place as a classic system of law). *See generally* M. Lesley Wilkins, *Harvard Law School Library Collections & Services Related to the Law of the Islamic World,* 31 INT'L J. LEGAL INFO. 380, 383 (2003) (proclaiming that "for over fourteen centuries, Islamic law has been the law of the land in a large part of the world").

20. *See* WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC Law 1 (Cambridge University Press 2005) (establishing that before the late 1970s and early 1980s, there was only a "peripheral scholarly interest" in Islamic law); *see also* John Makdisi, *A Survey of AALS Law Schools Teaching Islamic Law,* 55 J. LEGAL EDUC. 583, 583–86 (2005) (noting that at the time of publication only 20.8% of AALS law schools offered, or had offered within five years prior, courses on the origins and development of Islamic law).

21. *See* HALLAQ, *supra* note 20, at 1 (stating that in the late 1970s and early 1980s, Western academics started showing a renewed interest in the study of Islamic law); *see also* FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA xii (Brill 2000) (stressing that modern lawyers must study the practice of Islamic law to completely understand it); Twibell, *supra* note 13, at 33–34 (emphasizing that an international practitioner should be aware of the influence of Islamic law in international practice).

Western-influenced practice of international commercial arbitration. Part V compares both Islamic arbitration and Middle Eastern commercial arbitration with international commercial arbitration. Part VI discusses Middle Eastern public policy issues that arise during international arbitration and the enforcement of foreign arbitral awards.

Essentially, this article provides an overview of international commercial arbitration in the Middle East. It evaluates criticism pointed at the New York Convention, focuses on proposed solutions, and argues for greater transparency of judicial and public policies. The article puts forward a hypothesis that more accurate exposure of the underlying values that affect the recognition and enforcement of foreign decisions will allow for less uncertainty and greater foreign confidence in the practice of international law in the Middle East.

II. Islamic Legal Definitions, Schools of Law, and Middle Eastern Legal Systems

Shari`a, the body of Islamic sacred laws, is derived from Islam's primary and secondary sources: the *Quran*, the *Sunna*, and the *Hadith*.[22] Muslims view Islamic law as the study and analysis of the duty that God requires the Islamic community to observe.[23] That duty is best described as the obligation to behave decently and to prevent others from committing outrageous offenses against fellow humans.[24] The written analysis of the duty makes up the bulk of Islamic literature.[25] One notable Islamic legal scholar described the details of the duty as nothing less than "the law from its beginning to its end."[26]

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22. *See* VOGEL, *supra* note 21, at 4 (noting the *Sunna* and *Hadith* influence in forming Islamic law alongside the *Quran*); *Islam*, THE COLUMBIA ENCYCLOPEDIA (Columbia University Press, 6th Ed., 2007), *available at* http://www.encyclopedia.com/doc/1E1-Islam.html (explaining the hierarchy of the *Quran*, *Sunna*, and *Hadith* within Islam).

23. *See* Ebrahim Moosa, *Non-Violence, Peacebuilding, Conflict Resolution and Human Rights in Islam,* 15 J.L. & RELIGION 185, 191–92 (2001) (expounding on the types of duties God granted to Islam followers); s*ee also* Cynthia DeBula Baines, Note, *L'Affaire des Foulards—Discrimination, or the Price of a Secular Public Education System?*, 29 VAND. J. TRANSNAT'L L. 303, 308 (1996) (asserting that Muslims believe in a "clear and definite obligation to conduct every aspect of their . . . lives[ ] in accordance with the principles of shari`a," and that *Shari`a* regulates civil, commercial, criminal, and family law); Joëlle Entelis, Note, *International Human Rights: Islam's Friend or Foe?,* 20 FORDHAM INT'L L.J. 1251, 1268–69 (1997) (explaining the Muslim belief that the Islamic legal system comes directly from God).

24. *See* NOEL JAMES COULSON, THE HISTORY OF ISLAMIC LAW 11 (Edinburgh Univ. Press 1994) (explaining several facets of this duty, such as compassion, good faith, and justness); *see also* Khaled Abou El Fadl, *The Place of Ethical Obligations in Islamic Law,* 4 UCLA J. ISLAMIC & NEAR E. L. 1, 5 (2005) (acknowledging the values the *Quran* urges Muslims to uphold); Moosa, *supra* note 23, at 193 (stating the duty protects "religion, life, progeny, intellect and wealth").

25. *See* MICHAEL COOK, FORBIDDING WRONG IN ISLAM 2 (Press Syndicate of the Univ. of Cambridge 2003) (alleging that the bulk of Islamic literature concerns the duty God gave to his people). *See generally* ABD ALLAH BAYDAWI & MAHMUD ISFAHANI, NATURE, MAN AND GOD IN MEDIEVAL ISLAM 947 (Edwin E. Calverley & James W. Pollock eds. & trans., Brill 2002) (analyzing the duty given by God to the Islamic people).

26. A quote from the *Shafi`ite* scholar Juwayni. *See* COOK, *supra* note 25, at 22.

The *Quran* is the central Islamic text.[27] Muslims believe the *Quran* is the word of God revealed directly to the Prophet Muhammad.[28] The *Sunna*, the ways and traditions of the Prophet Muhammad, are normative practices Muslims seek to emulate.[29] The *Hadith* is a collection of narrations and approvals of the *Sunna*.[30] Scholars sometimes mistakenly interchange *Hadith* with *Sunna*.[31] However, the *Hadith* are classified by their status in relation to their text and chain of transmission (*isnad*),[32] while the *Sunna* is established by practical examples and is

27. *See Koran*, ENCYCLOPEDIA AMERICANA (Grolier Online 2007), http://ea.grolier.com/cgi-bin/article?assetid=0234000-000 (stating that the *Koran* is the highest Islamic authority).

28. *See* COULSON, *supra* note 24, at 11 (stating that the Prophet Muhammad transmitted the word of God to his community through the *Quran*); *see also* VOGEL, *supra* note 21, at xii (explaining the Muslim belief that God revealed his final laws to the Prophet Muhammad).

29. *See* Dr. I. Goldziher, *The Principles of Law in Islam*, in 8 THE HISTORIANS' HISTORY OF THE WORLD 294 (Henry Smith Williams ed., The Outlook Company 1904) (explaining that the *Sunna* became the normative practice of Muslims through its ancestral usage and its transmittal through past generations); Lubna A. Alam, *Keeping the State Out: The Separation of Law and State in Classical Islamic Law*, 105 MICH. L. REV. 1255, 1258 (2007) (reviewing RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY (2005) (establishing that the *Sunna* was the normative practice of the Prophet Muhammad).

30. *See* SAMI ZUBAIDA, LAW AND POWER IN THE ISLAMIC WORLD 10 (I.B. Tauris 2003) (explaining that the *Hadith* tell the history of the Prophet Muhammad's words and deeds—his *Sunna*—through stories); COULSON, *supra* note 24 at 42 (noting that the *Hadith* was a collection of traditions in the form of stories that were communicated down from the Prophet Muhammad). *See generally* HALLAQ, *supra* note 20, at 1 (tracing the development of the *Hadith* from encompassing only the words of the Prophet Muhammad to embracing his words, deeds, and tacit approvals).

31. *See* MAWIL IZZI DIEN, ISLAMIC LAW: FROM HISTORICAL FOUNDATIONS TO CONTEMPORARY PRACTICE 38, 160 (Edinburgh Univ. Press 2004) (distinguishing *Sunna*, which are normative customs that the Prophet Muhammad enacted for his people, from *Hadith*, the historical legacy of his words and actions); *see also* Geoffrey E. Roughton, Note, *The Ancient and the Modern: Environmental Law and Governance in Islam*, 32 COLUM. J. ENVTL. L. 99, 102 (2007) (asserting that although the terms *Sunna* and *Hadith* are sometimes used interchangeably, the proper usage of *Hadith* refers only to the Prophet Muhammad's sayings).

32. *See* DAVID E. FORTE, STUDIES IN ISLAMIC LAW 40 (Austin & Winfield 1999) (explaining the scholarly investigation of *Hadith* transmitters and the process of transmittal to ensure that both were pious and reliable, and that the process of transmission—*isnad*—was continuous back to the Prophet Muhammad); *see also* Bernard K. Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, n.168 (1998) (explaining that *isnad* is the recitation of the chain of transmitters preceding each *Hadith* and by which the *Hadith* must pass); Ali Kahn, *Islam as Intellectual Property: "My Lord! Increase Me in Knowledge,"* 31 CUMB. L. REV. 631, 657 (2001) (stressing that a *Hadith* is considered unimpeachable once its content has been verified against other authentic *Hadith* and its *isnad* is confirmed).

not validated by *isnad*.[33] The *Sunna* and *Hadith* clarify features of the *Quran*,[34] and therefore are considered secondary sources of Islamic law.[35] Third in merit as a source of Islamic law is *ijma*, a consensus-based sanctioning instrument whereby *mujtahids* ("creative jurists") reach agreement on a technical legal ruling.[36]

There are various methodologies used to divine *Shari`a* from its sources, each patterned by a different school of Islamic law.[37] *Fiqh* is Islamic jurisprudence,[38] and the underlying meth-

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33. *See* Sam Feldman, Comment, *Reason and Analogy: A Comparison of Early Islamic and Jewish Legal Institutions*, 2 UCLA J. ISLAMIC & NEAR E. L. 129, 138–39 (2003) (explaining that the *Sunna* consists of traditions practiced by the Prophet and his Companions, while the *Hadith* was established by tracing the transmitters); *see also* Zafar Ishaq Ansari, *Islamic Juristic Terminology Before Safi'i: A Semantic Analysis with Special Reference to Kufa*, in 27 THE FORMATION OF ISLAMIC LAW 229 (Wael B. Hallaq ed., Ashgate Pub. Co. 2004) (noting that compared to the *Hadith*, the *Sunna* is the norm of practical life).

34. *See* Donna E. Arzt, *Heroes or Heretics: Religious Dissidents Under Islamic Law*, 14 WIS. INT'L L.J. 349, 367 (1996) (explaining that one can turn to the *Sunna* to deduce the law when the *Quran* is silent); *see also* M.M. Slaughter, *The Salman Rushdie Affair: Apostasy, Honor, and Freedom of Speech*, 79 VA. L. REV. 153, 174 (1993) (noting that the *Quran* is the main source of Islamic law but the *Sunna* and *Hadith* make up the rest of the law); David S. Powers, *On Judicial Review in Islamic Law*, 26 LAW & SOC'Y REV. 315, 318 (1992) (describing the *Sunna* and *Hadith* as the sources of Islamic law after the *Quran*).

35. *See* Gemmell, *supra* note 3, at 171 (explaining that the *Sunna* and *Hadith* constitute the second primary source of Islamic law behind the *Quran*); SEYYED HOSSEIN NASR, ISLAM: RELIGION, HISTORY AND CIVILIZATION 77–78 (HarperCollins 2003) (stating that the *Sunna* and *Hadith* complement the *Quran* as the second major source of *Shari`a*).

36. *Compare* Freamon, *supra* note 32, at 22–23 (explaining that if the *Quran* and *Sunna* do not provide a definitive ruling on the lawfulness of a specific practice, *ijma* may be used to decide legality; and once consensus is reached, that rule becomes binding on all Muslims); *with* Mougeh Shisheneh Mozafarian, *The Fallacy of Hejab in Iran: A Critique of Islamic Judicial Review as Performed by the Guardian Council of the Islamic Republic*, 12 S. CAL. REV. L. & WOMEN'S STUD. 279, 284 (2003) (explaining that *ijma* is referred to when the *Quran* and *Sunna* lack a pertinent passage, and that *ijma* may be but does not necessarily have to be followed).

37. *See* NASR, *supra* note 35, at 78 (asserting that the four Imams—Maliki, Hanafi, Shafi`i, and Hanbali—had different ways of applying the religious texts and existing laws); *see also* M. Cherif Bassiouni and Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E. L. 135, 161 (2002) (showing that the general differences in expounding *Shari`a* are that the *Maliki* and *Hanbali* schools emphasize textual bases for legal norms, whereas the *Hanafi* and *Shafi`i* schools utilize analogies to base legal norms on what is best for the public good). *See generally* Marion Holmes Katz, *Pragmatic Rule and Personal Sanctification in Islamic Legal Theory*, in LAW AND THE SACRED 91–107 (Austin Sarat, Lawrence Douglas, & Martha Merrill Umphrey eds., Stanford Univ. Press 2007) (concluding that while the *Shari`a* is sacred law, it is subject to differing interpretations as to its sacred and legal nature).

38. *See* Shannon M. Roesler, *Modern Legal Reform in Egypt: Shifting Claims to Legal Authority*, 14 CARDOZO J. INT'L & COMP. L. 393, 396 (2006) (explaining that *fiqh*, which encompasses the entire body of substantive Islamic legal doctrine, originates in the private realm of individual scholars or jurists); *see also* Sadiq Reza, *Torture and Islamic Law*, 8 CHI. J. INT'L L. 21, 26 (2007) (describing *fiqh* as a collection of the various views of Muslim jurists, representing each jurist's analysis and reasoned interpretations of the ideals, aspirations and normative statements of God's law, which is afforded persuasive authority); COULSON, *supra* note 24 (stating that *fiqh*, a composite science of law and morality, regulates the ritual practices of matters of faith such as medical hygiene or social etiquette, which are considered part of Islamic jurisprudence).

odology is known as *usul al-fiqh*.[39] The four classical *Sunni* schools, *Hanafi*, *Maliki*, *Shafi`i*, and *Hanbali*, together compose the generally accepted authority for Sunni Muslims.[40] *Shi`a* Islam has its own school of law, the *Ja`fari* school,[41] founded by the sixth imam, Ja`far as-Sadiq.[42]

Riba is the *Quranic* prohibition of economic gain earned from moneylending.[43] The prohibition seeks to prevent usurious conditions[44] because any acquired profits would be exploitative in nature.[45] Although the *Quran* clearly prohibits *riba*, what constitutes the forbidden

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39. *See* YVONNE YAZBECK HADDAD & BARBARA FREYER STOWASSER, ISLAMIC LAW AND THE CHALLENGE OF MODERNITY 5 (Altamira Press 2004) (translating *usul al-fiqh* to mean, literally, "roots of jurisprudence" and describing it as the science of *fiqh* interpretation); *see also* ZUBAIDA, *supra* note 30, at 16 (defining *usul al-fiqh* as methodological reflections on the process and validity of legal discourse); M. Cherif Bassiouni and Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E. L. 135, 135 (2002) (explaining that Islamic jurists developed *usul al-fiqh* to interpret and develop the rules of law).

40. *See Sunni*, A DICTIONARY OF WORLD HISTORY (Oxford University Press 2000) available at http://www.encyclopedia.com/doc/1048-Sunni.html; FORTE, *supra* note 32, at 15 (explaining that there are variations among and within the four major legal schools of *Sunni* Islam).

41. *See* Twibell, *supra* note 13, at 56 (acknowledging that the major difference between *Sunni* and *Shi`a*, the two major sects in Islam, is a differing view of the Prophet Muhammad's successor); *see also* Catherine Warrick, *The Vanishing Victim: Criminal Law and Gender in Jordan*, 39 L. & SOC'Y REV. 315, n.44 (2005) (noting that *Ja`fari* is the more dominant of the *Shi`a* schools of legal thought); Dan E. Stigall, *Iraqi Civil Law: Its Sources, Substance, and Sundering*, 16 J. TRANSNAT'L L. & POL'Y 1, 48 (2006) (distinguishing between *Sunni* and *Shi`a* schools of legal thought).

42. *See* K.M. Sharma, *What's in a Name?: Law, Religion and Islamic Names*, 26 DENV. J. INT'L L. & POL'Y 151, 167 (1998) (affirming that Ja`far as-Sadiq is the founder of the *Ja`fari* school of law); *see also* BRUCE B. LAWRENCE, THE QUR'AN: A BIOGRAPHY 76 (Atlantic Monthly Press 2007) (describing Imam Ja`far as-Sadiq's lineage as one of the People of the Prophet's Household).

43. *Compare* Barbara L. Seniawski, Note, *Riba Today: Social Equity, the Economy, and Doing Business Under Islamic Law*, 39 COLUM. J. TRANSNAT'L L. 701, 701 (2001) (defining *riba* as "usury" but noting that many Muslim jurists interpret it to include interest in exchanges and loans specifically), *with* Asifa Quraishi, *From a Gasp to a Gamble: A Proposed Test for Unconscionability*, 25 U.C. DAVIS L. REV. 187, 209 (1991) (asserting that although *riba* is literally translated as "increase or excess" and has been frequently interpreted as "usury," the concept of *riba* actually covers the common law concepts of adhesion contracts or contracts where one party has little or no choice). *See generally* Haider Ala Hamoudi, *Muhammad's Social Justice or Muslim Can't?: Langdellianism and the Failures of Islamic Finance*, 40 CORNELL INT'L L.J. 89, 111–13 (2007) (explaining that the many interpretations of *riba* can be attributed to multiple *Hadith* on the subject).

44. Seniawski, *supra* note 43, at 702. *See* J. Michael Taylor, *Islamic Banking—The Feasibility of Establishing an Islamic Bank in the United States*, 40 AM. BUS. L.J. 385, 389 (2003) (attributing the *Quranic* ban on *riba* to the desire to avoid financial abuse). *See generally* John Y. Gotanda, *Awarding Interest in International Arbitration*, 90 AM. J. INT'L L. 40, 43 (1996) (remarking that loan interest is subject to public policy against usurious interest).

45. *See* Abdullah Saeed, *Islamic Banking and Interest: A Study of the Prohibition of Riba and Its Contemporary Interpretation*, 2 STUD. ISLAMIC L. & SOC'Y 481, 481 (1996) (commenting on one Islamic scholar's belief that *riba* is prohibited not because it is profitable but because it exploits the weak); *see also* M. Siddieq Noorzoy, *Islamic Laws on Riba (Interest) and Their Economic Implications* 14 INT. J. MIDDLE E. STUD. 3, 6 (1982) (explaining that *riba* is exploitative because people with higher income *should give charity to those with lower income). See generally* Noor Mohammed*, Principles of Islamic Contract Law*, 6 J. L. & RELIGION 119, 119 (1998) (pointing out that all forms of *riba* are illegal and fraudulent by nature).

practice is debated.[46] Ibn Hanbal, the founder of the *Hanbali* school of Islamic law, declared that "pay or increase" is the only form of *riba* beyond any doubt.[47] "Pay or increase" refers to the practice of deferring loan repayment in exchange for an increase in the sum owed.[48] All other forms of gain in financial transactions remain subject to doubt and disagreement.[49]

Gharar is the Islamic prohibition against speculation.[50] The guidelines for determining *gharar* come mostly from the *Hadith*, which depicts transactions characterized by pure speculation, uncertain outcomes, and unclear future benefits.[51] Modern application of *gharar* has prohibited investment in futures and commodities options.[52]

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46. *See* Seniawski, *supra* note 43, at 703 (stating that although *riba* is prohibited by the *Quran*, what actually constitutes *riba* is subject to disagreement); Hamoudi, *supra* note 43, at 111 (noting that *riba* is not clearly defined anywhere); Symposium, *Islamic Business and Commercial Law: Islamic Finance in a Global Context: Opportunities and Challenges*, 7 CHI. J. INT'L L. 379, 381 (2007) (positing that the term *riba* is subject to multiple interpretations).

47. *See* Seniawski, *supra* note 43, at 708 (identifying Ibn Hanbal's view of *riba* as pay or increase as the only clearly prohibited practice in the *Quran*); *see also* Symposium, *Islamic Business and Commercial Law: From Socioeconomic Idealism to Pure Legalism*, 7 CHI. J. INT'L L. 581, 597 (2007) (promulgating the view of Ibn Hanbal by declaring other monetary practices besides pay or increase as acceptable).

48. *See Islamic Business and Commercial Law*, *supra* note 46, at 381 (defining *riba* as a loan that is subject to interest charges in exchange for deferral); *see also* Seniawski, *supra* note 43, at 707 (using excerpts from the *Quran* to pinpoint the derivation of the definition of *riba*). *See generally* Taylor, *supra* note 44, at 389 (stating *riba* is prohibited because of doubling of payment).

49. *See* Seniawski, *supra* note 43, at 708 (expressing the varying interpretations outside of *riba* on whether increase is permissible); *see also* Babback Sabahi, *Islamic Financial Structures as Alternatives to International Loan Agreements: Challenges for U.S. Financial Institutions*, 24 ANN. REV. BANKING & FIN. L. 487, 490 (2005) (pointing out that different countries and institutions have varying policies on increase besides *riba*). *See generally* Hesham M. Sharawy, *Understanding the Islamic Prohibition of Interest: A Guide to Aid Economic Cooperation Between the Islamic and Western Worlds*, 29 GA. J. INT'L & COMP. L. 153, 163 (2000) (suggesting that the whole concept of interest in the Muslim world lacks uniform interpretation).

50. *See* Symposium, *Islamic Business and Commercial Law: Jurisprudential Schizophrenia: On Form and Function in Islamic Finance,* 7 CHI. J. INT'L L. 605, 611 (2007) (analogizing *gharar* to future sales of fish to show *gharar* is taking speculative uncertainties of commercial risk); *see also* Heba A. Raslan, *Shari`a and the Protection of Intellectual Property—The Example of Egypt*, 47 IDEA 497, 529 (2007) (stating that condemning gambling for its indefiniteness and risk spurred the prohibition of *gharar* for similar reasons); Roy, *supra* note 5, at 947 (defining *gharar* through contracts by voiding any terms unspecified when the contract is made).

51. *See* Sabahi, *supra* note 49, at 491–92 (detailing various examples of transactions that illustrate *gharar*); *see also* Arshad A. Ahmed & Umar F. Moghul, *Contractual Forms in Islamic Finance Law and Islamic Inv. Co. of the Gulf (Bahamas) Ltd. v. Symphony Gems N.V. & ORS.: A First Impression*, 27 FORDHAM INT'L L.J. 150, 171–72 (2003) (enumerating the legal requirements of *gharar*).

52. *See* Islamic Business and Commercial Law, *supra* note 46, at 382 (outlining the types of investments barred by *gharar*); *see also* Haider Ala Hamoudi, Symposium, *Islamic Business and Commercial Law: New Horizons for Islamic Securities: Emerging Trends in Sukuk Offerings*, 7 CHI. J. INT'L L. 409, 420 (2007) (labeling investments in futures as *gharar* and illegal); Angelo Luigi Rosa, *Harmonizing Risk and Religion: The Utility of Shari`a-Compliant Transaction Structuring in Commercial Aircraft Finance*, 13 MINN. J. GLOBAL TRADE 35, 38–39 (2003) (describing the modern effect of *gharar* as prohibiting futures and commodities options).

Riba and *gharar* are important in the field of international arbitration because of their potential to void arbitration awards.[53] If an arbitration clause contains a provision for awarding interest, it may be against public policy because of the prohibition against *riba*.[54] Similarly, if an arbitration clause is determined to be speculative because it calls for settlement of a future dispute by an unspecified arbitrator, the clause may be void or against public policy due to the prohibition against *gharar*.[55] Part VI of this article contains a more complete discussion on these two issues.

Shari`a* has a profound impact on the psyche of many Muslim Middle Easterners.[56] The impact of *Shari`a on national legislation, however, varies from nation to nation,[57] as do the numbers and demographics of Muslim and non-Muslim citizens.[58] The legal systems in the Middle East can be grouped loosely based on the relative influence of Western and Islamic principles.[59] The three groupings are: (1) countries that have adopted Western laws, including the civil law tradition[60] and the common law tradition;[61] (2) countries that have drawn more

53. *See* Natasha Affolder, *Awarding Compound Interest in International Arbitration*, 12 AM. REV. INT'L ARB. 45, 86–87 (2001) (asserting that the concept of Islamic public policy used in some Middle Eastern countries can void arbitral awards that include interest because of the prohibition against *riba*); *see also* Akaddaf, *supra* note 11, at 47–48 (pointing out that although *riba* may prohibit awards of commercial rates of interest, reasonable compensation for a party's loss of money use may be permissible).

54. *See* Affolder, *supra* note 53, at 86–87 (specifying arbitral interest awards as against the concept of Islamic public policy used in some Middle Eastern states); *see also* Kutty, *supra* note 4, at 619–20 (positing that arbitration clauses are subject to the views of the particular Muslim country that is a party to the contract). *See generally* Akaddaf, *supra* note 11, at 24–25 (touching on the public policies of several Middle Eastern countries in regard to arbitration).

55. *See* Susan D. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 1, n.47 (2001) (declaring that an arbitration agreement alone is against *gharar* because it assumes a future dispute, which is too speculative); *see also* Brower & Sharpe, *supra* note 3, at 645–46 n.17 (noting that Western nations are often ignorant of *gharar*).

56. *See* Kutty, *supra* note 4, at 594–95 (acknowledging *Shari`a*'s influence on the psyche of Muslim Middle Easterners); *see also* Chibli Mallat, *From Islamic to Middle Eastern Law A Restatement of the Field (Part I)*, 51 AM. J. COMP. L. 699, 700 (2003) (describing the far-reaching effect of *Shari`a* on Middle Eastern legal systems).

57. *See generally* Kutty, *supra* note 4, at 594–95 (indicating *Shari`a*'s variable impact on the legislation of Middle Eastern countries); *see also* Symposium, *Rebuilding Nation Building: On the Specificity of Middle Eastern Constitutionalism*, 38 CASE W. RES. J. INT'L 13, 32–33 (2006) (pointing out the prominence of *Shari`a* in establishing the laws of a Muslim country); Raslan, *supra* note 50, at 498 (showing that Muslim countries utilize *Shari`a* in determining their laws).

58. *See, e.g.*, Robert C. Blitt & Tad Stahnke, *The Religion-State Relationship and the Right to Freedom* of Religion *or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries*, 36 GEO. J. INT'L L. 947, 951 (2005) (outlining the demographic differences between some Middle Eastern countries); Jaclyn Ling-Chien Neo, *"Anti-God, Anti-Islam and Anti-Quran": Expanding the Range of Participants and Parameters in Discourse over Women's Rights and Islam in Malaysia*, 21 UCLA PAC. BASIN L.J. 29, 73–74 (2003) (demonstrating that in Malaysia, as well as in most Muslim countries, there are many Muslims and non-Muslims); *see also* Ahmed T. el-Gaili, *Federalism and the Tyranny of Religious Majorities: Challenges to Islamic Federalism in Sudan*, 45 HARV. INT'L L.J. 503, 520–21 (2004) (commenting on the impact of certain national laws on both Muslims and non-Muslims within the country).

59. *See* Kutty, *supra* note 4, at 595 (discussing groupings of Middle Eastern legal systems). *See generally* H.S. Shaaban, Note, *Commercial Transactions in the Middle East: What Law Governs?*, 31 LAW & POL'Y INT'L BUS. 157, 158 (1999) (describing the influences that shaped the legal systems of the Middle East).

60. *E.g.*, Lebanon, Syria, Egypt, Algeria, Bahrain, Kuwait, Libya, Morocco, and Tunisia. *See* Kutty, *supra* note 4, at 595.

61. *E.g.*, Iraq, Jordan, Sudan, and the UAE. *See* Kutty, *supra* note 4, at 595.

substantially from *Shari`a*;[62] and (3) countries that have Westernized their commercial laws but are strongly influenced by *Shari`a* principles.[63] Although these groups are not discrete, they do give perspective on the legal landscape.

To varying degrees, both Western legal thought and Islamic jurisprudence influence Middle Eastern national laws.[64] Similarly, which Islamic school is authoritative or which school takes precedence varies from state to state.[65] The weight accorded to a particular school ebbs and flows with national preferences,[66] which likewise affect the influence of Western laws.[67]

III. Arbitration in Islam and the Arab Middle East

A. Forms of Dispute Resolution, Points of Confusion, and Regional Practice

Options for dispute resolution in Middle Eastern Arab countries[68] are apparently no different from those available in other parts of the world, such as proceedings before state courts,

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62. *E.g.*, Saudi Arabia, Qatar, Oman, and Yemen. *See* Kutty, *supra* note 4, at 595.

63. *E.g.*, Jordan, Libya, and the UAE. *See* Kutty, *supra* note 4, at 595.

64. *See* DAISY HILSE DWYER, *Law and Islam in the Middle East: An Introduction*, LAW AND ISLAM IN THE MIDDLE EAST 2 (Daisy Hilse Dwyer ed., Praeger/Greenwood 1990) (noting that Western legal systems, namely laws imposed during the colonial period, influenced Middle Eastern national laws); *see also* Donna E. Arzt, *Heroes or Heretics: Religious Dissidents Under Islamic Law*, 14 WIS. INT'L L.J. 349, 368 (1996) (recognizing the four different *Sunni* schools of Islamic law and the regions in which each is prevalent); Gemmell, *supra* note 3, at 175–76 (explaining the general beliefs of the four *Sunni* schools of Islamic law).

65. *See* DIEN, *supra* note 31, at 127 (stating that the *Hanbali* school is authoritative in Saudi Arabia); *see also* VOGEL, *supra* note 21, at 9 (showing in which geographic area each school is generally followed); Ferris K. Nesheiwat, *Honor Crimes in Jordan: Their Treatment Under Islamic and Jordanian Criminal Laws*, 23 PENN ST. INT'L L. REV. 251, 262 (2004) (explaining that Jordan follows the *Hanafi* school).

66. *See* Nesheiwat, *supra* note 65, at 280 (discussing Jordan's strict adherence to Islamic law when dealing with honor killings); *see also* Robert Postawko, *Towards an Islamic Critique of Capital Punishment*, 1 UCLA J. ISLAMIC & NEAR E. L. 269, 271 (2002) (recognizing that the strength of "Islamization movements" differs from country to country); Twibell, *supra* note 13, at 33–34 (explaining there are 37 countries with mostly Muslim populations, 17 of which formally adhere to Islam in their Constitutions).

67. *See* Anne Elizabeth Mayer, *Islam and the State*, 12 CARDOZO L. REV. 1015, 1028–29 (1991) (explaining that although some Middle Eastern countries shifted the "direction of reforms" during political revivals of Islam, Western legal systems were not discarded in the process); *see also* Bassam Tibi, *The Fundamentalist Challenge to the Secular Order in the Middle East*, 23 FLETCHER F. WORLD AFF. 191, 194, 197 (1999) (reporting that Pan-Arabists, though "in many ways anti-Western," base their concept of a nation on Western values).

68. Saudi Arabia, Oman, Yemen, the United Arab Emirates, Qatar, Bahrain, Kuwait, Iraq, Iran, Egypt, Libya, Palestine, Jordan, Syria, and Lebanon. *See* WILLIAM L. CLEVELAND, A HISTORY OF THE MODERN MIDDLE EAST 454 (Westview Press 2004) (presenting a geographic picture of the Arab Middle Eastern region); *see also* PAUL RIVLIN, ECONOMIC POLICY AND PERFORMANCE IN THE ARAB WORLD, 32 (Lynne Rienner Publishers 2001) (listing Saudi Arabia, Oman, Yemen, the United Arab Emirates, Qatar, Bahrain, Kuwait, Iraq, Iran, Egypt, Libya, Palestine, Jordan, Syria, and Lebanon as the countries in the Arab Middle East). *See generally* ARTHUR GOLDSCHMIDT, A CONCISE HISTORY OF THE MIDDLE EAST (Westview Press 2001) (reviewing the general history of the Middle East).

arbitration, and conciliation.[69] State judicial courts settle the majority of commercial disputes.[70] Between nationals of the same country, claims are settled by conciliation, a dispute resolution mechanism synonymous with mediation.[71]

Conciliation is a process where the parties reach an agreement either by themselves or through a third party.[72] Because the conciliatory process is voluntary,[73] the parties may terminate the third-party mediator's appointment at any time before settlement.[74] Conciliation was the Prophet Muhammad's preferred method of dispute resolution.[75] The Prophet Muhammad made it clear that he was skeptical of judicial proceedings, which were conceived by man and,

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69. *See* Paul E. Pompeo, *East Meets West: A Comparison of Government Contract Dispute Resolution in the Common Law and Islamic Systems*, 14 LOY. L.A. INT'L & COMP. L.J. 815, 816 (1992) concluding that there are no fundamental differences between the options available for contract dispute resolution in common law systems and Islamic law systems); *see also* Breger & Quast, *supra* note 3, at 207 (claiming that many Arab states are modernizing their arbitration laws); Gemmell, *supra* note 3, at 192 (acknowledging that commercial arbitration is a well-recognized method for dispute resolution in the Middle East).

70. *See, e.g.,* Nancy B. Turck, *Resolution of Disputes in Saudi Arabia*, 6 ARAB L.Q. 3, 4 (1991) (stating that Saudi Arabian courts have general jurisdiction over any commercial dispute before them); *see also* Samir Saleh, The *Settlement of Disputes in the Arab World, Arbitration and Other Methods: Trends in Legislation and Case Law*, 1 ARAB L.Q. 198, 198 (1986) (explaining that the majority of commercial disputes are settled by state courts). *See generally* Howard L. Stovall et al., *Middle East Commercial Law Developments*, 32 INT'L LAW. 411, 421 (1997) (explaining that new commercial court laws expanded the Omani judicial system's jurisdiction).

71. Saleh, *supra* note 70, at 198 (emphasizing that conciliation or mediation is the next most common method of dispute settlement among citizens of the same country). *See* Christine Lecuyer-Thieffry & Patrick Thieffry, *Negotiating Settlement of Disputes Provisions in International Business Contracts: Recent Developments in Arbitration and Other Processes*, 45 BUS. LAW. 577, 582 (1990) (stating that in addition to the Middle East, conciliation is the preferred method for settling disputes in other countries of the world, such as China). *See generally* Raed M. Fathallah & Hamid G. Gharavi, *International Settlement of Water Disputes: A Middle Eastern Perspective* (1997), *available at* http://www.salans.com/FileServer.aspx?oID=375&lID=0 (explaining the benefits of mediation and conciliation).

72. *See* ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 33:8 (2006) (analyzing the United Nations rules for conciliation); *see also* Jay E. Grenig, *Distinguished from Mediation*, 1 Alt. DISP. RESOL. § 2:13 (3d ed. 2007) (explaining the role of the conciliator). *See generally* Jay E. Grenig, *Advantages and Disadvantages*, 1 ALT. DISP. RESOL. § 2:12 (3d ed. 2007) (discussing the disadvantages of conciliation).

73. *See* Avraham Azrieli, *Improving Arbitration Under the U.S.-Israel Free Trade Agreement: A Framework for a Middle-East Free Trade Zone*, 67 ST. JOHN'S L. REV. 187, 229 (1993) (affirming that parties involved in conciliation have the right to refuse proceeding); *see also* Christen Carlson White, *Regulation of Leaky Underground Fuel Tanks: An Anatomy of Regulatory Failure*, 14 UCLA J. ENVTL. L. & POL'Y 105, 174 (1996) (explaining that conciliatory programs have voluntary compliance); Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PENN ST. L. REV. 929, 932 (2004) (characterizing conciliatory processes as "voluntary, [and] consensual").

74. *See Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce,* art. 17, *reprinted in* 1 ARAB L. Q., 83, 90 (1985) (maintaining if parties do not complete conciliation, arbitration and other legal remedies are available); Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT'L L. 373, 384 (2006) (emphasizing that the completion of arbitration requires the "voluntary, ongoing assent of the parties").

75. *See* Bower & Sharpe, *supra* note 3, at 643 (explaining that the Prophet Muhammad called for arbitration of all disputes in the Treaty of Medina of A.D. 622); *see also* Kutty, *supra* note 4, at 580 (describing how the Prophet Muhammad presided over arbitrations); Marie Egan Provins, Comment, *Constructing an Islamic Institute of Civil Justice that Encourages Women's Rights*, 27 LOY. L.A. INT'L & COMP. L. REV. 515, 525 (2005) (acknowledging arbitration as an Islamic tradition stemming from the *Quran* and the teachings of the Prophet Muhammad).

therefore, fallible.[76] Muslims regard the use of conciliation as both a demonstration of solidarity and an observance of the religious duty to remain at peace with one another.[77]

Conciliation involving third parties is sometimes confused with amiable composition.[78] *Amiable composition* is an arbitral practice where a third party, referred to as an *amiable compositeur*, is permitted to make a decision according to what he or she considers fair and appropriate under the circumstances, and not necessarily by reference to any substantive legal system.[79] Unlike conciliation proceedings involving third parties, amiable composition is binding in nature.[80] The confusion between amiable composition and conciliation may stem from the flexibility of the amiable compositeur to make a decision according to equitable principles rather than fixed legal rules.[81]

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76. *Malik's Muwatta* 36:1.1 available at http://www.masmn.org/documents/Hadith/Muwatta_Malik/index.htm; *see* COULSON, *supra* note 24, at 22 (suggesting that the Prophet Muhammad favored resolving disputes on a case-by-case basis); *see also* S.D. Goitein, *The Birth-hour of Muslim Law? An Essay in Exegesis*, THE FORMATION OF ISLAMIC LAW 69, 71 (1995) (describing judges in pre-Islamic Arab culture as wise men "inspired by the spirit of God").

77. *See* ABDUL HAMID EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES 12 (Aspen Publishers 1998) (noting that the Arabian Peninsula ended a period of tribal warfare and became unified under the Prophet Muhammad and the later Caliphs); *see also* COULSON, *supra* note 24, at 10 (remarking that in Arab culture, intratribal conflicts were usually settled through arbitration); Goitein, *supra* note 76, at 74 (claiming that Islamic law permits Muslim mediators to refuse non-Muslim disputants).

78. *See* William W. Park, *Arbitration of International Contract Disputes*, 39 BUS. LAW. 1783, 1787 (1984) (illustrating the differences between conciliation and amiable composition); *see also* United Nations Conference on Trade and Development, International Commercial Arbitration, Dispute Settlement, 2005, *Law Governing the Merits of the Dispute*, 14, U.N. Doc UNCTAD/EDM/Misc.232/Add.40 (2005) (declaring that an arbitrator's "right to act as an amiable compositeur cannot be presumed and must result from an express authorization by the parties"). *See generally* Commercial Arbitration Code, R.S.C., ch. 17 (1985) (defining amiable composition).

79. *See* Michael Douglas, *The Lex Mercatoria and the Culture of Transnational Industry*, 13 U. MIAMI INT'L & COMP. L. REV. 367, 372 (2006) (reiterating the use of equity in amiable composition); *see also* PETER NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS 173 (Clarendon Press 1999) (dismissing common misperceptions about amiable composition); Commercial Arbitration Code, R.S.C., ch. 17 (1985) (detailing the rules of amiable composition).

80. *See, e.g.*, Commercial Arbitration Code, R.S.C., ch. 17 (1985) (declaring amiable composition as binding); *see also* United Nations, *Report of the International Law Commission*, 47 AM. J. INT'L L. 1, 14 (1953) (stating amiable composition is binding). United Nations Conference on Trade and Development, International Commercial Arbitration, Dispute Settlement, 2005, *Law Governing the Merits of the Dispute*, 14, U.N. Doc UNCTAD/EDM/Misc.232/Add.40 (2005) (implying that because amiable composition must be agreed to by the parties, it is binding in nature).

81. *See* United Nations Conference on Trade and Development, International Commercial Arbitration, Dispute Settlement, 2005, *Law Governing the Merits of the Dispute*, 14, U.N. Doc UNCTAD/EDM/Misc.2 32/Add.40 (2005) (describing how in amiable composition, the arbitrator is not bound by legal rules if "the requirements of equity call for a different solution"); *see also* NYGH, *supra* note 79, at 173 (examining the equitable characteristics of amiable composition). Douglas, *supra* note 79, at 372 (detailing the use of equity rather than established law in amiable composition proceedings).

Arbitrators may make decisions as amiable compositeurs only if the parties expressly have conferred such powers on them.[82] Middle Eastern countries influenced by French law, such as Lebanon and Syria, incorporate amiable composition legislatively.[83] On a practical level, however, amiable composition in those countries usually proceeds as mediation conducted by a third party[84]—evidencing the strength of other historical influences and their impact on modern legislation.[85] The anticipated effect of any form of dispute resolution, whether it is binding or not, should be clear at the start of a proceeding. Different views regarding the anticipated effects of arbitral proceedings—mindsets as to the nature of arbitration—are discussed in Part V.

Middle Eastern civil disputes where one party is a foreign national typically do not utilize mediation as a settlement mechanism.[86] Instead, arbitration is the norm.[87] Arbitration in this context is specified contractually and not spontaneously, unlike characteristic Islamic arbitra-

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82. *See* INTERNATIONAL TRADE CENTER, ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION: HOW TO SETTLE INTERNATIONAL BUSINESS DISPUTES 88 (2001) (stressing that arbitrators may make decisions as amiable compositors only after the agreement of the parties); *see also* UNICITRAL Model Law in International Commercial Arbitration art. 28, § 3 (2006) (codifying the rule that amiable composition may be used only after the express agreement of the parties); London Court of International Arbitration, *Arbitration Rules*, in INTERNATIONAL BUSINESS LITIGATION & ARBITRATION 2006, at 779, 800 (PLI Litig. & Admin. Practice, Litig. and Admin. Practice Course Handbook Series No. 8710, 2006) (noting that parties must have agreed in writing for amiable composition to apply).

83. *See* MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 49:2, n.2 (2007) (asserting amiable composition is authorized by the laws of France and other civil law countries); *see also* John Y. Gotanda, *Awarding Punitive Damages in International Commercial Arbitrations in the Wake of Mastrobuono v. Shearson Lehman Hutton, Inc.*, 38 HARV. INT'L L.J. 59, 91 (1997) (discussing French law expressly granting arbitrators the power of amiable compositeur); Karyn S. Weinberg, *Equity in International Arbitration: How Fair Is "Fair"? A Study of Lex Mercatoria and Amiable Composition*, 12 B.U. INT'L L.J. 227, 235 (1994) (suggesting that France uses amiable composition successfully because her laws enforce awards).

84. *See* Weinberg, *supra* note 83, at 238 (discussing the flexible nature of amiable composition); *see also* Ichiro Kitamura, *The Judiciary in Contemporary Society: Japan*, 25 CASE W. RES. J. INT'L L. 263, 288 (1993) (commenting on the French style of amiable composition); United Nations, *supra* note 81, at 14 (likening amiable composition to mediation).

85. *See* EL-AHDAB, *supra* note 77, at 11 (outlining the history of mediation in Arab countries); *see also* John E. Rothenberger, *The Social Dynamics of Dispute Settlement in a Sunni Muslim Village in Lebanon*, THE DISPUTING PROCESS—LAW IN TEN SOCIETIES 152, 164 (Laura Nader ed., 1978) (describing historical dispute resolution mechanisms in Lebanon); Saleh, *supra* note 70, at 199 (confirming local traditions dominate Western-inspired law in Arab countries).

86. *See* Gemmell, *supra* note 3, at 170 (maintaining foreign investors must know the role of religion in commercial arbitration in the Middle East).

87. *See* Saleh, *supra* note 70, at 199 (establishing that when a party is foreign, commercial disputes in the Middle East are usually resolved through arbitration); *see also* Syed Khalid Rashid, *Alternative Dispute Resolution in the Context of Islamic Law*, 8 VINDOBONA J. INT'L COM. L. & ARB. 95, 109 (2004) (noting arbitration awards are enforced in Arab nations that have accepted the Convention of Recognition and Enforcement of Foreign Arbitral Awards).

tion.[88] International commercial arbitration in the Middle East was once characterized as a "concession to a foreign party" causing "apprehension" typically leading the domestic party to search for alternatives.[89] However, the growing body of legislation and case law on arbitration has facilitated the practice of international commercial arbitration in the Middle East.[90] With greater experience and exercise of international norms, the trend may continue.

B. Arbitration During the Pre-Islamic Period

Arbitration, or *tahkim*, has a long history in the Middle East, stretching back before Islam.[91] In the pre-Islamic Arab community, self-help tended to be the most relied upon method of dispute resolution.[92] Arbitration was optional and left to the free choice of the par-

88. *See* David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT'L L. 194, 205 (2005) (emphasizing that states are bound to the commercial arbitration agreements they enter); *see also* David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 Am. J. INT'L L. 104, 148 n.202 (1990) (clarifying UNCITRAL Model Law regarding commercial arbitration agreements); Charles N. Brower, *Court-ordered Provisional Measures Under the New York Convention*, 80 AM. J. INT'L L. 24, 24 n.1 (asserting "the purpose of the New York Convention is to encourage the recognition and enforcement of commercial arbitration agreements").

89. *See* Husain M. Al-Baharna, *International Commercial Arbitration in a Changing World*, 9 ARAB L. Q. 144, 154 (1994) (explaining that initial efforts at international arbitration in the Gulf suffered because of foreign arbitrators' insensitivity to local laws and the Gulf countries' failure to fully appreciate the ramifications of international arbitration clauses); *see also* Kutty, *supra* note 4, at 591-92 (outlining the oil concession disputes that resulted in Middle Eastern distrust of international arbitration); Saleh, *supra* note 70, at 199 (explaining that Middle Easterners viewed arbitration negatively because it was held on foreign territory and subject to foreign rules).

90. *See* Mallat, *supra* note 56, at 134 (expressing that the Middle East is increasingly accepting international commercial arbitration); *see also* Frank Bannon & Simon Chapple, *The Balancing Act: International Arbitration's Developing Role in the Middle East*, MONDAQ BUS. BRIEFING, May 20, 2005 (noting that several Middle Eastern States passed legislation supporting international arbitration); Gary Born & Wendy Miles, *Global Trends in International Arbitration* (June 2007), *available at* http://www.wilmerhale.com/files/Publication/3eadc21b-4cad-4ea8-bf29-012226df50b5/Presentation/PublicationAttachment/bb9cd3fd-f046-4489-b2a9-086a72f6d24d/GlobalTrends_InternationalArbitration.pdf (presenting the growing reach and acceptance of international commercial arbitration).

91. *See* EL-AHDAB, *supra* note 77, at 11 (explaining that arbitration was used in the pre-Islamic period due to the lack of an organized judicial power); *see also* Joseph Schacht, *Pre-Islamic Background and Early Development of Jurisprudence*, in THE FORMATION OF ISLAMIC LAW 29 (Lawrence I. Conrad ed., 2004) (describing Middle Eastern arbitration in the pre-Islamic era); Kutty, *supra* note 4, at 589 (outlining the history of arbitration in the Middle East).

92. *See* JOSEPH SCHACHT, INTRODUCTION TO ISLAMIC LAW 7 (1964) (emphasizing that self-help was the only means of dispute resolution short of war in the pre-Islamic Middle East); *see also* Gemmell, *supra* note 3, at 173 (documenting the prominence of self-help in the pre-Islamic Middle East).

ties.[93] If the parties, in the course of negotiations, failed to resolve their dispute, an arbitrator, or *hakam*, was appointed.[94]

Arbitral proceedings in Arab countries during the pre-Islamic period were simple and rudimentary.[95] A valid arbitration proceeding merely required a hearing attended by the parties and proof of each claim.[96] Arbitral awards were not legally binding[97]—enforcement often depended on the moral authority of the arbitrator.[98] Priests were often chosen as *hakam*,[99] though the *hakam* could be any male who possessed high personal qualities, who enjoyed a favorable position in the community, and whose family was regarded as competent in dispute settlement.[100] Sometimes parties made a security deposit when the *hakam* agreed to arbi-

93. *See* EL-AHDAB, *supra* note 77, at 12 (asserting that arbitration was an option in the pre-Islamic Middle East); *see also* Kutty, *supra* note 4, at 590 (explaining that parties did not have to choose arbitration).

94. *See* SCHACHT, *supra* note 92, at 29 (stating that in the pre-Islamic Middle East, arbitration followed failed negotiations); *see also* Barbara J. Metzger, *Revelation and Reason: A Dynamic Tension in Islamic Arbitrament*, 11 J.L. & REL. 697, 700 (1995) (noting that a *hakam* was appointed to arbitrate a dispute upon failed negotiations in the pre-Islamic Middle East). George Sayen, *Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia*, 24 U. PA. J. INT'L ECON. L. 905, 923 (2003) (concluding that arbitration was used in the pre-Islamic Middle East to resolve disputes that otherwise would have led to war).

95. *See* EL-AHDAB, *supra* note 77, at 12 (describing pre-Islamic arbitral proceedings as simple); *see also* Kutty, *supra* note 4, at 596–97 (outlining arguments affirming the easy nature of pre-Islamic arbitral proceedings); Zeyad Alqurashi, *Arbitration Under the Islamic Sharia*, Oil Gas and Energy Law Intelligence, http://www.gasandoil.com/ogel/samples/freearticles/article_63.htm (2003) (expounding the simplicity of pre-Islamic arbitral proceedings).

96. *See* EL-AHDAB, *supra* note 77, at 12 (describing the requirements of a valid arbitration in the pre-Islamic Middle East); *see also* SAMIR SALEH, COMMERCIAL ARBITRATION IN THE MIDDLE EAST, 21 (1984) (describing the various elements of pre-Islamic arbitration); Alqurashi, *supra* note 95 (illustrating the pre-Islamic arbitration requirements).

97. *See* Kutty, *supra* note 4, at 589 (explaining that arbitral awards were not legally binding in the pre-Islamic period); *see also* Rashid, *supra* note 87, at 102 (describing the arbitral awards as unenforceable in the pre-Islamic era); Medhat Mahmoud, *The Judicial System in Iraq: Facts and Prospects*, IRAQI JUDICIAL FORUM (2004), http://www1.worldbank.org/publicsector/legal/iraq/1.doc (affirming that parties were not bound by arbitration in the pre-Islamic era).

98. *See* SCHACHT, *supra* note 92, at 8 (explaining that an arbitrator's decision was not an enforceable judgment but, rather, a statement providing answers to disputed situations); *see also* SCHACHT, *supra* note 93, at 30 (explaining that an arbitrator's decisions were not enforceable judgments); Rashid, *supra* note 87, at 102 (explaining that arbitral awards were not enforceable unless the tribal chief had the power to procure enforcement).

99. *See* EL-AHDAB, *supra* note 77, at 12 (establishing that pre-Islamic arbitrators were often priests); *see also* SCHACHT, *supra* note 92, at 8 (remarking that pre-Islamic arbitrators were spiritual leaders); Sayen, *supra* note 94, at 923 (expressing that arbitrators were chosen in the pre-Islamic era because their opinions were believed to be divinely inspired, thereby compelling submission to arbitration and compliance with the award).

100. *See* ZUBAIDA, *supra* note 30, at 16-17 (stating that pre-Islamic Middle Eastern arbitrators were typically men with special credentials); *see also* George Sayen, *Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia*, 24 U. PA. J. INT'L ECON. L. 905, 924 (2003) (describing the unusual characteristics of pre-Islamic arbitrators).

trate.[101] The security deposit ensured compliance, to a certain degree, with the *hakam*'s final decision.[102]

Arbitration continued as a dispute resolution practice during and after the life of the Prophet Muhammad.[103] There are many examples of the Prophet Muhammad serving as *hakam*,[104] "a role to which he attached great importance."[105] Two notable episodes were his arbitration with the Jewish tribe of Banu Qurayza,[106] and the negotiation of the Muslim community's first treaty, the treaty of Medina.[107]

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101. *See* EL-AHDAB, *supra* note 77, at 12 (explaining that in the pre-Islamic era, some arbitrators required parties to deposit a security to ensure enforcement of the arbitral award); *see also* SCHACHT, *supra* note 94, at 8 (noting that in pre-Islamic times, parties to an arbitration put up a security when a *hakam* agreed to arbitrate); Gemmell, *supra* note 3, at 173 (articulating the pre-Islamic practice of arbitrators refusing to arbitrate before receiving a security).

102. *See* EL-AHDAB, *supra* note 77, at 12 (emphasizing that the security is important to ensure compliance with the arbitrator's judgment); *see also* Schacht, *supra* note 93, at 29–30 (stating that the security guaranteed execution of the arbitrator's award in the pre-Islamic era); Gemmell, *supra* note 3, at 173 (noting that the security often led to compliance with the pre-Islamic arbitrators' decisions).

103. *See* ZUBAIDA, *supra* note 30, at 17 (indicating that even the Prophet Muhammad was an arbiter); *see also* Brower & Sharpe, *supra* note 3, at 643 (expressing the Prophet Muhammad's support for arbitration); Gemmell, *supra* note 3, at 173 (stating that arbitration continued during and after the life of the Prophet Muhammad).

104. *See* MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 232–33 (1955) (noting that the Prophet Muhammad served as a *hakam* before he became a prophet); *see also* JONATHAN P. BERKEY, THE FORMATION OF ISLAM: RELIGION AND SOCIETY IN THE NEAR EAST, 600–1800, at 67–68 (Patricia Crone ed., 2004) (detailing how the Prophet Muhammad functioned as a *hakam* between Yathrib tribes after taking up his prophetic preaching); WILLIAM H. SWATOS JR., ENCYCLOPEDIA OF RELIGION AND SOCIETY 239 (William H. Swatos Jr. ed., 1998) (describing the Prophet Muhammad as an impartial arbitrator in Medina).

105. *See* SAMIR SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST: SHARĪ`A, SYRIA, LEBANON AND EGYPT 18 (2d ed. 2006) (explaining that as prophet, Muhammad attached great importance to being appointed as an arbitrator by believers); *see also* MUHAMMAD KHALID MASUD ET AL., DISPENSING JUSTICE IN ISLAM: QADIS AND THEIR JUDGMENTS 7 (Muhammad Khalid Masud et al. eds., 2005) (noting the Prophet Muhammad's respect for his service as an arbitrator in the young Muslim community); MAJID KHADDURI, LAW IN THE MIDDLE EAST 30 (Herbert J. Liebesny ed., 1984) (stressing the Prophet Muhammad's emphasis on the value of serving as an arbitrator).

106. *See Libyan Am. Oil Co. v. Libyan Arab Republic*, 20 I.L.M. 1, 41 (1981) (referencing the Prophet Muhammad's arbitration with the tribe of Banu Qurayza); *see also* PATRICE C. BRODEUR, ISLAM AND OTHER RELIGIONS, IN ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD 361 (Richard C. Martin ed., 2004) (noting that the Prophet Muhammad was called to act as an arbitrator during the confrontation with the Banu Qurayza); HILMI M. ZAWATI, IS JIHAD A JUST WAR? WAR, PEACE, AND HUMAN RIGHTS UNDER ISLAMIC AND PUBLIC INTERNATIONAL LAW 70 (2002) (discussing the Prophet Muhammad's role in arbitration with the tribe of Banu Qurayza).

107. *See* BRODEUR, *supra* note 106, at 361 (noting that the Prophet Muhammad was called to act as an arbitrator in Medina); *see also* DAVID WAINES, AN INTRODUCTION TO ISLAM 18 (2003) (discussing the Prophet Muhammad's invitation to Medina to serve as an arbitrator); Muhammad Abu-Nimer, *A Framework for Nonviolence and Peacebuilding in Islam*, 15 J. L. & RELIGION 217, 247 n.62 (2000) (specifying how the Prophet Muhammad's arbitrations ended the incident of the Aws and Khazraj tribes of Medina).

Today, the practice of arbitration remains well accepted in Islamic society.[108] Arbitration is approved by the *Quran*, particularly in the matrimonial context, as illustrated by the following passage:[109] "And if you fear a breach between the two [husband and wife], then appoint a judge from his people and a judge from her people; if they both desire agreement, Allah will effect harmony between them, surely Allah is knowing, Aware."[110] The Prophet Muhammad accepted arbitral decisions, and he advised others, including his close companions, to arbitrate.[111] *Ijma* also confirms the use of arbitration as an Islamic dispute resolution tool.[112]

C. The Origins of Modern Arbitral Practice in the Middle East

During the period from the end of World War II to the 1970s, several notable international arbitral decisions concerning oil concession disputes set aside and undermined Islamic domestic laws.[113] The decisive characteristics of each of these arbitrations were the negation of domestic, Islamic laws and the elevation of "general principles of law" that were firmly rooted in the jurisprudence of Western jurisdictions.[114] One notable opinion questioned the adequacy of general contract law in *Shari`a*,[115] instead applying principles of English law because they were the "common practice of the generality of civilized nations."[116]

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108. *See* KHADDURI, *supra* note 104, at 233 (stating that Islam recognized the Arab arbitration system); *see also* BASSAM TIBI, ISLAM BETWEEN CULTURE AND POLITICS 57 (2d ed. 2002) (explaining that belief in the Prophet Muhammad as arbitrator was necessary to accept Islam during the foundation of Medina); Laura Veccia Vaglieri, *The Patriarchal and Umayyad Caliphates*, in 1A THE CAMBRIDGE HISTORY OF ISLAM 70 (Peter Malcome Holt et al. eds., 1977) (recounting one of the most famous battles in the history of Islam settled by arbitration).

109. *See* SHARIFAH ZALEHA SYED HASSAN ET AL., MANAGING MARITAL DISPUTES IN MALAYSIA: ISLAMIC MEDIATORS AND CONFLICT RESOLUTION IN THE SYARIAH COURTS 229 (1997) (detailing that an arbitrator may resolve marital problems under Islamic law); *see also* WERNER F. MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA 295 (2d ed. 2006) (stressing that the *Quran* legitimated the Prophet Muhammad as a legal arbitrator).

110. *Quran* 4:35.

111. *See* JOSEF MERI ET AL., MEDIEVAL ISLAMIC CIVILIZATION: AN ENCYCLOPEDIA 168 (Josef Meri ed., 2006) (noting that upon the Prophet Muhammad's death, the early Companions served as arbitrators); *see also* Gemmell, *supra* note 3, at 174–75 (explaining how the Prophet Muhammad both endorsed and submitted to arbitration).

112. *See* EL-AHDAB, *supra* note 77, at 13 (stressing the approval of arbitration by *ijma*); *see also* Kutty, *supra* note 4, at 590 (confirming the consensus of Islamic opinion, or *ijma*, regarding arbitration).

113. *See, e.g.*, *Petroleum Dev. v. Sheikh of Abu Dhabi*, 1 INT'L & COMP. L. Q. 247, 247 (1952); *Ruler of Qatar v. Int'l Marine Oil Co.*, 20 I.L.R 534, 534 (1953); *Saudi Arabia v. Arabian Am. Oil Co.*, 27 I.L.R. 117, 117 (1958)

114. *See* Brower & Sharpe, *supra* note 3, at 644; *see also* Patrick M. Norton, *A Law of the Future or the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT'L L. 474, 477 (1991) (stating that the tribunals applied general principles of law); Kutty, *supra* note 4, at 591 (noting that Islamic domestic laws were negated by Western laws).

115. *See Petroleum Dev. v. Sheikh of Abu Dhabi*, 1 INT'L & COMP. L. Q. 247, 250–51 (1952) (stating that a nation governed by Islamic law had no body of proper law with which to construe a contract); *see also Ruler of Qatar v. Int'l Marine Oil Co.*, 20 I.L.R. 534, 545 (1953) (claiming Islamic law had no sufficient principles to interpret a contract). *See generally* EL-AHDAB, *supra* note 77, at 23 (declaring that the *Shari`a* rejects many contracts or clauses because they are contingent upon luck or chance).

116. *Petroleum Dev. v. Sheikh of Abu Dhabi*, 1 INT'L & COMP. L. Q. at 250–51; *see also Saudi Arabia v. Arabian Am. Oil Co.*, 27 I.L.R. 117, 167–69 (1958) (illustrating how general principles of English law were used to decide the arbitration); Norton, *supra* note 114, at 477 (referring to several major Middle Eastern arbitrations that were governed by general principles and international law).

A similar ethnocentrism was evident in *Ruler of Qatar v. International Marine Oil Co. Ltd*.[117] In that case, the arbitrator held that Qatari law, based on Islamic law, was the proper law to apply.[118] However, rather than apply Qatari law, the arbitrator dismissed it, stating that "[he was] satisfied that the [Islamic] law does not contain any principles which would be sufficient to interpret this particular contract."[119] Such a statement indicated disregard of extensive Islamic legal scholarship that sets out clear principles of contract law based on the primary and secondary sources of Islamic law.[120]

Peremptory arbitral decisions framed the historical backdrop against which much of the Middle East viewed international arbitration.[121] For too long, various Middle Eastern states remained outside the regime of international conventions that provide for enforcement of international arbitral awards.[122] In recent history, Middle Eastern national legislation governing international arbitration was unfavorable or even hostile to arbitration;[123] some states discretionarily set aside international arbitral awards.[124] The current trend is that Middle Eastern nations are increasingly standardizing the process of arbitral review, adopting new or revised arbitration laws receptive to international needs, and establishing arbitration centers as adjuncts

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117. *Int'l Marine Oil*, 20 I.L.R. at 545 (holding that Islamic law was not the proper law to apply).

118. *See id.* (holding that Islamic law was not sufficient for the contract in question); *see also* William M. Ballantyne, *The Second Coulson Memorial Lecture: Back to the Shari`a!?*, 3 ARAB LAW Q. 317, 324 (1988) (recounting that although the arbitrator recognized Qatari law as the appropriate law, the arbitrator nevertheless declined to apply it). *See generally* Nabil Saleh, *The Law Governing Contracts in Arabia*, 38 INT'L COMP. L. Q. 761, 761–97 (1989) (discussing Qatari law as it relates to contracts).

119. *See Int'l Marine Oil Co.*, 20 I.L.R at 541 (stating that the arbitrator did not find Islamic contract law sufficient); *see also* Mark S. W. Hoyle, *The Origins of Mixed Courts in Egypt*, 1 ARAB L.Q. 220, 224 (1986) (noting the arbitrator in *Ruler of Qatar* found the Islamic law was insufficient to interpret the contract).

120. *See* William M. Ballantyne, *The Shari`a and Its Relevance to Modern Transactional Transactions*, First Arab Regional Conference (Feb. 15–19, 1987), 1 ARAB COMP. & COM. L. 3, 12 (1987) (discussing various forms of the Islamic law of contracts); *see also* Lombardi, *supra* note 10, at 94 (stating that in 83 opinions, the International Court of Justice only issued 2 opinions discussing Islamic law in any meaningful way).-

121. *See* Brower & Sharpe, *supra* note 3, at 644–45 (discussing the historical background of arbitration in the Middle East from World War II to 1970); *see also* Kutty, *supra* note 4, at 591–92 (giving historical reasons for Middle Eastern national unease toward international arbitration); Charles P. Trumbull, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts* 59 VAND. L. REV. 609, 630–33 (2006) (suggesting that Islamic laws and Western laws are at variance because each derives legitimacy from different sources).

122. *See* Gemmell, *supra* note 3, at 184–86 (stating that Islamic courts have the ultimate say in whether or not an arbitral award is enforceable); *see also* Michael J.T. McMillen, *Contractual Enforceability Issues: Sukuk and Capital Markets Developments*, 7 CHI. J. INT'L L 427, 457–58 (2007) (acknowledging that enforcement of arbitration awards is often unclear in *Shari`a*-compliant transactions). Roy, *supra* note 5, at 951–52 (stating the difficulties of enforcing Saudi Arabian arbitration).

123. *See* Brower & Sharpe, *supra* note 3, at 647 (expressing that some Middle Eastern countries have been hostile or unfavorable to modern arbitration); *see also* Christopher A. Ford, *Siyar-ization and Its Dicontents: International Law and Islam's Constitutional Crisis*, 30 TEX. INT'L L.J. 499, 519–22 (1995) (suggesting that Syria's doctrinal restraints restrict its compatibility with international norms); Roy, *supra* note 5, at 951–52 (discussing Saudi Arabian laws restricting international arbitration).

124. *See* Akaddaf, *supra* note 11, at 23–25 (highlighting reasons, including public policy, why some Middle Eastern countries did not enforce arbitral awards); *see also* Brower & Sharpe, *supra* note 3, at 647 (noting certain Middle Eastern countries' interference with or hostility toward international arbitration).

to those outside the region.[125] These developments demonstrate a renewed willingness to participate in the international arbitral system on a level field.

IV. International Arbitration and Selected Multilateral Conventions

Several multilateral conventions that address the enforcement of foreign arbitral awards are relevant to a discussion of international commercial arbitration in the Middle East.[126] In addition to those international conventions, Middle Eastern states have also enacted bilateral agreements to recognize and mutually enforce court judgments and arbitral decisions.[127] To focus the discussion, this article considers the following five multilateral conventions. The first three are regional treaties, specific to Middle Eastern countries. The remaining two are international conventions, products of the United Nations[128] and the World Bank,[129] respectively.

1. The Arab Convention on the Enforcement of Foreign Judgments and Arbitral Awards[130] ("Arab League Convention");
2. The Riyadh Convention on Judicial Cooperation[131] ("Riyadh Convention");

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125. *See* Berger & Quast, *supra* note 3, at 206–10 (discussing Egypt's new laws and ratification of the New York Convention); *see also* Brower & Sharpe, *supra* note 3, at 646–47 (arguing that the world is closer than ever before to reaching consensus on the utility of international arbitration); Bannon & Chapple, *supra* note 90 (stating that Jordan, Egypt, Kuwait, and other countries adopted the New York Convention and normally enforce its laws).

126. *See* Akaddaf, *supra* note 11, at 23–25 (claiming the New York Convention and the Geneva Convention have been used to encourage enforcement of international arbitration); *see also* Dr. Husain M. Al-Baharna, *The Enforcement of Foreign Judgments and Arbitral Awards in the GCC countries with Particular Reference to Bahrain*, 4 ARAB L. Q. 332, 332–33 (1989) (stating that the Arab League Convention encourages enforcement of international arbitral awards); *The Amman Arab Convention on Commercial Arbitration*, 7 ARAB L. Q. 83, 83 (1992) (showing that a number of Arab countries have met to improve commercial arbitration).

127. For example, Lebanon and Jordan have entered into the Jordanian-Lebanese Judicial Convention of 1954. *See* Nancy B. Turck, *Middle East Arbitration Status Chart*, 16 ARAB L. Q. 178, 178–85 (2001) (outlining the different agreements each Middle Eastern country entered into to promote arbitration); *see also* John H. Donboli & Farnaz Kashefi, *Doing Business in the Middle East: A Primer for U.S. Companies*, 38 CORNELL INT'L L.J. 413, 449–50 (2005) (discussing bilateral agreements Egypt entered into to facilitate arbitration); Jordanian Foreign Ministry, *First Report to the CTC*, http://www.mfa.gov.jo/pages.php?menu_id=676 (last visited September 3, 2007) (acknowledging the bilateral agreements that Jordan entered into, including the Jordanian-Lebanese Judicial Convention of 1954).

128. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, *available at* http://www.uncitral.org/pdf/english/texts/ar bitration/NY-conv/XXII_1_e.pdf (stating that the convention is meant to encourage enforcement and recognition of foreign arbitral awards).

129. *See* The World Bank Group, *International Center for Settlement of Investment Disputes, About ICSID*, http://www.worldbank.org/icsid/about/about.htm (last visited Sept. 3, 2007) (discussing the World Bank's role in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States).

130. Arab Convention for Enforcement of Judgments (and Arbitral Awards) of 1952, Sept 14, 1952; *see generally* Al-Baharna, *supra* note 126, at 332–33 (discussing the Arab League Convention's attempts to encourage enforcement).

131. Arab Convention on Judicial Cooperation (Riyadh), Apr. 6, 1983, *available at* http://www.kluwerarbitration.com/arbitration/toc.aspx?type=Conventions (last visited Sept. 22, 2007).

3. The Amman Arab Convention on Commercial Arbitration[132] ("Amman Arab Convention");
4. The Convention on the Recognition and Enforcement of Arbitral Awards[133] ("New York Convention"); and
5. The Convention on the Settlement of Investment Disputes between States and Nationals of other States[134] ("ICSID Convention").

Under the Arab League Convention, courts within contracting states are required to enforce foreign arbitral awards without adjudicating the merits of the underlying case, subject to procedural safeguards laid down within the convention's text.[135] The Arab League Convention is quite similar to but more complex than the New York Convention.[136] Notably, the Arab League Convention excludes from its purview those awards that seek enforcement based on international conventions or bilateral treaties.[137] This means that where two states are parties to both the Arab League Convention and the New York Convention or a bilateral agreement, the latter of the two will prevail.[138] The Arab League Convention therefore defers and gives precedence to international and bilateral conventions.[139]

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132. The Amman Arab Convention on Commercial Arbitration, *entered into* June 25, 1992 *available at* http://www.jurisint.org/en/ins/155.html (last visited Nov. 7, 2007).

133. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 128.

134. The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 54, Mar. 18, 1965, 17 U.S.T. 1270, *available at* http://www.worldbank.org/icsid/basicdoc/basicdoc.htm (last visited Sept. 3, 2007).

135. *See* Habib Mohd. Sharif Al Mulla, *Conventions of Enforcement of Foreign Judgments in the Arab States*, 14 ARAB L. Q. 33, 55 (1999) (stating that the judicial authority cannot examine the merits of the case when enforcement is sought under the Arab League Convention). *See generally* Samir Saleh, *The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East*, 1 ARAB L. Q. 19, 24 (1985) (noting that the court petitioned for enforcement cannot review the substantive matters of the case).

136. *See* Al-Baharna, *supra* note 126, at 334 (illustrating how the Arab League Convention of 1952 is more intricate and complex than the New York Convention of 1958).

137. *See* Jalila Sayed Ahmed, *Enforcement of Foreign Judgments in Some Arab Countries—Legal Provisions and Court Precedents: Focus on Bahrain*, 14 ARAB L. Q. 169, 173 (1999) (indicating the priority of applying international conventions when they conflict with the national law of an Arab League Convention signatory).

138. *See* Al-Baharna, *supra* note 126, at 335 (stressing that either the New York Convention or a bilateral agreement trumps the Arab League Convention if a state is party to both); *see also* Ahmed, *supra* note 137, at 173 (affirming that the New York Convention takes priority over the Arab League Convention).

139. *See also* Ahmed, *supra* note 137, at 173 (maintaining that international conventions have precedence over the national laws of the Arab States under the Arab League Convention); *see also* Saleh, *supra* note 135, at 23 (describing the New York Convention as a step forward from the Arab League Convention).

The Arab League Convention was essentially superseded by the Riyadh Convention.[140] The Riyadh Convention, a regional multilateral convention among Arab states, governs foreign awards made in other member states.[141] Under the convention, courts are prohibited from examining the substance of disputes referred for award enforcement.[142] Courts may only enforce or refuse to enforce an award.[143] The Riyadh Convention was a step forward for those countries that had not yet ratified the New York Convention.[144] However, with the large number of Middle Eastern states that have now acceded to the New York Convention, the Riyadh Convention is no longer as relevant as it once was.

The Amman Arab Convention, modeled after the Washington Convention,[145] was concluded by 14 Arab states in 1987.[146] The Amman Arab Convention established the Arab Cen-

140. *See* Marco Torsello, *L'Arbitrato Commerciale Internazionale*, 15 AM. REV. INT'L ARB. 639, 640 n.10 (2004) (book review) (noting that in some countries, the Riyadh Convention of 1983 replaced the earlier Arab League Convention of 1952); *see also* Richard Price & John Murkett, *Law: Application of Tonnage Limit in UAE—Richard Price and John Murkett of Clifford Chance Assess the Latest Developments in Gulf Shipping Law*, LLOYD'S LIST, Oct. 15, 1993, at 13 (stating that the Riyadh Convention was intended to improve the Arab League Convention); Law and Arbitration Center, *Enforcement of Foreign Judgments and Award in Jordan and Iraq*, Mar. 5–8, 1989, http://www.lac.com.jo/enforcement.htm#_ftn5 (last visited Sept. 11, 2007) (noting that the Riyadh Convention on Judicial Cooperation of 1983 replaced the Arab Convention for Enforcement of Judgments and Arbitral Awards of 1952).

141. Breger & Quast, *supra* note 3, at 222 (explaining how the Riyadh Convention applies only to foreign awards made in other Arab member states); *see also* Abdul Hamid El-Ahdab, *Enforcing Foreign Awards in the Middle East*, in COMMERCIAL LAW IN THE MIDDLE EAST 323, 331 (Hilary Lewis & Chibli Mallat eds., 1995) (stating that the Riyadh Convention applies to arbitral awards between member states); *Reconstruction of Iraq Coalition Provisional Authority Issues Order Number 39 Allowing Foreign Investments in Iraq*, INT'L NEWS BRIEF (Pillsbury Winthrop, LLP), Sept. 23, 2003, at 2 (stating that Article 37 of the Riyadh Convention requires member states to recognize and enforce arbitral awards issued in other member states).

142. *See* General Counsel's Office of the US Department of Commerce, *Overview of Commercial Law in Iraq,* Sept. 12, 2003, *available at* http://www.export.gov/iraq/pdf/iraq_commercial_law_current.pdf (explaining that the Riyadh Convention requires member states to recognize and enforce arbitral awards issued in other member states without reconsidering the merits of the case); *see also* Saleh Majid, *Enforcement of Foreign Judicial and Arbitral Awards in Iraq*, MIDDLE E. EXECUTIVE REP. 8, 17 (Sept. 1995) (noting that Article 37 of the Riyadh Convention demands states to enforce arbitration awards from other member states without assessing the merits of the case).

143. Breger & Quast, *supra* note 3, at 222. *See* Mulla, *supra* note 135, at 55 (reiterating that judicial authorities under the Riyadh Convention are limited solely to examining whether a judgment satisfies the conditions of the Convention); *see also* General Counsel's Office of the U.S. Department of Commerce, *supra* note 144 (stating that the Riyadh Convention requires courts to enforce arbitral awards of other states with few exceptions).

144. Breger & Quast, *supra* note 3, at 222 (declaring that the Riyadh Convention is a step forward from the Arab League Convention). *See* Saleh, *supra* note 135, at 25 (claiming that the Riyadh Convention of 1983 is more comprehensive than the Arab League Convention of 1952); *see also* Al-Baharna, *supra* note 126, 336 (concluding that the Riyadh Convention simplified procedures and updated the conditions of enforcement of foreign arbitral awards).

145. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 54, Mar. 18, 1965, 17 U.S.T. 1270 (showing that the Amman Arab Convention was modeled after the Washington Convention).

146. *See* The Amman Arab Convention on Commercial Arbitration, *supra* note 132 at 83 (listing the 14 Arab States that agreed to enter under the Amman Arab Convention on Commercial Arbitration).

tre for Commercial Arbitration in Rabat, Morocco.[147] However, the requirement that all proceedings be conducted in Arabic has limited the center's appeal.[148] To date, no Middle Eastern state has utilized the Amman Arab Convention nor has the Rabat Centre been established.[149] The Amman Arab Convention has not referred a single case to arbitration nor settled a commercial dispute, although it has been in effect since 1992.[150]

Of the five aforementioned conventions, the New York Convention is by far the most prominent. The New York Convention is one of the most widely accepted conventions governing international commerce.[151] It applies to two types of arbitral awards: those rendered in foreign countries and those not deemed as domestic in the state where enforcement is sought.[152] The Convention imposes two principal obligations on state parties: (1) to ensure that national courts, where appropriate, refer parties to arbitration and stay related judicial proceedings;[153] and (2) to recognize and enforce foreign arbitral awards essentially as if they were

147. *See id*. (showing that by virtue of the Amman Arab Convention, a permanent organization called the Arab Centre for Commercial Arbitration was created); *see also* Chibli Mallat, *Commercial Law in the Middle East: Between Classical Transactions and Modern Business*, 48 AM. J. COMP. L. 81, 136 (2000) (noting that the Amman Convention of 1987 made a genuine attempt to establish Rabat as a major center of arbitration); *Arbitration under the 1987 Amman Convention*, LAW AND ARBITRATION CENTER (2001), http://www.lac.com.jo/news1-8.htm (highlighting as the most important provision of the Convention the establishment of the Arab Centre for Commercial Arbitration in Rabat, Morocco).

148. *See* The Amman Arab Convention on Commercial Arbitration, *supra* note 132 at 88 (announcing that the language of the Arab Centre proceedings is Arabic); *see also* Brower & Sharpe, *supra* note 3, at 654 (noting that the Arab Centre's appeal outside of the Arab states is limited by the requirement that all proceedings be conducted in Arabic).

149. *See Arbitration under the 1987 Amman Convention*, *supra* note 147 (explaining that since the Arab Centre for Commercial Arbitration has not yet been established; the Convention is operative only in theory); *see also* Breger & Quast, *supra* note 3, at 222–23 (affirming that the Amman Convention has not become operative and the Rabat Centre has not been established).

150. *Arbitration under the 1987 Amman Convention*, *supra* note 147 (noting that no commercial dispute has been settled under the Amman Arab Convention). *See* Gemmell, *supra* note 3, at 190–91 (stating that no commercial dispute has been settled or even referred to Rabat since the Convention went into effect); *see also* Mallat, *supra* note 147, at 139 (noting the lack of any serious reported arbitration in the Rabat Centre).

151. *See* U.N. Comm'n on Int'l Trade Law, *supra* note 9 (listing the countries that are party to the New York Convention); *see also* Marian Nash Leich, *The Inter-American Convention on International Commercial Arbitration,* 75 AM. J. OF INT'L L. 982, 985 (1981) (asserting that the New York Convention is better established than the Inter-American Convention because of greater worldwide participation).

152. *See* Convention on the Recognition and Enforcement of Arbitral Awards, art. 1, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (declaring that the New York Convention applies to arbitral awards made in states other than the one where the recognition and enforcement of such awards are sought); *see also* STEVEN C. BENNETT, ARBITRATION: ESSENTIAL CONCEPTS 134 (2002) (indicating that each signatory state may designate arbitral awards that are considered not domestic and may apply the Convention to awards made in another signatory state).

153. *See* Convention on the Recognition and Enforcement of Arbitral Awards, *supra* note 152 art. 2, June 10 (stating that each signatory state shall agree in writing to arbitrate any differences that arise between them that is capable of settlement by arbitration); *see also* BORN, *supra* note 15, at 21 (outlining the New York Convention's requirements, including national courts' referral of parties to arbitration when an agreement to arbitrate subject to the Convention exists). *See generally* Brower & Sharpe, *supra* note 3, at 648 (discussing the obligations the New York Convention imposes on state parties).

domestic judgments.[154] By virtue of the New York Convention, enforcement of arbitral awards has been made much easier, and jurisdictional problems have been largely eliminated.[155]

Regional multilateral treaties in the Middle East defer to the New York Convention and give it precedence over other conventions concerning foreign arbitral award enforcement. Prior to their accession to the New York Convention, states such as Oman, Qatar, and Saudi Arabia required petitioners seeking enforcement of their foreign arbitral awards to survive domestic court review of the entire merits of the dispute.[156] The foreign award was simply one element of proof of the parties' rights and obligations.

The New York Convention severely restricts the grounds upon which national courts may refuse to enforce foreign arbitral awards.[157] A party can successfully plead for refusal of recognition or enforcement of an arbitral award only if that party can prove to the competent authority of the enforcing state that:[158]

> 1. The parties to the agreement were under some incapacity or the agreement was not valid, under either the applicable law or the law of the country where the award was made;[159]
>
> 2. Proper notice of the appointment of the arbitrator or of the arbitration proceedings was not given to the party against whom the award is invoked, or that party was otherwise unable to present his case;[160]
>
> 3. The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration;[161]

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154. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 (1974) (claiming the purpose of the New York Convention is to encourage recognition and enforcement of commercial arbitration agreements and unify arbitration standards among the signatory states); *see also* Charles N. Brower, Charles H. Brower II & Jeremy K. Sharpe, *The Coming Crisis in the Global Adjudication System*, 19 ARB. INT'L 415, 419 (2003) (noting that the New York Convention governs the recognition and enforcement of foreign arbitral awards).

155. *See* Gemmell, *supra* note 3, at 186 (naming the New York Convention as the document most credited with the enforcement of international arbitral awards); GORDON BLANKE, THE USE AND UTILITY OF INTERNATIONAL ARBITRATION IN EC COMMISSION MERGER REMEDIES 32 (2006) (remarking that the New York Convention guarantees the enforcement of an award in any of the contracting states).

156. *See* Brower & Sharpe, *supra* note 3, at 648 (explaining that prior to the New York Convention, the laws of many Middle Eastern states required a court order from the country in which the award was made to enforce a foreign arbitral award). *See generally* SALEH, *supra* note 105, at 341 (noting that because Qatar had no statutory provisions or judicial precedents for the enforcement of foreign awards, they were previously unenforceable).

157. *See* Convention on the Recognition and Enforcement of Arbitral Awards, *supra* note 152 art. 3 (declaring the binding nature of foreign arbitral awards); *see also* Brower & Sharpe, *supra* note 3, at 648 (describing how the New York Convention limits refusal of foreign arbitral awards); Charles Barwick & James Abbott, *New York Covention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards; United Nations Convention on the Recovery Abroad of Maintenance*, 25 INT'L FIN. L. REV. 75, 75 (2006) (explaining that the Convention sets out limited grounds on which a signatory state may refuse recognition and enforcement of an arbitral award).

158. The following five exceptions are paraphrased from the Convention on the Recognition and Enforcement of Arbitral Awards, *supra* note 152 art. 5, ¶ 1(a)-(e).

159. *See id*. at art. 5, ¶ 1(a).

160. *See id*. at art. 5, ¶ 1(b).

161. *See id*. at art. 5, ¶ 1(c).

> 4. Either the composition of the arbitration authority or the arbitral procedure was not in accordance with the agreement of the parties or was not in accordance with the law of the county where the arbitration took place;[162] or
>
> 5. The award has not yet become binding on the parties or has been set aside or suspended by competent authority.[163]

In addition to these party-invoked exceptions, the New York Convention also authorizes state courts to refuse to enforce arbitral awards "not capable of settlement by arbitration"[164] or "contrary to the public policy of that country."[165] The public policy exception guards against enforcement of an award that offends local principles of justice and fairness in a fundamental way.[166] An arbitral award contrary to the remedial purposes of a statute may be one type of award contrary to public policy.[167] According to the text of the New York Convention, state courts should look to the public policy "of that country" where recognition and enforcement is sought.[168] Though the open-textured nature of "public policy" created an initial fear that the public policy defense would be widely used by national courts to refuse enforcement of foreign

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162. *See id*. at art. 5, ¶ 1(d).

163. *See id*. at art. 5, ¶ 1(e).

164. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 128, at art. 5 2(a) (excluding arbitration awards for inarbitrable subject matters); *see also* Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1070 (1961) (quoting Art. 5(2)(a) of the New York Convention and analyzing its legislative history). *See generally* Michael A. Rosenhouse, *Confirmation of Foreign Arbitral Awards Under Convention on Recognition and Enforcement of Foreign Arbitral Awards*, 194 A.L.R. 291 §14 (2004) (discussing existing case law on arbitrable and inarbitrable subject matters).

165. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 128, art. 5 ¶ 2(b); *see* Am. Constr. Mach. & Equip. Corp. Ltd. v. Mechanised Constr. of Pak., 659 F. Supp. 426, 429 (S.D.N.Y. 1987) (citing Art. V(2)(b), also known as the "public policy defense" of the New York Convention). *See generally* Brette L. Steele, Comment, *Enforcing International Commercial Mediation Agreements as Arbitral Awards Under the New York Convention*, 54 UCLA L. REV. 1385, 1393 (2007) (addressing the New York Convention's limited list of exceptions to the enforcement of arbitral awards, including public policy).

166. *See* Parsons & Whittemore Overseas Co. v. Societe General de l'Industrie du Papier, 508 F.2d 969, 973 (2d Cir. 1974) ("Enforcement of foreign arbitral awards may be denied . . . only where enforcement would violate the forum state's most basic notions of morality and justice."); *see also* Scherck v. Alberto-Culver Co., 417 U.S. 506, 520 n.14 (1974) (citing fraud as possible public policy grounds on which to refuse recognition of a foreign arbitral award). *But see* Kresimir Sajko, *New York Arbitration Convention of 1958 from the Yugoslav Point of View: Selected Issues*, in ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION, 199, 208 (Petar Sarcevic ed., Brill, 1989) (arguing that the New York Convention's public policy defense refers to basic notions of morality and justice of the forum state but not to all the mandatory provisions of the forum state).

167. *See* Paladino v. Avnet Computer Tech., 134 F.3d 1054, 1062 (11th Cir. 1998) (explaining that an arbitration clause is not enforceable if it defeats the remedial purpose of the statute); *see also* M.A. Smith et al., *Arbitration of Patent Infringement and Validity Issues Worldwide* 19 HARV. J.L. & TECH., 302, 303 (2006) (claiming that awards contrary to the remedial purposes of a statute could violate public policy).

168. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 128, art. 5 ¶ 2(b); *cf.* Sajko, *supra* note 166, at 199, 209 (discussing public policy reasons to deny arbitration awards enforcement in Yugoslavia); Thomas D. Halket, *The Use of Technology in Arbitration: Ensuring the Future Is Available to Both Parties*, 81 ST. JOHN'S L. REV. 269, 276–77 (2007) (showing circumstances in which United States public policy would prevent the enforcement of an arbitral award).

awards, subsequent practice has proven that fear to be largely unfounded.[169] In the Middle East, however, exceptions to that generalization may remain as discussed in Part VI.

In the United States, the argument that enforcement of a foreign arbitration award should be denied because it would violate United States public policy has rarely been successful,[170] though it is the most often invoked exception.[171] The enforceability of both foreign arbitral awards and agreements to arbitrate is upheld strongly in the United States.[172] Where non–U.S. parties are involved, arbitration agreements may be enforced "even assuming that a contrary result would be forthcoming in a domestic context."[173] In other words, a liberal federal policy favoring arbitration agreements is in place notwithstanding any state substantive or procedural policies to the contrary.[174] This has resulted in the creation of a body of federal substantive law

169. *See* Kevin C. Kennedy, *Invalidity of Foreign Arbitration Agreement or Arbitral Award,* 31 AM. JUR. PROOF OF FACTS 3d 495 § 22; *see also* Waterside Ocean Nav. Co. v. Int'l Nav. Ltd., 737 F.2d 150, 152 (2d Cir. 1984) (holding that the public policy defense should be narrowly construed). *See generally* Nat'l Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp 800, 817–18 (Del. 1990) (noting the "severe" limitations on the court in confirming or vacating arbitration awards).

170. *See* M/S Bremen v. Zapata Off-Shore Co*.,* 407 U.S. 1, 9–12 (1972) (finding in favor of a forum selection clause despite being contrary to public policy because the choice of forum was negotiated at arm's length by competent parties); *see also* McDermott Int'l Inc. v. Lloyds Underwriters of London, 120 F.3d 585, 588 (5th Cir. 1997) (confirming an arbitral decision pursuant to the New York Convention rather than applying federal law, which may have resulted in overturning the decision); Andrew M. Campbell, *Refusal to Enforce Foreign Arbitration Awards on Public Policy Grounds,* 144 A.L.R. FED. 481, 481 (1998) (outlining in depth the circumstances in which arbitral agreements superceded U.S. policy).

171. *See* Kennedy, *supra* note 169, at § 22; Hong Xiao, *Refusing Recognition of Foreign Arbitral Awards Under Article V(2) of the New York Convention in China: From the Judicial Experience of Europe and U.S.A.,* 2 US-CHINA L. REV. 51, 54 (2005) *available at* www.jurist.org.cn/doc/uclaw200507/uclaw20050707.pdf. *See generally* Peter Sanders, *A Twenty-Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 13 INT. LAW. 269, 271 (1979) (stating that only 3 out of 100 invocations of the public policy defense under the New York Convention have been accepted).

172. *See* McCreary Tire & Rubber Co. v. CEAT S.p.A. 501 F.2d 1032, 1037 (Pa. 1974) (citing 9 U.S.C. § 206) (contending that the federal court may order arbitration of a dispute subject to the New York Convention applies); *see also* Antco Shipping Co., Ltd. v. Sidermar S.p.A., 417 F. Supp. 207, 214 (D.C.N.Y. 1976) (citing Parsons & Whittemore Overseas Co. Inc. v. Societe General de L'Industrie du Papier*,* 508 F.2d 969 (2d Cir. 1974)) (noting that repudiating arbitration agreements due to public policy concerns "was not meant to enshrine the vagaries of international politics under the rubric of 'public policy'"). *But see* Scherk v. Alberto-Culver Co., 417 U.S. 506, 531 n.10 (1974) (citing G.W. Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record United Nations Conference May/June 1958 (1958)) (affirming that an agreement may be found incapable of performance if the agreement is against public policy).

173. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985); *see also* Karen Maritime Ltd. v. Omar Intern. Inc., 322 F. Supp. 2d 224, 226 (E.D.N.Y., 2004) (discussing several cases in which foreign arbitral awards were confirmed despite contravening US policies).

174. *See* Letizia v. Prudential Bache Sec. Inc., 802 F.2d 1185, 1188 (9th Cir. 1986) (holding non-signatories to an arbitration agreement under ordinary contract and agency principles); *see also* Antco, 417 F. Supp. at 214 (admonishing against the failure of American courts to enforce international arbitration agreements). *See generally* Xiaowen Qiu, *Enforcing Arbitral Awards involving Foreign Parties: A Comparison of the United States and China* 11 AM. REV. INT'L ARB. 607, 620 (2000) (highlighting the American jurisprudential trend toward an "international" public policy as opposed to a domestic public policy in agreements governed by the New York Convention).

of arbitrability, applicable to any arbitration agreement within the coverage of the New York Convention.[175]

Similarly, several Middle Eastern countries narrowly construe the public policy defense.[176] Lebanon, for example, has expressly incorporated an exclusively "international public policy" exception in its arbitration laws.[177] Such a move indicates that the public policy defense would be successful only if enforcement of the award is contrary to basic notions of morality and justice in the international community.[178] Other countries, such as Saudi Arabia, remain unclear about the public policy standards that will be invoked upon review during enforcement proceedings.[179] While some prefer the view that international rather than domestic public policy is at issue under the exception,[180] the New York Convention is apparently unambiguous that the public policy applied is that of the country where arbitral enforcement is sought.[181] As such, it appears that the breadth of exception is left to national interpretation.

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175. *See* Parsons & Whittemore Overseas Co., v. Societe General de l'Industrie du Papier, 508 F.2d 969, 973 (2d Cir. 1974) (tracing the legislative history and purpose of public policy defenses to arbitration under the New York Convention). *See generally Karen Maritime,* 322 F. Supp. 2d at 225–28 (referring to multiple cases in which arbitration agreements trumped public policy).

176. *See* Brower & Sharpe, *supra* note 3, at 649 (commenting on the Middle Eastern trend toward construing the New York Convention solely on "international public policy" grounds); *see also* Sami Kallel, *The Tunisian Draft Law on International Arbitration*, 7 ARAB L. Q. 175, 192 (1992) (assessing the meaning of Tunisian international public policy in light of prominent U.S. court decisions that construe the New York Convention's public policy defense narrowly). *See generally* Saleh, *supra* note 135, at 26 (describing elements of the Islamic concept of public policy applied in various countries).

177. Brower & Sharpe, *supra* note 3, at 649 (discussing Middle Eastern states' adoption of "international public policy"). *See generally* Saleh, *supra* note 135, at 27 (describing some elements of the "Islamic concept of public policy").

178. *See generally* MGM Prod. Group, Inc., v. Aeroflot Russ. Airlines, 91 Fed. Appx. 716, 716–17 (2d Cir. 2004) (denying arbitral awards upon the respondent's failure to prove a violation of the forum state's most basic notions of morality and justice)*;* John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 COLUM. J. TRANSNAT'L L. 507, 512–13 (2007) (remarking on the controversy of the New York Convention's public policy defense when the parties in conflict are international as opposed to domestic).

179. *See* EL-AHDAB, *supra* note 77, at 612–13 (providing examples of inarbitrable disputes under Saudi Arabian law); *see also* Kutty, *supra* note 4, at 602–03 (explaining how public order in Saudi Arabia is determined); Michael J.T. McMillen, *Islamic Shari`ah-Complaint Project Finance: Collateral Security and Financing Structure Case Studies*, 24 FORDHAM INT'L L.J. 1184, 1201–02 (2001) (noting the uncertainty of reviewing an award to ensure compliance with the *Shari`a*).

180. *See* SALEH, *supra* note 105, at 271 (2d ed. 2006) (noting that Lebanon uses international public policy when determining whether to set aside an international arbitration award); *see also* Brower & Sharpe, *supra* note 3, at 649); Kutty, *supra* note 4, at 602–03 (stating that some Middle Eastern national courts refuse to recognize foreign arbitral awards contrary to domestic public policy).

181. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 128, at art. 5, ¶ 2(b) (stating that "[r]ecognition 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 . . . the recognition or enforcement of the award would be contrary to the public policy of that country"); *see also* Venture Global Eng'g, LLC v. Satyam Computer Servs., Ltd., 2007 WL 1544160, at *4 (6th Cir. 2007).

Accession to the New York Convention ameliorates reciprocity problems.[182] The New York Convention contains an optional reciprocity reservation that allows a state to limit the application of awards to only those other states which are parties to the New York Convention.[183] Given the widespread acceptance of the New York Convention, reciprocity challenges are losing their relevance.[184] However, the reciprocity requirement has created interesting situations in the past.

In the *Frederick Snow* arbitration,[185] neither Kuwait nor the United Kingdom was party to the New York Convention at the time that a Kuwaiti arbitral award of £3.5 million was made against a British civil engineering firm.[186] Upon acceding to the New York Convention in 1975, the United Kingdom invoked the reciprocity reservation.[187] Enforcement of the arbitral award was therefore not possible until Kuwait acceded to the New York Convention in 1978, at which time the award was successfully enforced.[188]

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182. *See* Brower & Sharpe, *supra* note 3, at 649; *see also* Luiz Gustavo Escorcio Bezerra, *Arbitration in Brazil: New Perspectives for Proceedings Involving Government Entities*, DISP. RESOL. J. 74, 76 (2006) (explaining that Brazil's ratification of the New York Convention allowed its arbitration awards to be enforced in countries that would invoke the reciprocity reservation). *See generally* Kuwait v. Snow (1984) A.C. 426 (H.L.) (U.K) (affirming a Kuwaiti arbitral award against Sir Frederick Snow & Partners and others).

183. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 128 art. 1, ¶ 3 ("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"); *see also* SALEH, *supra* note 105, at 149 (2d ed. 2006) (discussing the reciprocity reservation); Greco & Meredith, *supra* note 7, at 24 (noting that ratification of the New York Convention requires reciprocity between the country where enforcement will occur and the place the award was made).

184. *See* Brower & Sharpe, *supra* note 3, at 649; *see also* Dan. C. Hulea, Note, *Contracting to Expand the Scope of Review of Foreign Arbitral Awards: An American Perspective*, 29 BROOK. J. INT'L L. 313, 322 (2003) (stating that the reciprocity reservation is almost entirely moot given the widespread ratification of the New York Convention); Christine Lecuyer-Thieffry & Patrick Thieffry, *Enforcement of Arbitral Awards: The New York Convention*, THIEFFRY ASSOCIES ¶ 5 (March 28, 2005), *available at* http://www.thieffry.com/articles/new_york_convention.htm (opining that the reciprocity reservation is no longer an obstacle to the enforcement of arbitral awards given the growing number of countries that have acceded to the New York Convention).

185. *See* Kuwait v. Snow (1984) A.C. 426 (H.L.) (U.K).

186. *See* Brower & Sharpe, *supra* note 3, at 649; *see also* Kuwait v. Snow (1983) 1 LLOYD'S REP. 596, ¶ 31 (A.C.) (U.K) (noting that neither Kuwait nor the United Kingdom were parties to the New York Convention at the time of the arbitral award); Thyssen Stahl Union GMBH & ORS v. Steel Authority of India Ltd. (1999) 4 LRI 722, ¶ ¶ 88–89.

187. *See* Brower & Sharpe, *supra* note 3, at 649–50; *see also* Kuwait v. Snow, (1983) 1 LLOYD'S REP. 596, 600 (A.C.) (U.K) (stating that the United Kingdom acceded to the New York Convention and invoked the reciprocity provision, meaning the Convention would only apply to awards made in other contracting states).

188. *See* Brower & Sharpe, *supra* note 3, at 649 (noting that Kuwait was able to enforce the arbitral award in the United Kingdom once both states acceded to the New York Convention).

The ICSID Convention provides for the settlement of disputes between host states and foreign investors through arbitration or conciliation.[189] The ICSID Convention established the International Center for Settlement of Investment Disputes in Washington, D.C.[190] Numerous investment agreements between states and foreign investors contain consent clauses submitting disputes between the parties to the ICSID Center;[191] and hundreds of bilateral investment treaties offer dispute settlement under the ICSID Convention to investors from the respective countries.[192] A number of multilateral treaties also offer ICSID dispute settlement to investors.[193] States party to the ICSID Convention must enforce pecuniary obligations under arbitral awards as if they were a final judgment in a domestic state court.[194] In that the subject

189. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *supra* note 134, Oct. 14, 1966 ("The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention"); *see also* Ibironke T. Odumosu, *The Antinomies of the (Continued) Relevance of the ICSID to the Third World*, 8 SAN DIEGO INT'L L.J. 345, 347–48 (2007) (explaining that the ICSID was established, in part, to "settle foreign investment disputes through arbitration and conciliation"); Wenhua Shan, *Is Calvo Dead?*, 55 AM. J. COMP. L. 123, 139 (2007) (noting that the ICSID Convention aims to provide an international tool to settle disputes).

190. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *supra* note 134, Oct. 14, 1966.

191. See CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY ¶ 11 (Cambridge U. Press 2001), *available at* http://www.dundee.ac.uk/cepmlp/journal/html/schreuer.html; *see also* Katherine E. Lyons, Note, *Piercing the Corporate Veil in the International Arena*, 33 SYRACUSE J. INT'L. L. & COM. 523, 528 (2006) (noting the increase in number of foreign investment contracts that contain clauses submitting disputes to ICSID for arbitration); Antonio R. Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 41 INT'L LAW. 47, 53 (2007) (explaining that the traditional manner of consenting to ICSID was a provision in an investment contract).

192. *See* SCHREUER, *supra* note 191, ¶ 11; *see also* Jennifer M. DeLeonardo, *Are Public and Private Political Risk Insurance Two of a Kind? Suggestions for a New Direction for Government Coverage*, 45 VA. J. INT'L L. 737, 763 (2005) (explaining there are over 900 bilateral investment treaties between states, and the United States is a party to almost all of them); Charity L. Goodman, *Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 U. PA. J. INT'L ECON. L. 449, 473–74 (2007) (stating that as of 2002, most ICSID arbitration cases resulted from bilateral investment treaty provisions).

193. *See* SCHREUER, *supra* note 191, ¶ 11; *see also* Goodman, *supra* note 192, at 461–62 (stating that consent to ICSID arbitration can be accomplished pursuant to certain multilateral treaties); Lyons, *supra* note 191, at 528 (stating that hundreds of bilateral and multilateral investment treaties offer ICSID dispute resolution).

194. *See* Convention of the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 134, at art. 54, Aug. 27, 1965 (stating that awards must be treated not only as if they were issued by the state's court but also enforced through the state's court system); *see also* Ronald A. Brand, *Instruments Governing International Arbitration: Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, ¶ 8, 2 BASIC DOCUMENTS OF INT'L ECON. L. 947 (1991) (explaining that contracting parties to the convention must abide by an arbitral award as if it were issued by their own state court); *France: Court of Appeals of Paris Judgment Concerning Recognition and Enforcement of Award in Context of ICSID Convention*, ¶ 23, 20 INT'L LEGAL MATERIALS 877 (July 1981) (acknowledging that the awards promulgated under the convention are binding as final decisions issued by the court of the state).

matter is confined to "investment disputes," the ICSID Convention is of more limited significance than the New York Convention.[195]

V. Comparative Analysis of International and Islamic Arbitral Systems

Arbitration goes far back in the history of the Middle East. While the practice is certainly an acceptable form of dispute resolution in the region, it evolved separately from the Western model.[196] Consequently, there are significant differences between Middle Eastern and Western notions of arbitration.[197] The following comparative analysis of those two views will follow five broad headings: (1) the nature of arbitration; (2) the scope of arbitration; (3) the rules governing arbitration; (4) choice of law for the underlying dispute; and (5) scope of judicial review. Under each heading, where relevant, the article discusses the views of different Islamic jurisprudential schools.

The nature of arbitration refers to the anticipated effect an arbitral decision will have on the parties involved.[198] A settled characteristic of arbitration in the West is its binding nature;[199] the parties are legally bound by the decision of the arbitrator. In Islamic jurisprudence, the debate surrounding the question of whether *tahkim* is more than simple conciliation continues.[200] The potential for misunderstanding based on the difference between Western and

195. *See* Convention of the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 134, art. 25, Aug. 27, 1965 (stating that the jurisdiction is only to legal disputes relating to an investment between a contracting state and a national of another contracting state); *see also* Al-Baharna, *supra* note 128, at 336 (explaining that the ICSID Convention is limited to "investments disputes," and therefore it is more narrow in its applicability than the New York Convention); Ramona Martinez, Comment, *Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The Refusal Provisions*, 24 INT'L LAW. 487, 491 (1990) (reiterating that the ICSID Convention only applies to one form of international arbitration arising out of investment disputes).

196. *See* Henry P. De Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 43–45 (1982) (explaining that arbitration has long been a favored means of resolving disputes among organized commercial groups in the West); *see also* Kassir, *supra* note 4, at 548 (stating that arbitration evolved in the Middle East for both sociological and religious reasons); Kutty, *supra* note 4, at 577–90 (illustrating how arbitration in the Middle East developed from a form of tribal justice to a means of resolving disputes influenced by Islamic principles).

197. *Compare* Saleh, *supra* note 135, at 29 (outlining the religious background to rules governing subject-matter arbitrability used by several Middle Eastern nations); *with* De Vries, *supra* note 196, at 43–45 (showing that Western arbitration was traditionally considered a commercial dispute resolution mechanism, governed only by secular arbitration institutions). *See generally* Brower & Sharpe, *supra* note 3, at 656 (recognizing "progress at every level" in that Middle Eastern nations increasingly accept what is considered the "international" notion of arbitration).

198. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 8 (2d ed. 2001) (acknowledging that perceptions of bias in international commercial arbitration impede the enforcement of arbitral awards); *see also* Martinez, *supra* note 195, at 488 (claiming that avenues for the successful enforcement of arbitral awards are necessary for international arbitration to be effective).

199. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 128, art. 3 (stating that contracting states must recognize and enforce arbitral awards as binding on the parties); *see also* BORN, *supra* note 198, at 1 (stressing that a hallmark of arbitration is a binding award that is enforceable in national courts).

200. *See* Sayen, *supra* note 94, at 934 (stating the different positions of the *Sunni* schools on the binding effect of *tahkim*); *see also* Ifrah Zilberman, *The Future of Jerusalem: A Symposium: Palestinian Customary Law in the Jerusalem Area*, 45 CATH. U. L. REV. 795, 802 (1996) (referring to *tahkim* as a conciliation process). *See generally* Alqurashi, *supra* note 95, ¶ 2 (stating that *tahkim* is a method for the settlement of disputes).

Middle Eastern assumptions regarding the nature of arbitration is significant.[201] Clearly, each party bound by an arbitration clause should understand the consequences of agreeing to submit the dispute to an arbitrator.[202]

The nature of arbitration during the Pre-Islamic period was not uniform.[203] An arbitral award during this era was not binding if either of the parties contested it, unless an outside authority—such as local government—or other means of coercion was in place.[204] As stated in Part III, arbitrating parties sometimes used a security at the outset of arbitration to ensure a measure of compliance with the arbitral award. This is not to say that all arbitration during this period was nonbinding unless a security was present.[205] For example, awards of arbitrators appointed in the *Ukaz*, a fair held periodically in Mecca, were binding on the parties.[206] The nature of arbitration during the Pre-Islamic period therefore varied greatly and could depend on several factors.

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201. *See* Saleh, *supra* note 135, at 29 (recognizing the differences in Middle Eastern countries relating to what subjects are arbitrable and what religious law, if any, may apply); Kassir, *supra* note 4, at 546 (citing several oil concession arbitration cases as the root of a Middle Eastern impression that international arbitration was used to fit the needs of Western nations).

202. *See generally* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 128, art. 1–3 (detailing the arbitral provisions to which the signatory parties are bound under the convention); Convention of the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 134, art. 44, Aug. 27, 1965 (describing the results of a dispute arbitrated under the convention); Abby Cohen Smutny, *Arbitration Before the International Centre for Settlement of Investment Disputes*, 1 TRANSNAT'L DISP. MGMT. ¶ 3 (2004) (illustrating that arbitral disputes subject to the ICSID Convention are governed only by the convention's provisions and law and are binding decisions).

203. *See* LAWRENCE I. CONRAD, THE FORMATION OF ISLAMIC LAW, 30 (2004) (explaining that during the pre-Islamic era arbitration was governed by each tribe's customs, resulting in non-uniformity throughout the Middle East); Sayen, *supra* note 94, at 923 (stressing that pre-Islamic societies were dissociated in tribal sectors, each governed by their own system of arbitration).

204. *See* CONRAD, *supra* note 203, at 30–31 (stating that the decision of a tribal arbitrator was not an enforceable judgment unless a security guaranteed its execution); *see also* N.J. COULSON, A HISTORY OF ISLAMIC LAW 10 (1964) (illustrating that pre-Islamic arbitration not governed by an appointed official was not directly enforceable); Rashid, *supra* note 87, at 102 (explaining that during the tribal period, the arbitral award could not be enforced if one of the parties contested it unless the chief used his authority to do so).

205. *See* HALLAQ, *supra* note 20, at 35–36 (explaining that although arbitration verdicts during the tribal era were not binding, participants often adhered to the rulings of the arbitrator); *see also* Alqurashi, *supra* note 95, ¶ 5 (stating that arbitral awards of this period were not binding unless participating parties made a prior agreement). *See generally* W.M. BALLANTYNE, ESSAYS AND ADDRESSES ON ARAB LAWS 34 (2000) (recognizing that enforcing an arbitral award without state support fell heavily on the individual in a tribal society).

206. *See* Rashid, *supra* note 87, at 102 (stating that arbitral awards issued at the fair in Mecca were binding). *See generally* BALLANTYNE, *supra* note 205, at 34 (acknowledging that the fair in Mecca evidenced a starting point for modern commercial law with arbitration); COULSON, *supra* note 204, at 10 (illustrating that public arbitrators in Mecca worked within a basic legal system).

There is no consensus among the four leading *Sunni* schools on the issue of whether an arbitral decision is binding on the parties.[207] *Hanafi* teachings hold that arbitration is close to compromise,[208] but the school's views are not easily classified into this limited category.[209] *Hanafi fiqh* stresses the contractual nature of the arbitration agreement.[210] *Hanafi fiqh* suggests that arbitration is closer to conciliation, though some jurists have held that an arbitrator has the same function as a judge.[211] Arbitral awards under *Hanafi*-influenced legal systems are characterized by the use of subjective opinions, and arbitral awards more closely approximate conciliation than court judgments.[212] *Hanafi fiqh* permits more cases to proceed under arbitration than do other schools, but arbitration in cases involving certain crimes is prohibited.[213] *Hanafi fiqh* holds that arbitration legally resembles agency and compromise.[214]

Shafi`i* teachings, similar to those of the *Hanafi* school, hold that arbitration closely resembles compromise.[215] Under *Shafi`i fiqh, disputes may require judicial intervention where

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207. *See* EL-AHDAB, *supra* note 77, at 16–17 (2d ed.) 1999 (distinguishing the two basic views dividing the *Sunni* schools on whether arbitration is binding); *see also* SALEH, *supra* note 105, at 17 (2d ed.) 2006 (outlining the four *Sunni* schools' viewpoints on arbitration and the conflicting consensus on whether arbitral awards are binding); Abdul Razzaq Abdullah, *Concept Comparatively Cost-Effective, Swift and Unproblematic; Kuwait Law Recognizes Arbitration*, ¶ 2.1, ARAB TIMES ONLINE, *available at* http://www.arabtimesonline.com/client/faqdetails.asp?faid=151&faqid=9 (explaining that the four leading *Sunni* schools hold different viewpoints on the concept of arbitration).

208. *See* EL-AHDAB, *supra* note 77, at 18, 2d ed. 1999 (stating that *Hanafi fiqh* views arbitration as legally analogous to compromise); *see also* SALEH, *supra* note 158, at 17, 2d ed. 2006 (stressing that the *Hanafi* school sees a close connection between the concepts of arbitration and compromise).

209. *See* Kutty, *supra* note 4, at 597 (explaining that although *Hanafi* scholars hold arbitration closer to conciliation, some jurists believe that an arbitrator is more like a judge).

210. *See* Gemmell, *supra* note 3, at 175 (noting that *Hanafi* scholars emphasize the contractual nature of arbitration). *But see* Rashid, *supra* note 87, at 104 (indicating that followers of the *Hanafi* school view an arbitral award as binding only if the parties so agree).

211. *See* EL-AHDAB, *supra* note 77, at 19, 1990 (discussing the view held by those who see arbitration as conciliation and that the arbitrator is a delegate of the judge); *see also* Gemmell, *supra* note 3, at 175 (describing the close connections between arbitration and conciliation and arbitrator and judge); Kutty, *supra* note 4, at 597 (affirming the close relationship between arbitration and conciliation).

212. *See* Gemmell, *supra* note 3, at 175 (stating the view that subjective opinions are characteristic of *Hanafi* arbitral awards); *see also* Rashid, *supra* note 87, at 104 (concluding that because arbitral awards lack binding effect unless otherwise agreed upon by the parties, the award is less like a court judgment). *But see* Kutty, *supra* note 4, at 598 (discussing the similar binding effect of a court judgment and arbitral award).

213. *See* Gemmell, *supra* note 3, at 175 (stating that the "Hanafi school permits more cases to go to arbitration than do other schools."); *see also* Rashid, *supra* note 87, at 104 (describing the types of crimes excluded from arbitration).

214. *See* EL-AHDAB, *supra* note 77, at 20 (stating that "Hanafi fiqh holds that arbitration is legally quite close to agencies and compromise"); *see also* Rashid, *supra* note 87, at 104 (stating that "Hanafi holds arbitration very close to compromise").

215. *See* EL-AHDAB, *supra* note 77, at 49 (discussing the opinion attributed to Imam Shafi`i that the agreement of the parties is the binding force behind arbitral awards); *see also* Gemmell, *supra* note 3, at 175 (describing the similarities between the *Shafi`i* School and the *Hanafi* School); Rashid, *supra* note 87, at 104 (stating that *Shafi`i* teachings hold arbitration is similar to compromise).

conflicting parties contest an arbitral award.[216] Although the *Shafi`i* view holds that an arbitral award is equally as enforceable as a judge's judgment, the arbitrator has no authority to effect its enforcement.[217] Furthermore, unlike a judge's appointment, under *Shafi`i fiqh* an arbitrator's appointment is revocable.[218] These factors suggest that *Shafi`i* jurisprudence confers less authority to arbitral decisions than other schools.

Both *Maliki* and *Hanbali* schools of Islamic jurisprudence hold the view that arbitral decisions are binding unless there is a "flagrant injustice."[219] *Hanbali* jurists believe than an arbitral award has the same binding effect as a court judgment.[220] Because the decision of an arbitrator is binding, awards have a *res judicata* effect on both parties.[221] *Hanbali fiqh* stresses the qualifications of arbitrators; and arbitrators must have the same qualifications as a judge.[222] *Maliki fiqh* displays the same confidence in arbitration, even allowing one of the disputants to serve as an arbitrator if chosen by the other party.[223]

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216. *See* EL-AHDAB, *supra* note 77, at 20 (explaining that judges have higher status than arbitrators); *see also* Abdul Hamid El-Ahdab, *The Moslem Arbitration Law,* 1 ARAB COMP. & COM. L. 342 (1987) (referring to the lesser role and status held by arbitrators compared to judges); Gemmell, *supra* note 3, at 176 (describing the subsidiary status of arbitrators compared to judges).

217. *See* Rashid, *supra* note 87, at 104 (discussing how the status of an arbitrator is less than that of a judge under the *Shafi`i* school); Alqurashi, *supra* note 95, ¶ 5.5 (noting that most *Shafi`i* scholars hold an arbitral award to be as enforceable as a judicial judgment).

218. *See* Kutty, *supra* note 4, at 598 (explaining that arbitrators' appointments can be revoked); EL-AHDAB, *supra* note 101, at 342 (referring to the fact that an arbitrator can be removed whereas a judge can not). *See generally* MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION LAW 215 (1990) (stating that under "Islamic Law" an arbitrator's position can be revoked until it is confirmed by a judge).

219. *See* EL-AHDAB, *supra* note 77, at 21, 1990 (explaining that *Maliki* doctrine renders an arbitral decision binding unless it is flagrantly unjust); Rashid, *supra* note 87, at 104 (stating that *Maliki* and *Hanbali* jurisprudence hold an arbitrator's decision as binding "unless it contains a flagrant injustice").

220. *See* El-Ahdab, *supra* note 216, at 342 (describing the *Hanbali* view that an arbitrator's decision is binding, just as a judge's decision); Gemmell, *supra* note 3, at 176 (expressing that under the *Hanbali* school, an arbitrator's decision is just as binding as a court's judgment).

221. *See* EL-AHDAB, *supra* note 77, at 19 (referring to the binding character of arbitral decisions); *see also* Alqurashi, *supra* note 95, ¶ 4.1 (describing the similar binding nature of an arbitral ruling and a court judgment under the *Hanbali* school).

222. *See* EL-AHDAB, *supra* note 77, at 19 (stating that an arbitrator must have the same qualifications as a judge); Alqurashi, *supra* note 95 (describing the qualifications of an arbitrator as the same as those required of a judge).

223. *See* El-Ahdab, *supra* note 216, at 342 (referring to the trust held by the *Maliki* doctrine in arbitration); Gemmell, *supra* note 3, at 175 (stating that one of the disputants can be chosen as the arbitrator).

The Ottoman Turks, influenced by the civil law tradition, attempted to codify *Hanafi fiqh*.[224] Those provisions confirmed the conciliatory nature of arbitration.[225] Because judges could set aside arbitral awards, the Ottoman legal provisions gave less force to arbitral awards than court judgments.[226] However, Ottoman laws did note that arbitral decisions would be binding on the parties just as a contract would be binding under *Shari`a*.[227]

Middle Eastern perception of the nature of arbitration has clearly evolved over the span of arbitral practice in the region.[228] Although the view equating arbitration with conciliation was once predominant in Middle Eastern legal systems,[229] as evidenced by the codification of that appraisal by the Ottomans, the flexible nature of *Shari`a* has generated alternative views.[230] In Saudi Arabia, for example, the binding character of arbitral decisions is the preferred viewpoint.[231] The Saudi position, supported by the *Hanbali* school, allows for the adoption of the current international approach to arbitration.[232] Though *Shari`a* influenced legal systems have historically favored approaching arbitration as conciliatory in nature, some Islamic jurispru-

224. *See* Oussama Arabi, *Contract Stipulations (Shurut) in Islamic Law: The Ottoman Majalla and Ibn Taymiyya*, 30 INT'L J. OF MIDDLE EAST STUD. 29, 30 (1998) (explaining that the *Majalla* was essentially a codification of the traditionally favored *Hanafi* school of law and Ottoman civil laws); *see also* Enid Hill, *Al-Sanhuri and Islamic Law: The Pace and Significance of Islamic Law in the Life and Work of 'Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895–1971*, 3 ARAB L.Q. 33, 34 n. 1 (1988) (noting that the *Majalla* drew mainly from *Hanafi* sources).

225. *See* Kutty, *supra* note 4, at 598 (2006); *see also* Sayen, *supra* note 94, at 932 (describing the primary attempt of conciliation as an objective of the *hakam*); *cf.* Nicholas B. Angell & Gary R. Feulner, *Arbitration of Disputes in the United Arab Emitrates*, 3 ARAB L.Q. 19, 19 (1988) (expressing there was no distinction between conciliators and arbitrators).

226. *See* Kutty, *supra* note 4, at 598 (claiming that the Turks held court judgments to be of greater force than arbitral awards because a judge could not set them aside); *see also* HALLAQ, *supra* note 20, at 35–36 (suggesting the *hakams*' involvement in the law to be lesser than a *qadi*'s, or judge's).

227. *See* Sayen, *supra* note 94, at 936 (articulating the obligation of the parties to the decision of a *hakam*); Timur Kuran, *The Economic Ascent of the Middle East's Religious Minorities: The Role of Islamic Legal Pluralism*, 33 J. LEGAL STUD. 475, 487 (2004) (explaining that a binding decision required the court). *But see* HALLAQ, *supra* note 20, at 35–36 (establishing that a verdict by an arbitrator was not binding).

228. *See* Yahya Al-Samaan, *The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia*, 9 ARAB L.Q. 217, 221 (1994) (noting that Saudi Arabia shifted its attitude toward arbitration as a means of dispute settlement); *see also* Brower & Sharpe, *supra* note 3, at 643 (positing that in relation to the "Islamic world," international arbitration has passed through two phases and is well into a third); Saleh, *supra* note 70, at 200 (claiming that, in all, there is a trend in pro-arbitration legislation).

229. *See* Angell & Feulner, *supra* note 225, at 19 (finding that formally, there is no distinction among conciliators, arbitrators, and judges); *see also* Saleh, *supra* note 70, at 199 (claiming that conciliation-like compromises are commonly confused with arbitration by "amiable composition"); Sayen, *supra* note 94, at 929 (explaining that early arbitration resembled conciliation).

230. *See* DAVID F. FORTE, STUDIES IN ISLAMIC LAW 29 (1999) (stating that in states applying portions of Islamic law, *Shari`a* is varied in enforcement as the society requires); *see also* YVONNE YAZBECK HADDAD & BARBARA FRYER STOWASSER, ISLAMIC LAW AND THE CHALLENGES OF MODERNITY 10 (2004) (establishing several differing religious views in relation to the application of *Shari`a*).

231. *See* Al-Samaan, *supra* note 228, at 218 (explaining that Saudi Arabia chose international arbitration as a method for dispute resolution prior to the 1950 oil concession agreements); *see also* Kutty, *supra* note 4, at 598 (claiming that Saudi Arabia views arbitration as binding).

232. *See* Saleh, *supra* note 135, at 21 (claiming that Saudi Arabia adheres to the enforcement of arbitral awards and procedure); *cf.* W.M. Ballantyne, *The States of the GCC: Sources of Law, the Shari`a and the Extent to Which It Applies*, 1 ARAB L.Q. 3, 4 (1985) (stating that Saudi Arabia applies the *Hanbali* school of Islamic jurisprudence).

dential schools and most, if not all, Middle Eastern national legal systems stand by international arbitral norms insofar as the nature of arbitration.[233]

The scope of arbitration identifies which subjects are arbitrable.[234] The idea of excluding certain categories of disputes from arbitration is present in both Western and Middle Eastern legal systems.[235] The New York Convention permits refusal of recognition or enforcement of a foreign arbitral award if the subject matter is not capable of settlement by arbitration under the laws of the country where enforcement is sought.[236]

The practice of international commercial arbitration is particularly affected when differences among jurisdictions regarding matters considered within the scope of arbitration lead to variation in enforcement of foreign arbitral awards.[237] These differences surface when arbitration agreements properly reached in one jurisdiction are deemed void *ab initio* or excluded as contrary to public policy when the parties seek foreign enforcement.[238] Part VI discusses those related public policy issues. While public policy may affect a state court's decision on whether a matter is capable of being subject to arbitration, the scope of arbitration and public policy are nevertheless two separate issues.[239]

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233. *See* Brower & Sharpe, *supra* note 3, at 650–51 (noting the "wave of modernization" in that Middle Eastern states now incorporate laws that "go beyond the requirements" of the New York Convention, thus making arbitral awards "even easier to enforce."); *see also* Kutty, *supra* note 4, at 593 (explaining the current trend of growth and promotion of arbitral adjudicatory systems throughout the Middle East).

234. *See* Al-Samaan, *supra* note 228, at 223 (explaining that arbitration in Saudi Arabia is not allowed in criminal matters, personal status matters, administrative law matters, and matters explicitly prohibited by *Shari`a*). S*ee generally* BORN, *supra* note 198, at 6 (articulating that certain kinds of disputes are "non-arbitrable").

235. *See* Robert Donald Fischer & Roger S. Haydock, *International Commercial Disputes Drafting an Enforceable Arbitration Agreement,* 21 WM. MITCHELL L. REV. 941, 957–58 (1996) (listing areas of law ineligible for arbitration, including antitrust, matrimonial, bankruptcy, and criminal); *see also* Angell & Feulner, *supra* note 225, at 19–20 (claiming that sanctioned arbitration outside of the *Shari`a* principles has been adopted from Western legal sources).

236. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 128, art. 5, ¶ 2(a).

237. *See* Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 973 (2005) (explaining that courts have an "intentionally minimal role" in reviewing final arbitral awards to prevent national courts from usurping the decision making power of arbitrators).

238. *See* Angell & Feulner, *supra* note 225, at 23 (explaining that strong public policy bars certain issues from being heard by private arbitrators); *see also* Brower & Sharpe, *supra* note 3, at 651 (stating that Middle Eastern states have rejected foreign awards on domestic public policy grounds).

239. *See* United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 43 (1987) (announcing that courts are free to deny enforcing collective bargaining agreements where provisions in the agreement clearly violate public policy); *see also* Ansonia v. Stanley, 854 A.2d 101, 113 (Conn. Super. Ct. 2004) (referring to the traditional idea that an arbitrator's authority can be challenged only where his actions or award are in direct conflict with public policy); Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come,* 52 BAYLOR L. REV. 781, 873 (2000) (discussing how explicit and well-defined public policies have been used to vacate arbitral awards).

There is no unanimity among the Islamic jurisprudential schools on the exact types of disputes within the scope of arbitration.[240] Notably, however, the four *Sunni* schools share the view that arbitration is applicable primarily in financial matters.[241] Islamic law excludes certain categories of crimes from being capable of settlement by arbitration.[242] Those categories of exclusions have limited application in international business disputes.[243] Practical concerns about the scope of arbitrability in international commercial arbitration are peripheral because disputes usually revolve around finances and property.[244]

In the United States, doubts concerning the scope of arbitrable issues are generally resolved "in favor of arbitration."[245] The Supreme Court of the United States has found no reason to depart from that guideline even where a party raises claims founded on statutory rights, unless Congress "evinced an intention" to preclude a waiver of judicial remedies for the statutory rights at issue.[246] Concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in dispute resolution were cited as reasons for enforcement of arbitration agreements.[247]

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240. *See* Kutty, *supra* note 4, at 598–601 (discussing the scope of arbitration within Islam).

241. *See* Gemmell, *supra* note 3, at 180 (noting that the four *Sunni* schools of Islamic jurisprudence and the *Mejella* hold arbitration is most appropriate in financial matters); *see also* Kutty, *supra* note 4, at 599. *See generally* Kuran, *supra* note 227, at 486 (asserting that the four *Sunni* schools generally agree on the applicability of arbitration in financial matters).

242. *See* Kutty, *supra* note 4, at 599–600 (stating that in Saudi Arabia, a category of crimes—including murder and robbery—not subject to mediation are similarly not subject to arbitration).

243. *See* Kutty, *supra* note 4, at 599 (explaining that matters relevant to international arbitration are generally within the scope of arbitration).

244. *See* Kutty, *supra* note 4, at 599 (stating that the four *Sunni* schools view arbitration is appropriate in matters of finance and property). *See generally* Al-Samaan, *supra* note 228, at 217 (discussing the importance of arbitration agreements for business disputes arising from foreign investment).

245. *See* 9 U.S.C.A. § 2 (1947) (requiring disputes in any maritime transaction or other commercial transaction involving an arbitration agreement to be settled according to that agreement); *see also* Mitsubishi v. Soler, 473 U.S. 614, 626 (1985); Krista L. Klett, *A Discussion of the Proper Forum for Resolving Arbitral Clause Disputes in Dockser v. Schwartzberg*, 6 J. AM. ARB. 55, 59 (2007) (recognizing the Supreme Court's pro-arbitrability policy).

246. *See Soler*, 473 U.S. at 628; *see also* Mara Kent, *"Forced" v. Compulsory Arbitration of Civil Rights Claims*, 23 LAW & INEQ. 95, 101 (2005) (reiterating that a party to a statutory claim within the scope of an arbitral agreement will be held to it unless Congress evinced an intention to prohibit a waiver of judicial remedies for the statutory rights at issue). *See generally* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (holding that arbitration agreements have been enforced in claims arising under the Sherman Act, Securities Exchange Act of 1934 and others).

247. *See Soler*, 473 U.S. at 629 (stressing the need to enforce arbitration agreements to ensure predictability in the resolution of international commercial disputes). *See generally* Scherk v. Alberto-Culver Co., 417 U.S. 506, 507 (1974) (holding that previously agreed-upon contractual provisions specifying the forum for litigation are essential to any international business contract); William S. Fiske, *Should Small and Medium-Size American Businesses "Going Global" Use International Commercial Arbitration?*, 18 TRANSNAT'L LAW. 455, 485 (2005) (addressing the emergence of international commercial arbitration to provide fair and predictable alternatives to national courts).

Quranic injunctions do not permit any law to be recognized except for *Shari`a*.[248] Choice of law simply does not exist when it comes to *Shari`a*, according to *fiqh* rules.[249] *Shari`a* categorizes both the regulations governing the arbitral proceeding and the choice of law for the underlying dispute as inapplicable foreign laws.[250] In certain Middle Eastern states, arbitrating parties were limited in their ability to select the law governing their disputes, thus undermining the important principle of party autonomy.[251] Examples of state-imposed legal rules, both procedural and substantive, were common in significant Middle Eastern jurisdictions.[252] However, most Middle Eastern jurisdictions currently strive to give "the widest effect" to the contractual provisions agreed upon by the parties,[253] and the trend is certainly in favor of less-restrictive choice of law rules.[254]

Public policy is uniquely influenced by religious and historical considerations in the Middle East.[255] The difference between a Middle Eastern nation's public policies and "international" norms corresponds with the spectrum described above,[256] which tracks the influence of

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248. *See Quran* 5:49 (teaching to "[j]udge between them by what God has revealed and follow not their vain desires"); *see also* Kutty, *supra* note 4, at 614 (emphasizing that *Quranic* injunctions urge followers to settle disputes as God has revealed).

249. *See* Kutty, *supra* note 4, at 614 (contrasting the flexibility of the ICC arbitration choice of law rules against fixed *fiqh* rules).

250. *See* Kutty, *supra* note 4, at 614 (noting dismissal of Western conflict of law principles by those courts that strictly apply *Shari`a*); *see also* Turck, *supra* note 70, at 3 (explaining that Saudi courts often impose their own laws even when commercial disputes necessitate the application of foreign laws).

251. *See* Brower & Sharpe, *supra* note 3, at 652 (noting the negative impact on party autonomy resulting from the inability to choose the law governing arbitration).

252. *See* Brower & Sharpe, *supra* note 3, at 652 (explaining that past arbitrations in Bahrain required the application of substantive and procedural Bahraini law to all contractual disputes unless the parties agreed unanimously that a foreign law was applicable); *see also* Kutty, *supra* note 4, at 614 (citing the Syrian and Libyan civil codes, which call for application of *Shari`a* in the absence of other legal provisions). *But see* Kassir *supra* note 4 at 561 (noting Lebanon's adherence to international arbitration norms in all circumstances).

253. *See* Turck, *supra* note 70, at 180 (highlighting the progress of Middle Eastern states in accepting various international arbitral agreements or implanting their own arbitration laws); *see also* Kassir *supra* note 4, at 549 (noting the positive trends regarding international arbitration in Middle Eastern countries).

254. *See* Hoda Atia, *Egypt's New Commercial Arbitration Framework: Problems and Prospects for the Future of Foreign Investment*, 5 INT'L. TRADE & BUS. L. ANN 1, 6 (2000) (stating that the United Nations Commission on International Trade Law developed a model law for international arbitration in developing countries to limit the intervention of local courts); *cf.* Mark S. Hamilton, *Sailing in a Sea of Obscurity: The Growing Importance of China's Maritime Arbitration Commission*, 3 ASIAN-PAC. L. & POL'Y J. 10, 21 (2002) (noting that China's Maritime Arbitration Commission allows parties seeking arbitration to choose the applicable law). *See generally* J.P. Van Niekerk, *Aspects of Proper Law, Curial Law and International Commercial Arbitration*, 2 S. AFR. MERCANTILE L.J. 117, 117 (1990) (showing that international contract disputes are increasingly being settled through arbitral proceedings rather than by national courts).

255. *See* IRA SHARKANSKY, RITUALS OF CONFLICT: RELIGION, POLITICS, AND PUBLIC POLICY IN ISRAEL 101 (Lynne Rienner Publishers 1996) (revealing the inseparable nature of religious and secular issues in Israel); *see also* Amir H. Koury, *Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks*, 43 J.L. & TECH. 151, 2001 (2003) (claiming that many Middle Eastern countries do not separate religion and politics).

256. *Supra* Part II.

common law, civil law, and Islamic law on national legal systems.[257] As "international" legal principles continually impress Middle Eastern national law, public policy values will similarly align.[258]

As previously stated, according to *fiqh* rules, the freedom to choose the applicable law of a contract does not exist.[259] *Quranic* injunctions urge believers to have their disputes judged by "what God has revealed."[260] This notion explains why Saudi Arabian courts set aside conflict of law principles and instead apply domestic law.[261] In other Middle Eastern jurisdictions, two approaches to the choice of law are applied when disputants are faced with arbitration.[262] The choice between the two alternatives depends on whether the state adheres to the *Shari`a* requirement of arbitration or whether the state has bifurcated its religious and secular civil codes.[263] For example, the Yemeni arbitration acts require the arbitrator to apply the law cho-

257. *See* VOGEL, *supra* note 21, at 4 (emphasizing that the law of the land is the *Shari`a*); *see also* Ann Elizabeth Mayer, *Religious Law and Legal Pluralism*, 12 CARDOZO L. REV. 1015, 1029 (1991) (recognizing that some governments turn to Islamic ethics to rectify legislation). *See generally* Jacques du Plessis, *Common Law Influences on the Law of Contract and Unjustified Enrichment in Some Mixed Legal Systems*, 78 TUL. L. REV. 219, 221 (2003) (portraying the influence of the common law on the law of contracts).

258. *See* Donboli & Kashefi, *supra* note 127, at 421 (stating that some Middle Eastern countries replaced Islamic laws with European codes); Elizabeth Mayer, *Conundrums in Constitutionalism: Islamic Monarchies in an Era of Transition*, 1 UCLA J. ISLAMIC & NEAR E. L. 183, 190–91 (2002) (noting that the Saudi system has adopted some Western laws); *see also* Kassir *supra* note 4, 550 (listing efforts made by international organizations, expansion of worldwide investments, and increased liberalization of economies as reasons why arbitration has found increased favor in developing countries).

259. *See* Nat'l Group for Commc'n & Computers Ltd. v. Lucent Tech. Int'l Inc., 331 F. Supp. 2d 290 (2004) (D. N.J.) (holding that arbitral proceedings in Saudi Arabia are governed by Islamic law); *see also* Kutty, *supra* note 4, at 614 (stating that the rules of *Shari`a* prohibit parties from choosing another governing law in a dispute).

260. *See Qur`an* 4:60, 5:49 (encouraging Muslims to use the *Quran* as God's word in deciding disputes among one another); *see also* JOHN BURTON, THE SOURCES OF ISLAMIC LAW: ISLAMIC THEORIES OF ABROGATION 9 (Edinburgh University Press 1990) (establishing that God directly gave his word of law to the Muslims to be treated as the sole source of all authority).

261. *See* Kutty, *supra* note 4, at 614 (stating that Saudi courts will not recognize Western conflict of law principles); *see also* David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 VA. J. INT'L L. 819, 869–70 (1993) (distinguishing Islamic law from Western law based on an absence of Islamic international law). *See generally* David J. Karl, Note, *Islamic Law in Saudia Arabia: What Foreign Attorneys Should Know*, 25 GEO. WASH. J. INT'L L. & ECON. 131, 134 (2002) (proclaiming that Islamic law differs from common and civil law in that it governs all aspects of life, from religion to the legal system).

262. *See* W.M. Ballantyne, *The Middle East*, 3 INT'L BUS. LAW. 383, 384 (1975) (explaining that there is no one law in the Middle East given the law actually revolves around both the *Shari`a* and the civil and commercial laws); *see, e.g.*, Brenda Oppermann, *The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa, and the United States*, 17 HASTINGS WOMEN'S L.J. 65, 68 (2006) (labeling Egypt as a prime example of a dual legal system that applies both the Western-inspired national law and the Islamic personal law). *See generally* Michael J.T. McMillen, *Contractual Enforceability Issues: Sukuk and Capital Markets Development*, 7 CHI. J. INT'L L. 427, 446 (2007) (stating that certain nations will allow a choice of law in the contract itself in order to avoid confusion).

263. *See* Gemmell, *supra* note 3, at 182 (stating that throughout the Middle East, some courts may adhere to the *Shari`a* requirements of arbitration while others may apply secular codes); *see also* Justus Reid Weiner, *Palestinian Christians: Equal Citizens or Oppressed Minority in a Future Palestinian State*, 7 OR. REV. INT'L L. 26, 140 (2005) (noting that throughout the Palestinian territories, both *Shari`a* and secular democratic law are applied in parallel).

sen by the parties,[264] a notable leniency in a country reputed to be among the more religiously conservative in the Middle East.[265] Whether there are ways to comply with *Shari`a* principles while ensuring that parties can exercise their contractual freedom in determining the choice of law for either the arbitral proceeding or the underlying dispute is an area that needs further scholarship.[266] It is likely that state views on this subject depend on whether "conservative" or "progressive" positions are used with regard to *Shari`a* application.[267]

One of the advantages of international commercial arbitration is the freedom that parties have to negotiate their choice of law provisions.[268] Where arbitral clauses do not specify the commercial principles governing a dispute, arbitrators are forced to evaluate foreign legal provisions and cultural differences in determining an equitable settlement.[269] In cases where Islamic issues or parties are in dispute, Middle Eastern cultural differences must be considered in any interpretation of contract formation and negotiation.[270]

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264. *See* Gov't of the State of Eritrea v. Gov't of the Republic of Yemen, 40 ILM 900 (2001) (illustrating the process of enforcing an arbitration agreement signed between two parties in Yemen). *See generally Arbitration Court Used in Yemen to Settle Tribal Disputes*, 9 WORLD ARB. & MEDIATION REP. 8, 8 (1998) (displaying the Yemeni government's pro-arbitration attitude in other areas).

265. *See* Gemmell, *supra* note 3, at 169 (commenting that Yemen is affording parties to an arbitral dispute the right to choose the governing law); *see also* Mohamed Y. Mattar, *Unresolved Questions in the Bill of Rights of the New Iraqi Constitution: How Will The Clash Between "Human Rights" and "Islamic Law" Be Reconciled in Future Legislative Enactments and Judicial Interpretations?*, 30 FORDHAM INT'L L.J. 126, 151 (2006) (stressing the fact that Yemen is a profoundly religious nation that uses Islam as the main source of legislation).

266. *See* Almas Khan, *The Interaction Between Shariah and International Law in Arbitration*, 6 CHI. J. INT'L L. 791, 799 (2006) (proclaiming that international arbitrators proved *Shari`a* can be resourcefully employed); *see also* Alexander Nerz, *The Structuring of an Arbitration Clause in a Contract with a Saudi Party*, 1 ARAB L.Q. 380, 380 (1985–86); Trumbull, *supra* note 121, at 641 (asserting that it will be instrumental for courts to establish an approach that satisfies both secular rights and religious beliefs).

267. The Yemeni Minister of Justice characterized his country's efforts in passing the arbitration act as an "avant-garde experience" that cast *Shari`a* provisions in a "modern mould." *See* Gemmell, *supra* note 3, at 183 (stating that Yemen can be viewed as a somewhat progressive state that has made efforts to become more modern); *see also* Shaheen Sardar Ali, *The Concept of Jihad in Islamic International Law*, 10 J. CONFLICT & SEC. L. 321, 326 (2005) (emphasizing the stringent religious beliefs of some conservative Islamic scholars). *See generally* Rashid, *supra* note 87, at 108 (acknowledging the fact that Islamic law may not always govern, even in the most conservative states).

268. *See* Craig M. Gertz, *The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depecage*, 12 NW. J. INT'L L. & BUS. 163, 173 (1991) (stating that parties gain many benefits by negotiating a choice of law provision in transnational contracts); *see also* Kutty, *supra* note 4, at 613 (asserting that an advantage of international commercial arbitration is the freedom that parties have to negotiate their choice of law provisions); Jessica Thrope, *A Question of Intent: Choice of Law and the International Arbitration Agreement*, 54 DISP. RESOL. J. 16, 18 (1999) (recognizing a choice of law provision as one of the many provisions to be negotiated in an arbitration agreement between different international parties).

269. *See* Kutty, *supra* note 4, at 567 (stating that arbitrators must evaluate foreign legal provisions and cultural differences in determining an equitable settlement where arbitral clauses do not specify the commercial principles governing a dispute).

270. *See* McCary, *supra* note 14, at 319 (emphasizing that arbitrators must consider Islamic cultural differences). *See generally* Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes*, 15 J. L. & RELIGION 185, 208 (2000) (reinforcing that any discussion of Islamic law must acknowledge the broader political and economic aspects of Islam).

State courts in the Middle East were not always routinely restrained in the scope of their judicial review.[271] Prior to implementing the New York Convention, courts in Oman, Qatar, and Saudi Arabia reviewed the merits of disputes in their entirety before enforcing foreign arbitral awards.[272] Although apprehension toward the recognition and enforcement of foreign arbitral awards may have given way to separate national interests, such as increasing attractiveness to foreign investors, this view could be too optimistic.[273] At least some Middle Eastern countries continue to review the merits of arbitral decisions to ensure that they are consistent with public policy or in accordance with *Shari`a*.[274]

VI. Islamic Public Policy

For those Middle Eastern countries that connect Islam with government authority, public policy runs parallel with *Shari`a*.[275] It would be a mistake, however, to homogenize the political values of the Middle East or equate Islam with Arabic culture.[276] In Lebanon, public policy is not linked to any one religion due to the country's age-old blend of cultures.[277] In Saudi Ara-

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271. *See* Kutty, *supra* note 4, at 617 (declaring that limited judicial review is uncommon in the Middle East). *But see* Powers, *supra* note 34, at 315 (arguing that courts governed by Islamic law are subject to limited judicial review). *See generally* SALEH, *supra* note 158, at 234 (outlining the different approaches to judicial review in the Middle East).

272. *See* Brower & Sharpe, *supra* note 3, at 648 (noting that prior to ratifying the New York Convention, Qatar and Oman relied on general principles of Islamic law to decide disputes); *see also* Kutty, *supra* note 4, at 617–18 (explaining that prior to acceding to the New York Convention, Oman, Qatar, and Saudi Arabia reviewed the merits of a dispute in their entirety before enforcing foreign arbitral awards); Roy, *supra* note 5, at 922 (announcing that before becoming party to the New York Convention, Saudi Arabia reviewed arbitral awards based on Islamic law and public policy).

273. *See* SAMI D. EL-FALAHI, AN INTRODUCTION TO BUSINESS LAW IN THE MIDDLE EAST: THE LEGAL ENVIRONMENT FOR NEGOTIATING COMMERCIAL AGREEMENTS IN THE MIDDLE EAST 81–82 (Brian Russel ed., Oyez Publishing 1975) (showing that foreign arbitral clauses were not fully recognized by all courts in the Middle East); Kutty *supra* note 4 at 592, 618 (citing "the end of colonialism, rise in nationalism, challenge to capitalism, and increasing oil wealth" as reasons for the change in attitude toward arbitration among Middle Eastern states and discussing the view that Saudi Arabia's hostility to the recognition and enforcement of foreign arbitral awards gave way to the country's interest in attracting foreign investors); *see also* Roy, *supra* note 5, at 953 (declaring that although foreign investors recognize the advantages of investing in Saudi Arabia, they may hesitate because of favoritism to domestic companies).

274. *See* MUHAMMAD JABER NADER, COMMERCIAL LAW IN THE MIDDLE EAST: ENFORCEMENT OF FOREIGN JUDGMENTS IN SAUDI ARABIA 298 (Hilary Lewis Ruttley & Chibli Mallat eds., Graham & Trotman 1995) (asserting that an essential condition to the enforcement of a foreign judgment in Saudi Arabia is that it will not violate *Shari`a*); *see also* Gemmell, *supra* note 3, at 188 (suggesting that a Saudi Arabian party to a contract can refuse to honor a foreign arbitral award if it is contrary to public order); Roy, *supra* note 5, at 953–54 (acknowledging that Saudi Arabia reviews arbitral awards to see if they are consistent with Saudi public policy).

275. *See* NADER, *supra* note 274, at 298 (suggesting that the *Shari`a* is the public order or policy of Saudi Arabia); *see also* Khaled Abou El Fadl, *The Place of Ethical Obligation in Islamic Law*, 4 UCLA J. ISLAMIC & NEAR E. L. 1, 8 (2004) (recognizing the *Shari`a* is the basic ethical and moral public policy of an Islamic legal system); Kutty, *supra* note 4, at 620 (proclaiming that an overriding objective of *Shari`a* is to benefit the people).

276. *See* Roger Scruton, *The Political Problem of Islam*, THE INTERCOLLEGIATE REV., Fall 2002, at 1, *available at* http://www.mmisi.org/ir/38_01/scruton.pdf

277. *See* Kassir *supra* note 4 at 557 (explaining that the Lebanese legal system is not inspired by religious law).

bia, public order is constituted by *Shari`a*.[278] Each Middle Eastern country's public policy values should be assessed in light of the variety of factors influencing its government systems.[279] It is therefore important to adjust the context of the following issues when they are assessed at the national level.

The Islamic criterion for public order is that of general interest.[280] An oft-cited scholarly maxim states that "Muslims must comply with contractual provisions except for those which authorize what is forbidden or forbid what is authorized."[281] While such regulations of Muslim public order are clearly broad, there are specific rules as well; such as those that prohibit speculative contracts (*gharar*) and those that forbid usurious interest (*riba*).[282] The Islamic jurisprudential schools interpret and create the methodology for identifying the specifics of what exactly is permissible and what is not.[283] Although the positions of each school may differ on some issues, a general Islamic public policy is evident to a degree relevant to international commercial transactions.[284]

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278. Article I of the Basic Regulations of the Kingdom of Saudi Arabia states in pertinent part, "The religion of [Saudi Arabia] is Islam, its constitution is the book of God Most High and the Sunna of His Prophet, may God bless him and give peace." Article 48 adds, "The courts shall apply in cases brought before them the rules of the Islamic Shari`a in agreement with the indications in the Book and the Sunna." *See* NADER, *supra* note 274, at 298 (defining *Shari`a* as the public order or policy of the state); *see also* Basic Regulations of the Kingdom of Saudi Arabia, http://www.the-saudi.net/saudi-arabia/saudi-constitution.htm, (stating that courts shall apply the rules of *Shari`a* according to the Book and the *Sunna*); *cf.* Gemmell, *supra* note 3, at 188 (equating an inquiry into *Shari`a* with public order).

279. *See* Ali Gheissari, Transcript, *Doing Business in the Middle East: A Guide for U.S. Companies*, 34 CAL. W. INT'L L.J. 273, 276–78 (2004) (illuminating the differences between Middle Eastern countries, including the impact of religion, imperialism, nationalism, oil, ethnic and linguistic diversities, and how individual states were formed).

280. *See* Gemmell, *supra* note 3, at 188 (establishing public order as a main concern in the enforcement of arbitral awards); *see also* Kutty, *supra* note 4, at 603 (indicating that the public order involved in a contract dispute is reviewed in regards to the common good of humanity); *cf.* NADER, *supra* note 274, at 298 (suggesting that public order should be considered when addressing arbitral awards).

281. The Fatawa of Ibn Taymiya, III, 326; *see* Kutty, *supra* note 4, at 610 (announcing the general rule of contract law that "anything is permitted which is valid and that only which is forbidden or set aside by one of the texts or the Qiyas is forbidden"). *See generally* Khaled Abou El Fadl, *The Place of Ethical Obligation in Islamic Law*, 4 UCLA J. ISLAMIC & NEAR E. L. 1, 8 (2004) (illustrating that contracts under the *Qaran* must be free from coercion, fraud, deception, or misrepresentation and parties to it must in good faith make every effort to honor their promises).

282. S*ee* NAYLA COMAIR-OBEID, THE LAW OF BUSINESS CONTRACTS IN THE ARAB MIDDLE EAST 44, 57 (Dr. Mark S. W. Hoyle ed., Kluwer Law International 1996) (explaining that *riba* generally means an illicit profit or gain; and that *gharar* generally means risk, uncertainty, or speculation); *see also* NABIL A. SALEH & AHMAD AJAJ, UNLAWFUL GAIN AND LEGITIMATE PROFIT IN ISLAMIC LAW 16, 63 (Dr. Mark S. W. Hoyle ed., Graham & Trotman 1992) (defining *riba* as usury or interest and discussing the numerous definitions of *gharar*); Kutty, *supra* note 4, at 604–06 (describing *riba* as essentially any unlawful or unjustified gain and defining *gharar* as speculation).

283. *See* Gemmell, *supra* note 3, at 173–76 (detailing the different Islamic schools of interpretation); Roy, *supra* note 5, at 945–46 (identifying the different Islamic jurisprudential schools).

284. *See* Gemmell, *supra* note 3, at 192 (explaining that the *Quran* and *Shari`a* provide guidance and direction toward the use of arbitration); *see also* Kutty, *supra* note 4, at 610 (asserting that an appreciation of *Shari`a* and Islamic policies is essential to international arbitration in the Middle East); *cf.* Roy, *supra* note 5, at 922 (highlighting that Saudi Arabian laws and public policy are relevant to international commercial arbitration).

The myth of Islamic law's irrelevance parallels a similar myth that Islamic law is unsuitable for modern commercial transactions.[285] A clash, purportedly created by the "impasse" between the international commercial order and Islamic prohibition of certain transactions, namely *riba* and *gharar*, was described as the classic situation of an "irresistible force against an irremovable object."[286] The fallout generated by this collision appears in law and business.[287] Creative solutions, reorganizations, and mere end runs have cropped up to help the flow of commerce continue despite the complications.[288] To overcome the standoff, "expedients" were developed as workable solutions for the problems created by competing Islamic legal requirements and global transactional structure.[289] An expedient may be viewed as a practical solution or an unprincipled shortcut, depending upon one's opinion of the underlying issue.[290] Arab legal systems have developed distinctions that permit the charging of interest in certain transactions, despite the prohibition against *riba*, or the use of option contracts despite the prohibition against speculation (*gharar*).[291]

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285. *See* Donboli & Kashefi, *supra* note 127, at 418 (remarking on the misperception that Islamic law is unsuitable for modern commercial transactions); *see also* Howard L. Stovall, *Arab Commercial Laws—Into the Future*, 34 INT'L LAW. 839, 839 (2000) (commenting on the myth that Islamic law does not apply to modern commercial transactions); Christopher F. Richardson, *Islamic Finance Opportunities in the Oil and Gas Sector: An Introduction to an Emerging Field*, 42 TEX. INT'L L.J. 119, 120 (2006) (detailing the incompatibilities of Islamic commercial law and Western financing).

286. *See* W.M. Ballantyne, *Legal Development in Arabia*, 121 (1980); *see also* Christopher Faille, *What Went Wrong? Western Impact and Middle Eastern Response by Bernard Lewis*, 52 FED. LAW., Sept. 50, 51 (2005) (book review) (comparing the prohibition of *riba* and *gharar* to "Scylla and Charybdis"). *See generally* Hamoudi, *supra* note 43, at 110 (describing both *riba* and *gharar* as "problematic").

287. *See* Hilmar Krüger, *The Study of Islamic Law in Germany: A Review of Recent Books on Islamic Law*, 15 J.L. & RELIGION 303, 313 (2000–01) (examining recent books on the problems of *riba* and *gharar* in law and business); *see also* Jamil Zouaoui, *Quick Guide to Negotiating and Establishing Franchises in the Region—with Examples from a Kuwaiti Experience*, 21 no. 9 MIDDLE E. EXECUTIVE 9 (1998) (discussing the effects of *riba* and *gharar* on financing and insurance); Sabahi, *supra* note 49, at 488–89 (proclaiming that *riba* and *gharar* are impediments to law and business).

288. *See* Scruton, *supra* note 276 at 4 (identifying devices (*hila*) for discovering creative solutions within Islamic law); Hamoudi, *supra* note 52, at 612 (discussing some theoretical solutions to *riba* and *gharar*).

289. *See* Stovall, *supra* note 285, at 841–42 (detailing expedients employed to overcome difficulties); *see also* Anver M. Emon, *Conceiving Islamic Law in a Pluralist Society: History, Politics, and Multicultural Jurisprudence*, SING. J. LEGAL STUDIES, 335 (2006) (reviewing Islamic techniques of juristic analysis). *See generally* Angelo Luigi Rosa, *Harmonizing Risk and Religion: The Utility of Shari`a-Compliant Transaction Structuring in Commercial Aircraft Finance*, 13 MINN. J. GLOBAL TRADE 35, 52–53 (2004) (discussing workable solutions between Islamic law and Western law).

290. *See* Raslan, *supra* note 50, at 497–98 (illustrating that intellectual property laws must somehow conform to the *Shari`a* principles); *see also* Scruton, *supra* note 276, at 4 (remarking on expedients).

291. *See* Donboli & Kashefi, *supra* note 127, at 424 (discussing how Islamic systems have tackled issues surrounding *riba* and *gharar*); *see also* Kimberly J. Tacy, *Islamic Finance: A Growing Industry in the United States*, 10 N.C. BANKING INST. 355, 357 (2006) (distinguishing *gharar*, or unacceptable risk, from high risk). *But see* Sabahi, *supra* note 49, at 501 (suggesting that option contracts are a problem for Islamic law).

Islamic scholars have described international law as both "foreign" and a continual attempt to "reconcile" Islamic authority with Western ideas.[292] With such an assessment, approaches vary between the adoption of Western solutions, the secularization of international legal authority, and reconsideration of traditional Islamic legal positions.[293] Reconciliatory attempts adopted from the West are not definitive to a Muslim nor are arguments made from Islamic authority applicable on an international scale.[294] The shortfall leads some academics to state plainly, "There is no Islamic international law."[295] Other scholars take the debate further by analyzing the international political theories available from within Islam and the perception of public international legal authority over Muslims.[296] Nevertheless, such an analysis is beyond the scope of this article.

There is a statutory vacuum created between domestic laws and international conventions such as the New York Convention. This gap is produced when issues of law related to the international convention must be analyzed by the domestic legal system. The gap is especially obvious when it must be filled by something as conceptual as public policy. Variation among national interpretations has not so far been eliminated by the anticipation or proper planning of international treaties. Differences in national views on the scope of arbitration and the policies reflected through those opinions create the potential for inconsistent and nonuniform

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292. *See* Westbrook, *supra* note 261, at 829 (stating that Islamic law is continuously attempting to reconcile with Western law); *see also* Sireesha Chenumolu, Note, *Revamping International Securities Laws to Break the Financial Infrastructure of Global Terrorism*, 31 GA. J. INT'L & COMP. L. 385, 404 (2003) (concluding that a capable framework for reconciling Islamic law with Western ideas exists). *But see* Pavani Thagirisa, *A Historical Perspective of the Sharia Project & a Cross-Cultural and Self-Determination Approach to Resolving the Sharia Project in Nigeria*, 29 BROOKLYN J. INT'L L. 459, 499 (2003) (claiming that Islamic law will sometimes not reconcile with international human rights standards).

293. *See* Westbrook, *supra* note 261, at 829 (stating that Islamic scholars vacillate between those three positions); Moosa, *supra* note 270, at 186 (discussing the discrepancy between Islamic and Western thought in human rights). *But see* William Samuel Dickson Cravens, Note, *The Future of Islamic Legal Arguments in International Boundary Disputes Between Islamic States*, 55 WASH. & LEE L. REV. 529, 532 (positing that reconciliation between Islamic and Western law fails).

294. *See* Westbrook, *supra* note 261, at 829 (stating that the Western arguments made by Islamic scholars are not authoritative to a Muslim); s*ee also* Abdullah Ahmed An-Na`im, *Islam and International Law: Toward Positive Mutual Engagement to Realize Shared Ideals*, 98 AM. SOC'Y INT'L L. PROC. 159, 164 (2004) (quoting David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 VA. J. INT'L L. 819, 829). *But see* Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari`a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L L. REV. 379, 380 (2006) (commenting that Egypt has embraced international law).

295. *See* Westbrook, *supra* note 261, at 843 (stating that in Islam there is no international law, only "commentary on international law"). *But see* An-Na`im, *supra* note 294, at 164 (critiquing Westbrook's analysis defining Islamic international law).

296. *See generally* Cravens, *supra* note 293 (debating the Islamic approach to international political theories); Andrew Grossman, "*Islamic Land": Group Rights, National Identity and Law*, 3 UCLA J. ISLAMIC & NEAR E. L. 53 (2003–04) (reviewing Islamic public international legal authority); Westbrook, *supra* note 261 (discussing both the political theories and public international legal authority).

results across jurisdictional boundaries. The idea of "international public policy" serves as a standard to highlight the deviations of national courts from "international" norms.[297]

Saudi Arabia has been described as "traditionally hostile"[298] to the recognition and enforcement of nondomestic arbitral awards, finding such awards contrary to Saudi Arabian law and public policy.[299] However, the accuracy of such characterizations is now questionable if one accounts for the 14 years that have passed since Saudi Arabia's ratification of the New York Convention.[300] Other Middle Eastern countries, especially those like Kuwait and Syria, that led the pack in acceding to the New York Convention, have been described as "not traditionally hostile to international arbitration."[301] The difference lies not so much in accession to the New York Convention, which most Middle Eastern countries have now reached, but rather with the interpretation of the Convention's mandates and exceptions.[302] Those countries that seek to give the New York Convention greater effect by narrowing the reading of the public policy exception are generally viewed as "embracing" the system of international commercial arbitration.[303]

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297. Harold J. Berman, *The Historical Foundations of Law*, 54 EMORY L.J. 13, 20–21 (2005) (defining international law as treaties, laws governing the United Nations, and contractual and customary legal norms and explaining that even though there is no overriding sovereign, this constitutes a body of law).

298. Roy, *supra* note 5, at 922 (stating that Saudi Arabia has been traditionally hostile to the enforcement of nondomestic arbitral awards); *see also* Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773, 794 (2002) (declaring Saudi Arabia as the country with the most negative position on international arbitration).

299. *See* Gemmell, *supra* note 3, at 189 (detailing the opinions of some writers who believe Saudi Arabian law is opposed to the rules and laws of the New York Convention members); Kutty, *supra* note 4, at 602 (observing that Saudi Arabia's membership in the New York Convention provides no security in terms of enforcement of foreign arbitral awards).

300. *See* Brower & Sharpe, *supra* note 3, at 649 (commenting that Saudi Arabia's accession to the New York Convention has permitted enforcement of foreign arbitral awards). *But see* Dahmane Ben Abderrahmane, *Saudi Arabia's Ratification of the New York Convention: What Practical Effects Will It Have?*, 18 No. 3 MIDDLE E. EXECUTIVE REP. 9, 20 (1995) (reporting that Saudi Arabia will not violate its public policy when called to recognize foreign arbitral awards); Kent Benedict Gravelle, *Islamic Law in Sudan: A Comparative Analysis*, 5 ILSA J. INT'L & COMP. L. 1, 19 (1998) (stating that Saudi Arabia has refused to enforce some foreign arbitral awards).

301. *See* Roy, *supra* note 5, at 935–36 (quoting that Kuwait and Syria are not traditionally hostile to international arbitration); *see also* Brower & Sharpe, *supra* note 3, at 651 (announcing that Syria is contemplating the modernization of its international arbitration laws). *See generally* Iran Progresses with Sales to Oman, Kuwait, ENERGY INTELLIGENCE GROUP, INC. WORLD GAS INTELLIGENCE, Mar. 23, 2005, A1 (explaining how a dispute between Kuwait and Iran may be solved through international arbitration).

302. *See* Clayton Utz, *The Balancing Act: International Arbitrations Developing Role in the Middle East,* MONDAQ BUS. BRIEFING (Australia), May 24, 2005, A1 (stating that Middle Eastern countries have interpreted "public policy" to mean "domestic public policy"); *see also* Herbert Smith, *Arbitration News,* MONDAQ LTD (Hong Kong), Aug. 2, 2002, A1 (explaining that Iran's accession to the New York Convention does not prevent it from applying its Constitution comprised of Islamic principles and morals).

303. *See* Recognition and Enforcement of Foreign Arbitral Awards Convention, Dec. 29, 1970, 21 U.S.T. 2517 at 2519 (1970) (indicating that several nations have given Article V defenses narrow readings to increase the New York Convention's effectiveness); Roy, *supra* note 5, at 955–56 (stating that countries have embraced the New York Convention by giving a narrow reading to its public policy exception).

The features of Islamic public policy may be divided into two categories: those of a procedural nature and those of a substantive nature.[304] With respect to the procedural features of Islamic public policy, three important principles emerge. These principles are not necessarily found in the *Quran* or *Sunna*; however, they historically constitute the immutable rules of Islamic judicial law.[305] The three principles are: (1) the strictly equal treatment of the parties to the judicial or arbitral action; (2) the prohibition against a judge or arbitrator deciding a dispute without hearing both plaintiff and defendant; (3) the prohibition against a judge or arbitrator making his judgment or award without giving the parties the opportunity to submit their evidence, pleas, and defenses.[306]

The procedural concerns of Islamic law are well addressed by the New York Convention. Article V(1)(b) of the New York Convention allows for the refusal of recognition or enforcement of an arbitral award if a party was not given proper notice of the proceedings or was otherwise unable to present his case.[307] That provision directly addresses the second and third Islamic procedural principles listed above. Similarly, article V(1)(a), the provision of the New York Convention that deals with the capacity of the parties and the validity of their arbitration agreement, addresses the Islamic procedural principle of fair treatment and may allow for the same type of exception to exist as contemplated by the Islamic principle.[308] Perhaps because of their appeal to universal norms of due process and fairness, Islamic arbitration procedural concerns overlap well with the New York Convention.[309]

With respect to the substantive features of the Islamic concept of public policy, two problems most likely to arise stem from the prohibitions of *riba* and *gharar*. In contrast to the procedural concerns, the substantive concerns are deeply rooted in scriptural sources.[310] *Riba* is

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304. *See* Saleh, *supra* note 135, at 26 (noting that there are procedural and substantive aspects to the Islamic concept of public policy); *see also* Richard Harding, *An Introduction to Arbitration in the Middle East*, MONDAQ BUS. BRIEFING (United Kingdom, Keating Chambers), June 8, 2005, A1 (explaining that the two elements of law applicable to arbitration are substantive law and procedural law).

305. *See* Saleh, *supra* note 135, at 26 (quoting the three important principles of procedure that are not necessarily found in the *Quran* or *Sunna*); *see also* SAMIR SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST: SHARI`A, LEBANON, SYRIA, AND EGYPT 18 (Hart Publications 2006) (expressing the notion that the procedural aspect has a strong religious connotation).

306. *See* Saleh, *supra* note 135, at 26 (quoting the three principles).

307. *See* James M. Gaitis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 AM. REV. INT'L ARB. 9, 65 (2004) (citing Article V(1)(b) of the New York Convention).

308. *See* U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 128 (quoting Article V (1)(a), which reiterates the Islamic procedural principle of fair treatment).

309. *See* ABDUL EL-AHDAB, ARBITRATION IN ARAB COUNTRIES, 45 (Kluwer Law International 1998) (stating the fundamental principles of arbitral proceedings are due process and fairness). *See generally* Jennifer L. Amundsen, *Notes and Comments: Membership Has Its Privileges: The Confidence-Building Potential of the New York Convention Can Boost Commerce in Developing Nations,* 21 WIS. INT'L L.J 383, 390 (2003) (indicating that exceptions to the New York Convention exist to ensure fairness).

310. *See* Hamoudi, *supra* note 52, at 610–12 (describing *Quranic* prohibitions of *riba* and *gharar*); *see also* Hamoudi, *supra* note 43, at 109–15 (addressing *riba* and *gharar* in *Shari`a*).

prohibited because it is morally reprehensible for a lender to exploit a borrower.[311] *Hanafi* adherents have managed to circumvent the prohibition of *riba* for centuries by a series of judicial ruses that endow the concept of interest with a semblance of respectability (*hyals*).[312] These *Hanafi hyals* are of little interest because the countries in which *Hanafi* teachings prevail (Syria, Jordan, and Egypt) historically have operated under laws that greatly relax the prohibition against *riba* through regulation of interest rates.[313]

The prohibition of *riba* is strictly applied in *Hanbali* and *Zaydi* jurisdictions.[314] Also, in Saudi Arabia, Qatar, Oman, and Yemen, the prohibition against *riba* is strictly enforced.[315] According to *Hanbali* teaching, the prohibition extends beyond the geographical boundaries of Islam.[316] In such countries, one can expect foreign arbitral awards that incorporate interest as compensation for damages to be viewed as *riba* and struck down as against public policy.[317]

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311. *See* Akaddaf, *supra* note 11, at 48–49 (explaining that the *Quran* prohibits *riba* because it is unjust); *see also* Kutty, *supra* note 4, at 604 (stating that *riba* is prohibited because it is an unlawful or unjustified gain); Affolder, *supra* note 53, at 87 (addressing the public policy concern regarding prohibiting *riba*).

312. *See* Raslan, *supra* note 50, at 559 (describing the *Hanafi* school's wait-and-see approach, which is one way to circumvent the prohibition against *riba*); *see also* Seniawski, *supra* note 43, at 711 (stating that under the *Hanafi* view, a loan bearing interest is suspect but is not automatically void).

313. *See* Seniawski, *supra* note 43, at 711–14 (illustrating that under the *Hanafi* view, some forms of accrued interest are not *riba*). *See generally* Nicholas Dylan Ray, *The Medieval Islamic System of Credit and Banking: Legal and Historical Considerations*, 12 ARAB L.Q. 43, 54 (1997) (explaining that the *Hanafi* definition of *riba* allows for interest in certain situations); Daniel Klein, Comment, *The Islamic and Jewish Laws of Usury: A Bridge to Commercial Growth and Peace in the Middle East*, 23 DENV. J. INT'L L. & POL'Y 535, 538 (1995) (stating that in Egypt, where *Hanafi* jurists predominate, a Muslim may engage in *riba* with a non-Muslim).

314. *See* Hassanuddeen Abdul Aziz, *My Say: Taking Another Look at BBA Contracts,* THE EDGE MALAYSIA, Feb. 20, 2006, A1 (showing how the *Hanbali* school rejected a contract, rationalizing it was a way to cheat God and induce *riba*); *see also Shiites*, A DICTIONARY OF WORLD HISTORY (Oxford University Press 2000) *available at* http://www.encyclopedia.com/doc/1048-Sunni.html (defining *Zaydi* as one of the main *Shiite* sects). *But see* Walid S. Hegazy, *Islamic Business and Commercial Law: Contemporary Islamic Finance: From Socioeconomic Idealism to Pure Legalism*, 7 CHI. J. INT'L L. 581, 597 (2007) (stating that *tawarruq*, a strategy to circumvent the prohibition against *riba*, was acceptable to the *Hanbali* school); Seniawski, *supra* note 43, at 708 (stating that the founder of the *Hanbali* school declared that only one form of *riba* is prohibited beyond a doubt, and that all other occasions and aspects of "increase" are subject to doubt as to whether the prohibition against *riba* applies).

315. *See* Donboli & Kashefi, *supra* note 127, at 424 (noting Saudi Arabian banks provide interest-free funding). *But see* Ann Elizabeth Mayer, *Law and Religion in the Muslim Middle East*, 35 AM. J. COMP. L. 127, 167 (1987) (stating that Saudi banks pay and charge interest and place their funds in investments where interest will be earned); Gravelle, *supra* note 300, at 20 (explaining that Qatar and Oman do not strictly enforce the prohibition against *riba*).

316. *See* SAMIR SALEH, COMMERCIAL ARBITRATION IN THE MIDDLE EAST: SHARI`A, LEBANON, SYRIA, AND EGYPT (Hart Publishing 2006) (1984) (stating that the *Hanbali* school claims the prohibition against *riba* extends beyond Islam's territorial boundaries). *See generally* Mohammed, *supra* note 45, at 120 (stating that Islamic societies as a whole are attempting to eliminate *riba*).

317. *See* Gemmell, *supra* note 3, at 180 (asserting that arbitration clauses are invalid if they permit the payment of *riba* or interest); *see also* Kathryn S. Cohen, Comment, *Achieving a Uniform Law Governing International Sales: Conforming the Damage Provisions of the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code*, 26 U. PA. J. INT'L ECON. L. 601, 615 (2005) (suggesting that the dispute resolution mechanism of the CISG avoids interest rate calculations). *But see* Kutty, *supra* note 4, at 604 (claiming that there have been no court cases or arbitral awards determining whether arbitral decisions awarding interest would be enforced in states that prohibit *riba*).

The doctrine of *riba* does not bar all interest-related awards, especially where a party experiences a financial loss due to the withholding of a monetary award to which he or she is otherwise entitled.[318] In one case, a defendant argued that under Saudi Arabian law, *riba* barred the plaintiff's claim for interest on an arbitration award.[319] The arbitral tribunal held that the prohibition of *riba* did not bar all awards of compensation for financial losses due to a party not having had the use of money it was otherwise owed.[320] The tribunal did not award a commercial rate of interest but rather based the award on a rate that reflected the incidence of annual inflation over the period at issue. [321]

In addition to *riba*, the Islamic prohibition against *gharar* is often addressed in arbitral proceedings in the Middle East.[322] The question of the existence of a future dispute involves speculation and uncertainty (*gharar*).[323] As such, contract clauses calling for the arbitration of

318. *See* Akaddaf, *supra* note 11, at 47 (discussing an arbitral tribunal's statement that the doctrine of *riba* did not prohibit all compensation awards); *see also* Sabahi, *supra* note 49, at 490 (commenting that certain Muslim scholars believe the prohibition against *riba* does not enjoin all forms of interest on loans); Hamoudi, *supra* note 52, at 612 (examining the specific *murabaha* exception that may allow interest-based transactions despite the Islamic ban on *riba*).

319. *See* Final Award No. 7063 (1993) (Saudi Arabia v. Saudi Arabia), 22 Y.B. COM. ARB. 87, 89 (Int'l Comm. Arb. 1997) (describing an arbitration proceeding in which the defendant argued that the claimant could not recover an award in addition to substantive damages according to Saudi Arabian law and the doctrine of *riba*); *cf.* Jason C.T. Chuah, *Islamic Principles Governing International Trade Financing Instruments: A Study of the Morabaha in English Law*, 27 NW. J. INT'L L. & BUS. 137, 153–154 (2006) (recounting a case in which a defendant argued that an English court should invalidate a contract because it is illegal under Saudi Arabian law).

320. *See* Final Award No. 7063 (1993) (Saudi Arabia v. Saudi Arabia), 22 Y.B. COM. ARB. 87, 89 (Int'l Comm. Arb. 1997) (concluding that an additional award of damages was not prohibited because the *Shari`a* prohibition against interest is subject to a number of exceptions under modern Saudi commercial practice); *see also* Akaddaf, *supra* note 11, at 47–48 (confirming that the arbitral tribunal in Final Award no. 7063 of 1993 refused to apply the *riba* doctrine's ban on interest to all arbitral awards of compensation for financial loss).

321. *See* Final Award No. 7063 (1993) (Saudi Arabia v. Saudi Arabia), 22 Y.B. COM. ARB. 87, 90 (Int'l Comm. Arb. 1997) (awarding compensation at a rate reflecting annual inflation levels); *cf.* M.A. Ansari-pour, *Interest in International Transactions under Shiite Jurisprudence*, 9 ARAB L.Q. 158, 160–61 (1994) (describing a case where an arbitration panel held that an award involving interest was permissible, despite arguments that it would violate Saudi Arabian law).

322. *See* Franck, *supra* note 55 (asserting that arbitration clauses aimed at resolving future disputes are unenforceable "in principle" due to the prohibition against *gharar*); *see also* Karl, *supra* note 261, at 164 (stating that *gharar* should make contracts with arbitration clauses unenforceable). *E.g.*, Roy, *supra* note 5, at n.248 (explaining that in Saudi Arabia a contractual provision regarding resolution of a future dispute would be void due to the prohibition against *gharar* had the government not adopted regulations making such clauses enforceable).

323. *See* Franck, *supra* note 55, at 9 (declaring that pursuant to the prohibition against *gharar*, valid arbitration agreements can only be made after a dispute has arisen); *see also* Karl, *supra* note 261, at 164 (explaining that because the existence of a future dispute is uncertain, contract clauses calling for arbitration of such disputes should be void).

future disputes are technically unenforceable.[324] For an arbitration clause to be valid and enforceable, historically, the following conditions were necessary:[325]

> 1. The dispute must have already arisen (future disputes could not be covered by anticipation);[326]
>
> 2. There must be an arbitration agreement;[327]
>
> 3. The arbitrator must be appointed by name (the arbitrator's identity must be certain; if the parties agreed that the arbitrator shall be, for example, the first person encountered on the road, the agreement is void);[328] and
>
> 4. The arbitrator must be mentally and physically competent (the arbitrator's competence is determined according to the teachings of the applicable school of law).[329]

The underlying idea of *gharar* is that the parties to a contract must be fully aware of their obligations at the time they enter into the contract; an element of risk in a contract is the equivalent of a gamble and results in immoral gain.[330] Strictly speaking, *Shari`a* prohibits agreements to arbitrate future disputes or disputes not yet in existence.[331] If such an agreement is included in a contract, the contract is void.[332] Yet arbitration takes place in the Middle East, based on clauses calling for arbitration of future disputes.[333] Attempts to clarify this seeming

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324. Final Award No. 7063 (1993) reprinted in 22 Y.B. COM. ARB. 87 (1997), IADR Ref. No. 112; *see* Karl, *supra* note 261, at 164 (stating that contracts providing for solutions to a future dispute should be unenforceable under the principle of *gharar*).

325. *See* Gemmell, *supra* note 3, at 180 (commenting on the four conditions that must exist for an arbitration agreement to be valid).

326. *See* Rashid, *supra* note 87, at 105.

327. *Id.*

328. *Id.*

329. *Id.*

330. *E.g.*, Sabahi, *supra* note 49, at 501 (concluding that certain financial strategies to minimize risk are prohibited under Islamic law due to their inherent uncertainty and *gharar*); *see* Akaddaf, *supra* note 11, at 26 (stating that the focus of the prohibition of *gharar* is to eliminate the risk that stems from the lack of consent between contracting parties when some thing is uncertain); *see also* Saleh, *supra* note 135, at 28 (maintaining that *gharar* requires parties to a contract to be fully aware of their duties under the contract at the time the contract is created).

331. *See* W.M. Ballantyne, *Arbitration in the Gulf States: "Delocalisation": A Short Comparative Study*, 1 ARAB L. Q. 205, 206 (1986) (suggesting that no *Shari`a* provision allows for an arbitration process regarding a future dispute); *see also* Franck, *supra* note 55, at 9 (mentioning that *Shari`a* does not allow arbitration clauses regarding future disputes); S. E. RAYNER, THE THEORY OF CONTRACTS IN ISLAMIC LAW, 366 (Dr. Mark S. W. Hoyle ed., Graham & Trotman 1991) (stating that *Shari`a* holds that arbitration can occur only after a dispute arises).

332. *See* Gemmell, *supra* note 3, at 180–182 (listing the type of arbitration clauses that are invalid and void according to *Shari`a*). *See generally* R.B. SERJEANT, CUSTOMARY AND SHARI`AH LAW IN ARABIAN SOCIETY 313–15 (Vaiorum 1991) (explaining a typical arbitration procedure under *Shari`a*).

333. See SALEH, *supra* note 105, at 40, (explaining that Middle Eastern countries respect arbitration clauses in contracts that a Muslim executed in a foreign territory). *See generally* Trumbull, *supra* note 121, at 623–24 (explaining the reasons why a court may choose not to enforce an arbitration clause); Al-Samaan, *supra* note 228, at 217 (explaining the practical need for arbitration and arbitration clauses for foreign investments in Saudi Arabia).

paradox may incorporate notions of pragmatism, evasion, or the principle that "agreements must be observed"—a general Islamic legal precept.[334]

Enacted legislation in nearly all Middle Eastern countries recognizes arbitration agreements for both present and future disputes.[335] In fact, the recommended standard arbitration clause for the Gulf Cooperation Council's Arbitration Center established in Bahrain[336] contains future statements about uncertain disputes.[337] Valid *Shari`a* arbitration clauses in this direction are those "necessary to the contract, appropriate to the contract and commonly used in commercial transactions."[338] Valid arbitration clauses should not contain provisions for the payment of *riba*, *shurut* (extraneous conditions), or *gharar*.[339] Practically, however, agreements to arbitrate future disputes are enforced, but arbitral awards upholding aleatory contracts or aleatory clauses, other than the arbitration clause itself, may be considered contrary to public policy.[340]

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334. *See* BALLANTYNE, *supra* note 205, at 89, 1999 (explaining that Muslims must observe the doctrines of their faith when contracting); *see also* CARLO CALDAROLA, RELIGION AND SOCIETIES: ASIA AND THE MIDDLE EAST 473 (Mouton De Gruyter 1982) (proclaiming that while some countries enforcing *Shari`a* profess "freedom of thought, conscience and religion," they allow state law to "control or restrict" religious promotion of non-Muslim religions). *See generally* Trumbull, *supra* note 121, at 631–33 (recognizing that a major obstacle in creating a set of laws that the Middle East and Western Culture can agree upon are the different views on religion's role in the law).

335. *See* SALEH, *supra* note 105, at 93–94 (showing how many Middle Eastern countries' modern statutory laws have shifted to more arbitration-friendly legal systems); s*ee also* William M. Ballantyne, *Arbitration in the Gulf States "Delocalisation": A Short Comparative Study*, 1 ARAB L.Q. 205, 207 (1985–86) (listing the Middle Eastern states that have instituted legislation recognizing arbitration of both present and future disputes).

336. *See* G.C.C. Commercial Arbitration Center, http://www.gcac.biz/en/ (last visited April 9, 2007) (supporting a campaign to further the Gulf Cooperation Council's goals); Brower & Sharpe, *supra* note 3, at 653–54 (proclaiming the objectives of the Arbitration Center). *See generally* William F. Pepper, *Foreign Capital Investment in Member States of the Gulf Cooperation Council: Considerations, Issues and Concerns for Investors: Part I*, 6 ARAB L.Q. 231, 231 (1991) (providing a general understanding of the Gulf Cooperation Council and its members).

337. *See* Richard H. Kreindler, *An Overview of the Arbitration Rules of the Recently Established GCC Commercial Arbitration Centre, Bahrain*, 12 ARAB L.Q. 15, 15 (1997) (analyzing the project "Model Law," which seeks to overcome the pitfalls of the New York Convention). *See generally* UGO FASANO, MONETAY UNION AMONG MEMBER COUNTRIES OF THE GULF COOPERATION COUNCIL 10–12 (International Monetary Fund, Publication Services 2003) (discussing structural reforms in the labor markets of GCC countries); Kutty, *supra* note 4, at 576–77 (pointing out that many Middle Eastern nations enacted laws that enforce arbitration clauses regarding future disputes).

338. *See* Gemmell, *supra* note 3, at 180 (analyzing necessary elements to a valid contract according to *Shari`a*). *See generally* Pompeo, *supra* note 69, at 835 (explaining what type of clauses are inherently accepted under Islamic law); Alqurashi, *supra* note 95, ¶ 5.1 (explaining that *Shari`a* is rooted in the *Quran*, whose principles make arbitration clauses "necessary to the contract").

339. *See* Gemmell, *supra* note 3, at 180–81 (explaining that the types of arbitration clauses that violate Islamic law contain *riba* or *gharar*).

340. *See also* CHRISTIAN CAMPBELL, LEGAL ASPECTS OF DOING BUSINESS IN THE MIDDLE EAST 181 (Lulu.com 2005) (listing public policy reasons for a Jordanian court that did not enforce an arbitration award). *But see* Northrop Corp. v. Triad Intern. Marketing S.A. 811 F.2d 1265, 1270–71 (9th Cir. 1987) (holding that the alleged violation of Saudi Arabian public policy would not void the arbitration clause). *See generally* WILLIAM MORRIS BALLANTYNE, ESSAYS AND ADDRESSES ON ARAB LAW 45–46 (Routledge Curzon 1999) (pointing out that Kuwait uses the guise of public policy to ensure that arbitration does not violate its "principal source of law," the *Shari`a*).

VII. Conclusion

Critics condemn the New York Convention for allowing Saudi Arabia to accomplish the goal of "modernizing" its international dispute resolution methods while concurrently providing a "safe harbor" for the country to electively enforce foreign arbitral awards that are contrary to its public policy.[341] Essentially, Saudi Arabia is having its cake and eating it too; Saudi Arabia "embraces" the international community[342] without rejecting its domestic public policy. As a result, the international community loses the certainty offered by the New York Convention that international arbitral awards will be reviewed methodically.[343]

This criticism is flawed. While Saudi Arabia "may not be required to enforce any more nondomestic arbitral awards than it did prior to its 1994 accession to the New York Convention,"[344] the New York Convention does not require any state court to enforce an arbitral award that is against national public policy.[345] The interpretation of "public policy" as used in the New York Convention is neither defined nor settled law. The construction of "public policy" by national courts turns on legal interpretation as much as it does on political, sociological, and even religious matters. Signatories should choose either to accede to a convention whose limits are clearly defined or have the freedom to interpret open terms within the parameters set forth in the treaty. In the final analysis, the New York Convention's utility lies in its ability to require national courts to enforce foreign arbitral awards that do not violate domestic public policy—an outcome that, while perhaps available without an international convention, has become more expedient and obvious.

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341. *See* SAMIR SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST: SHARI`A, SYRIA, LEBANON AND EGYPT 225 (Hart Publications 1984) (examining another possible loophole in the current system for countries to determine that the law is not applicable); *see also* Roy, *supra* note 5, at 953 (expressing why Saudi Arabia's adoption of the New York Convention has been criticized).

342. *See* Roy, *supra* note 5 at 951 (outlining past aversion to international arbitration models by the Saudi Arabian government); *see also* Charles N. Brower & Jeremy K. Sharpe, *International Arbitration and the Islamic World: The Third Phase*, 97 Am. J. Int'l L. 643, 656 (2003) (commenting on "increasingly convergent views" in Middle Eastern nations regarding international arbitration culture).

343. *See* Roy, *supra* note 5, at 954 (reasoning that if Saudi Arabia adopts a liberal definition of the public policy defense then it will not realize its own goals in adopting the New York Convention); Kutty, *supra* note 4, at 623 (reasoning that Middle Eastern nations may be less likely to follow arbitration clauses if they think that the "Shari`a is being sidelined"). *But see* World Intellectual Property Organization: Neutrals, http://www.wipo.int/amc/en/neutrals/ (last visited Sept. 1, 2007) (recognizing that the "general WIPO List of Neutrals" helps to ensure a fair arbitration process).

344. Roy, *supra* note 5, at 954 (determining that the New York Convention may not force Saudi Arabian courts to treat arbitral awards any differently then they did prior to its accession); *see* Giorgio Bernini, *The Enforcement of Foreign Arbitral Awards by National Judiciaries: A Trial of the New York Convention's Ambit and Workability, in* THE ART OF ARBITRATION, 51–52 (Jan C. Schultsz & Albert Jan Van Den Berg eds., Kluwer Law and Taxation Publishers 1982) (explaining that some courts interpret the New York Convention to require "local law" to be applied to an arbitration clause if none other was contractually chosen).

345. *See* 21 U.S.T. 2517 art. V(2)(b) (allowing a nation to forego enforcement of an arbitration award if it deems it contrary to public policy); *see also* Karen Stewart & Joseph Matthews, Comment, Online Arbitration of Cross-Border, Business to Consumer Disputes, 56 U. MIAMI L. REV. 1111, 1132–33 (2002) (determining that Article V of the New York Convention permits a court to not enforce arbitral awards that violate the public policy of any involved country). *See generally* Peter J.W. Sherwin & Jordan B. Leader, *Snags Arise in Enforcing Foreign Arbitration Awards*, 4/9/2007 Nat'l L.J. 14, (C0l. 1) (pointing out that even American courts have declined to enforce foreign arbitral awards).

This is not to say that all Middle Eastern jurisdictions have engaged the process of foreign arbitral award review with the necessary transparency that the various interests call for. While "progressive" jurisdictions have gone to great lengths to open the channels of commerce with reciprocity and transparency, other jurisdictions have not. The right to Islamic legal interpretation, its definition, and articulation is "arduously defend[ed]" and attempts to codify law or make it accessible to the public are frequently "resisted."[346] This state of affairs has led to both ambiguity and aversion when foreigners deal with legal systems that are strongly influenced by *Shari`a* principles.

International commerce cannot take place within a vacuum. Nor can any truly "global" system hope to achieve certainty through uniformity. Expressly narrowing the allowable construction of the New York Convention's public policy defense[347] is a viable solution. At such a time, signatories should have the opportunity to reevaluate the costs and benefits of accession to an amended convention. Cutting out the New York Convention's public policy defense,[348] and instead relying on the question of an award's validity, is an ineffectual solution based on semantics. While amending the New York Convention to allow a third party, such as the American Arbitration Association, to determine an award's acceptability in the enforcing jurisdiction[349] will undercut national sovereignty and may be open to the circumvention that it seeks to remedy, having replaced national favoritism with third-party ascendancy.

Certainty, if achievable when seeking to enforce international arbitral awards, will come about through experience, familiarity, and consistency—signals broadcast first by accession and later made more precise through continued application of the New York Convention. To require from a treaty that which cannot be guaranteed by the state is to act without foundation.

All this requires government function and public policy value judgments to be open and accessible. States should outline the methodology used in creating laws and enforcing them. Such transparency helps ensure that a degree of predictability regarding rights and obligations be present. While the law's evolution (and perhaps revolution) is presumed, good state government helps make that possible in a legitimate manner. As Middle Eastern national systems develop alongside international authorities, it is hoped that the trends of reexamination, acceptance, and fair inclusion continue on all sides.

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346. *See* GCC Arbitral Rules of Procedure, Art. 29 *available at* http://www.gcac.biz/en/rules3.php (requiring the GCC to apply local customs when hearing arbitration disputes); *see also* Trumbull, *supra* note 121, at 632 (pointing out that Islamic scholars strongly oppose the watering down of *Shari`a* law); A.M. Rosenthal, *On My Mind: The City and the Kingdom*, N.Y. TIMES, June 17, 1991, at A21 (commenting on the Saudi Arabian government's position on religion in the kingdom).

347. *See* Roy, *supra* note 5, at 955 (pointing out that many countries narrowly interpret Article V(2)(b) to give the article fuller effect).

348. *Id.* at 957 (asserting that removing Article V(2)(b) would not leave a party opposing enforcement "without a remedy").

349. *Id.* at 956–57 (claiming that nullification proceedings before a third and neutral party would provide impartiality to the arbitration process and thus ensure that Article V(2)(b) was properly used).

Ebb and Flow: The Changing Jurisdictional Tides of Global Litigation

By Perry S. Granof,* Richard F. Hans,** Samaa A.F. Haridi,*** and Jennifer S. Kozar****

The United States has long provided an attractive and enticing venue for foreign plaintiffs,[1] particularly in the securities realm,[2] because of the potential availability of class actions, the right to civil jury trials, extensive discovery rights, large damage awards, and avoidance of legal costs.[3] With the globalization of capital markets and the cross-border mergers of

1. *See* James P. George, *Civil Law, Procedure, and Private International Law: Access to Justice, Costs, and Legal Aid,* 54 AM. J. COMP. L. 293, 307 (2006) (acknowledging that the United States is the venue of choice for foreign parties); *see also* Jonathan T. Schmidt, Note, *Keeping US Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels*, 31 YALE J. INT'L L. 211, 233 (2006) (noting that foreign plaintiffs recognize U.S. courts to be more favorable toward them); Jeffrey Silva, *Courting Multilateralism*, RCR WIRELESS NEWS, April 5, 2004, at 10 (affirming that risks are low and benefits are great for foreign plaintiffs filing suit in the United States).

2. *See* Brandy L. Fulkerson, *Extraterritorial Jurisdiction and US Securities Law: Seeking Limits for Application of the 10(b) and 10b-5 Antifraud Provisions*, 92 KY. L.J. 1051, 1051 (2003) (stating that the United States remains an attractive forum for securities litigation due to its deference to plaintiffs). *But see* James J. Finnerty III, *The "Mother Court" and the Foreign Plaintiff: Does Rule 10b-5 Reach Far Enough?*, 61 FORDHAM L. REV. 287, 320 (1993) (suggesting that a "purpose use" analysis to the application of securities actions restricts a foreign plaintiff's access to U.S. courts).

3. *See* Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction over and Enforcement of Judgments against Alien Defendants,* 39 HASTINGS L.J. 799, 828 (1988) (listing the benefits of the U.S. judicial system such as a jury trial, avoidance of legal fees, and extensive discovery).

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exchanges and self-regulatory organizations proceeding apace, it is likely that United States courts will be asked to hear such claims with increasing frequency.[4] Although federal courts have generally opened their doors to these plaintiffs, they have often struggled with the issue of when they should entertain claims brought by foreign plaintiffs against foreign defendants in the United States.[5] As foreign plaintiffs repeatedly turn to the U.S. legal system for redress, defendants are increasingly seeking to avoid securities class action litigation in the United States[6]—employing both jurisdictional and *forum non conveniens* arguments.[7]

An analysis of the current state of the law governing litigation involving predominantly foreign parties and events in U.S. federal and state courts is therefore in order.

I. Determining When Jurisdiction Exists over Claims Involving Primarily Foreign Transactions

The increasingly global nature of financial transactions often results in U.S. lawsuits involving federal securities claims where at least one party is a domiciliary of another country.[8]

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4. *See* Michael A. Perino, Symposium, *Securities Law for the Next Millennium: A Forward-Looking Statement: Introduction*, 75 ST. JOHN'S L. REV. 1, 7–9 (2001); *see also* Perry E. Wallace, *The Globalization of Corporate Governance: Shareholder Protection, Hostile Takeovers and the Evolving Corporate Environment in France,* 18 CONN. J. INT'L L. 1, 16–17 (2002) (discussing the class actions suits a French company faced in American courts based on the globalization of U.S. securities law); Andrew Longstreth, *When Can Foreign Investors Who Bought Shares of Foreign Companies on Foreign Exchanges Sue in the U.S.?: Billions of Dollars in Settlements and Attorneys' Fees Can Hang on the Answer,* AMERICAN LAWYER, Nov. 2006, at A1 (attributing the increase in the number of foreign companies sued in securities class actions to globalization).

5. *See* Kevin B. Clark & Joseph G. Davis, *The Long Arm of Companies and Their Directors and Officers to US Securities Laws,* THE METROPOLITAN CORPORATE COUNSEL (Northeast Edition), July 2003, at 4 (stating that the U.S. courts apply the conduct test to test jurisdiction over claims of foreign plaintiffs against foreign defendants); *see also* Finnerty, *supra* note 2, at 307 (explaining that courts apply the Exchange Act to reject a foreign plaintiff's private action where the defendant's acts in the United States are "merely preparatory").

6. *See* David Boyce, *Foreign Plaintiffs and* Forum Non Conveniens*: Going Beyond Reyno*, 64 TEX. L. REV. 193, 196 (1985) (affirming that foreign plaintiffs consistently turn to U.S. courts for redress); Peter Kurer, *America: The Legal Nation*, EUROMONEY INST. INVESTOR PLC, Jan. 1, 2007, at A1 (noting that defendants settle securities class actions in order to avoid litigation in the United States). *But see* Robert S. De Leon, *Some Procedural Defenses for Foreign Defendants in American Securities Litigation*¸ 26 IOWA J. CORP. L. 717, 718 (2001) (establishing three procedural defenses that foreigners may raise in defending securities actions).

7. *See* Dan Jerker B. Svantesson, *In Defence of the Doctrine of* Forum Non Conveniens, 35 H.K.L.J. 395, 413 (2005) (explaining author Hu Zhenjie's contention that jurisdiction and *forum non conveniens* applications make it easy for foreign defendants to sue in the United States).

8. *See* Max Huffman, *A Standing Framework for Private Extraterritorial Antitrust Enforcement,* 60 SMU L. REV. 103, 103 (2007); *see also* Clark & Davis, *supra* note 5, at 4 (stating that the growth in globalization resulted in many foreign company defendants in U.S. courts under securities laws).

Thus, a domestic plaintiff may initiate a lawsuit in the United States against a foreign defendant,[9] or a foreign plaintiff may sue a domestic defendant in a U.S. court.[10] Because subject matter jurisdiction depends on a plaintiff's or defendant's relationship with the U.S.,[11] such disputes are almost always less problematic in terms of jurisdictional issues than those involving a foreign plaintiff who purchased the securities of a foreign defendant in an overseas market.[12]

While the Securities Litigation Uniform Standards Act of 1998 ("SLUSA")[13] prevents certain class actions alleging securities fraud from being filed in state courts,[14] certain types of securities fraud claims may still be brought in state courts under state Blue Sky Laws.[15] Just as in federal courts, personal jurisdiction is often contested.[16] On the state level, personal jurisdiction is governed by the forum's long arm statute and federal constitutional due process requirements.[17] The due process clause requires that the defendants have "minimum contacts" with

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9. *See* Jessica Garcia, *Made in America: Latin American Consumers Meet Their Maker,* 4 J. INT'L & COMP. L. 759, 772 (1998) (noting that the Foreign Sovereign Immunities Act allows plaintiffs to sue a foreign defendant in U.S. courts).

10. *See* David I. Becker, *A Call for the Codification of the Unocal Doctrine,* 32 CORNELL INT'L L.J. 183, 184 (1998) (affirming that since the Constitution was ratified, U.S. courts have been open to disputes between foreign plaintiffs and domestic defendants); *see also* S. Lynn Diamond, *Empagran, the FTAIA and Extraterritorial Effects: Guidance to Courts Facing Questions of Antitrust Jurisdiction Still Lacking*, 31 BROOK. J. INT'L L. 805, 805 (2006) (stating that U.S. case law embraces many antitrust cases between foreign plaintiffs and domestic defendants).

11. *See* Finnerty, *supra* note 2, at 294–95 (announcing that subject matter jurisdiction over securities fraud exists if the securities are traded on a U.S. exchange and could affect U.S. investors); *see also* Robert A. Prentice, *The Internet and Its Challenges for the Future of Insider Trading Regulation,* 12 HARV. J.L. & TECH. 263, 338–40 (1999) (presenting two tests under which a party's relationship to the United States helps establish subject matter jurisdiction for securities fraud claims).

12. *See generally* Interbrew v. Edperbrascan Corp., 23 F. Supp. 2d 425 (S.D.N.Y.1998) (SEC filings were insufficient to confer jurisdiction over a foreign investor of a foreign corporation even though the corporation had U.S. investors); Kun Young Chang, *Multinational Enforcement of US Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 FORDHAM J. CORP. & FIN. L. 89, 114 (2003) (U.S. courts opt either to dismiss securities actions against foreign issuers purely on grounds of *forum non conveniens* or redirect those cases to foreign courts).

13. 15 U.S.C. § 78a (1998).

14. Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 78a, 101 (1998). *See* Jennifer O'Hare, *Director Communication and the Uneasy Relationship Between the Fiduciary Duty of Disclosure and the Anti-Fraud Provisions of the Federal Securities Laws,* 70 U. CIN. L. REV. 475, 487–88 (2002) (establishing that the SLUSA makes federal court the exclusive venue for most securities fraud class actions involving nationally traded securities).

15. *See* Jeannette Filippone, Comment, *Clearer Skies for Investors: Clearing Firm Liability Under the Uniform Securities Act,* 39 SAN DIEGO L. REV. 1327, 1360 (2002) (stating that the SLUSA's preemption of certain state causes of action applies only to class actions and thus state Blue Sky Laws are available to individual investors). *But see* Robert W. Brownlie, *Specific Applications: Federal Preemption as a Possible Response to a New Challenge: Securities Class Actions in State Court,* 34 CAL. W. L. REV. 493, 502–03 (1998) (reporting that due to jurisdictional constraints, state Blue Sky Laws may limit the ability of plaintiffs to successfully shift nationwide securities fraud class action from federal to state courts).

16. *See* Lewis R. Mills, *Pendent Jurisdiction and Extraterritorial Service Under the Federal Securities Laws,* 70 COLUM. L. REV. 423, 426–27 (1970) (discussing an action where the defendants contested the court's personal jurisdiction); Rosalie Van Nuis, *Securities Regulation—Kentucky Takeover Bids Act Declared Unconstitutional—Esmark, Inc. v. Strode,* 10 N. KY. L. REV. 461, 484 (1983) (citing Esmark, Inc. v. Strode, where plaintiff challenged a state court's personal jurisdiction); James W. Paulsen & Gregory S. Coleman, *Survey: Civil Procedure,* 25 TEX. TECH. L. REV. 509, 517 (1994) (noting that the Texas state court upheld defendant's personal jurisdiction challenge in Viller v. Crowley Maritime Corp.).

17. *See* WSRS Credit Corp. v. Graeme Dow, 1994 Del. C.P. Lexis 21, 2 (1994).

the forum whereby defendants purposefully avail themselves of the privileges and benefits of conducting activities within the forum state,[18] and the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[19]

II. The Effects and Conduct Tests

Federal courts have employed two principal tests for determining whether subject matter jurisdiction exists for claims involving largely foreign transactions: the "effects test" and the "conduct test." Under the effects test, "a court has jurisdiction where illegal activity abroad causes a substantial adverse effect within the United States, either on American investors or on American securities markets."[20]

The "conduct test," on the other hand, considers "whether the fraudulent conduct that formed the alleged violation occurred in the United States."[21] Courts have applied the conduct test with varying degrees of strictness. The Second, Fifth, and D.C. Circuits employ relatively strict standards in determining whether conduct can be characterized as "occurring" domestically.[22] The Second and Fifth Circuits, for example, require the defendant's activities or culpa-

18. *See* David M. Cielusniak, Note, *You Cannot Fight What You Cannot See: Securities Regulation on the Internet,* 22 FORDHAM INT'L L.J. 612, 622 (1998) (stating that to exercise personal jurisdiction over securities transactions in the United States, the defendant must have established minimum contacts with a forum state to the degree that he could reasonably anticipate being haled into court in the state); *see also* Christine T. Jarmer, Comment, *International Internet Securities Fraud and SEC Enforcement Efforts: An Update,* 73 TUL. L. REV. 2121, 2134 (1999) (maintaining the SEC's success in obtaining personal jurisdiction over foreign defendants for securities fraud by applying the minimum contacts test).

19. *See, e.g.,* Aaronson v. Lindsay Hauer Int'l Ltd., 597 N.W.2d 227, 264–69 (Mich. Ct. App. 1999) (holding that a Canadian corporation was subject to specific jurisdiction because (1) it actively participated in a business relationship with a Michigan resident through mail and telephone; (2) it had an interest in protecting its citizens from fraud; and (3) Michigan was the most convenient forum); Milliken v. Meyer, 311 U.S. 457, 463 (1940) (stating that the traditional notions of fair play and substantial justice were satisfied when defendant received adequate service that gave him actual notice of the proceeding and the opportunity to be heard).

20. *In re* Royal Ahold N.V. Sec. and Erisa Litig., 219 F.R.D. 343, 351 (D. Md. 2003). It should be noted that although the effects test is generally applicable to largely foreign transactions, courts are typically unwilling to find this test to be satisfied where the claims at issue are by foreign investors who purchased shares of a foreign corporation on a foreign exchange. *See, e.g., In re* Rhodia S.A. Sec. Litig., Civ. Action No. 1:05 Civ. 5389(DAB), 2007 WL 2826651, at *8 (S.D.N.Y. Sept. 26, 2007); Froese v. Staff, No. 02 CV 5744 (RO), 2003 WL 21523979, at *2 (S.D.N.Y. July 7, 2003) (finding effects test not satisfied where plaintiffs were all foreign investors in a foreign corporation whose shares were sold on a foreign exchange, and U.S. investors made up an "exceptionally small percentage" of the total number of investors in the corporation).

21. Robinson v. TCI/US West Communications, Inc., 117 F.3d 900, 905 (5th Cir. 1997).

22. *See* Itoba Ltd. v. LEP Group PLC, 54 F.3d 118, 122 (2d Cir. 1995); Zolesch v. Arthur Anderson & Co., 824 F.2d 27, 31 (D.C. Cir. 1987).

ble failures to act within the United States (1) to be more than "merely preparatory" to a securities fraud conducted elsewhere[23] and (2) to "directly [cause] the claimed losses."[24]

In *Bersch v. Drexel Firestone, Inc.*,[25] a seminal case on subject matter jurisdiction over foreign securities fraud claims, the Second Circuit Court of Appeals held that the anti-fraud provisions of the federal securities laws do not apply to securities sold to foreigners outside the United States unless acts or culpable failures to act "within the United States directly cause[] such losses," and determined that these laws should therefore not be extended to claims by foreign plaintiffs against a Canadian company that was primarily engaged in the sale and management of mutual funds.[26] Those claims included fraudulent misrepresentations by underwriters as to the company's suitability for public ownership and the failure of the company's prospectuses to disclose illegal activities.[27] While the court found that the mailing of prospectuses containing alleged material misrepresentations or omissions into the United States and the reliance upon them by domestic investors established subject matter jurisdiction over claims by American citizens and residents in the United States, the court held that the exercise of subject matter jurisdiction over foreign claims would be improper, as such "merely preparatory" activities in the United States will not confer jurisdiction over claims of foreign plaintiffs.[28] A more recent decision of the U.S. District Court for the Southern District of New York raises questions as to the level of United States-related conduct that warrants a finding of subject matter jurisdiction.[29]

Conversely, courts within the Third, Fourth, Eighth and Ninth Circuits are viewed as employing a more relaxed standard for the conduct test, which essentially requires the domestic

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23. In interpreting what rises to the level of "more than merely preparatory," one court found, for instance, that the creation of false financial information within the United States, the transmission of this false financial information overseas, and the approval of the resulting false financial statements in the United States prior to sending these statements to investors constituted conduct that was "more than 'merely preparatory'" and warranted extension of subject matter jurisdiction. *See* SEC v. Berger, 322 F.3d 187, 194 (2d Cir. 2003); *see also In re* Vivendi Universal, S.A. Sec. Litig., 381 F. Supp. 2d 158, 169–70 (S.D.N.Y. 2003) (finding that a scheme to acquire U.S. companies "specifically to increase investments by United States investors," was more than merely preparatory in nature). *But see* Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 667 (noting that the "merely preparatory" requirement does not require the domestic conduct itself to be a securities violation).

24. *In re* Bayer AG Sec. Litig., 423 F. Supp. 2d 105, 111 (S.D.N.Y. 2005); *see also* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975); Robinson, 117 F.3d at 905–06; *In re* Rhodia S.A. Sec. Litig., 2007 WL 2826651 at *11 (stating that foreign corporations' U.S. activities were "neither significant in light of the global scope of their business, nor can they be said to have been a direct cause of" the foreign plaintiffs' losses, and declined to extend subject matter jurisdiction).

25. 519 F.2d at 993.

26. *Id.*; *cf.* Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 FORDHAM J. CORP. & FIN. L. 89, 97 (2003) (arguing that under Bersch, "merely preparatory" acts of fraud do not grant jurisdiction to a U.S. court when the acts injure foreigners outside of the United States but may confer such jurisdiction when resident Americans are harmed).

27. *Bersch*, 519 F.2d at 986–87. For a comprehensive review of *Bersch* and its progeny, *see* Lawrence Jackson & Richard Bortnick, *Foreign Shareholder Securities Fraud Litigation: Welcome to Our Federal Courts*, PLUS J. (Prof. Liab. Underwriting Soc'y, Minneapolis, Minn.), November 2005, at 1.

28. *Id.* at 987–93.

29. *See In re* Nortel Networks Corp. Sec. Litig., No. 01 Civ. 1855(RMB), 2003 WL 22077464, at *7 (S.D.N.Y. 2003).

conduct at issue to be significant in scope and a substantial component of the alleged fraud, rather than a direct cause of the loss.[30]

There is no requirement that the two tests be applied separately from one another,[31] and indeed, "an admixture or combination of the two often gives a better picture of whether there is sufficient US involvement to justify the exercise of jurisdiction by an American court."[32]

III. Grounds for Finding Subject Matter Jurisdiction over Foreign Corporations

Domestic courts confronted with claims brought by foreign purchasers of securities of non–U.S. entities on foreign exchanges have the difficult task of determining whether any U.S. interests are implicated in a manner that warrants the exercise of jurisdiction.[33] In *Bayer AG Securities Litigation*,[34] for example, the court held it lacked jurisdiction and granted the defendants' motion to dismiss a securities fraud class action as to claims brought by foreign investors who bought shares in Bayer AG, a corporation headquartered in Germany.[35] The court held that because the majority of the alleged material misstatements at issue originated in Germany, and only a small percentage of shares were held by U.S. investors during the class period, the plaintiffs failed to show sufficient contact with the United States to warrant a finding of subject matter jurisdiction.[36] The court further determined that plaintiffs were unable to demonstrate a substantial effect on U.S. citizens to support jurisdiction over the foreign purchasers of Bayer AG stock and concluded that "[t]he magnitude of Bayer AG's conduct abroad and the overwhelming number of Foreign Purchasers affected thereby" militated against a finding that subject matter jurisdiction should be extended.[37]

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30. While the Seventh Circuit professed to adopt the approach followed by the Second and Fifth Circuits, it appears to have in fact adopted an approach more akin to circuits employing a more relaxed standard, stating that federal courts have jurisdiction over securities fraud claims when the United States–based conduct "directly causes" the alleged loss "in that the conduct forms a substantial part of the alleged fraud and is material to its success." Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 667 (7th Cir. 1998); *see* Grunenthal GmbH v. Hotz, 712 F.2d 421, 424–25 (9th Cir. 1983) (adopting the test established by the Eighth Circuit in deciding that subject matter jurisdiction was established because the misrepresentations in question were significant); *see also In re* Cable & Wireless, PLC, Sec. Litig., 321 F. Supp. 2d 749, 762–63 (E.D. Va. 2004) (adopting the "middle ground" approach used by the Seventh, Eighth, and Ninth Circuits, which allow significant levels of fraudulent conduct in the United States to confer subject matter jurisdiction on U.S. courts).

31. *See* Euro Trade & Forfaiting, Inc., et al. v. Vowell, et al., No. 00 Civ. 8431 (LAP), 2002 U.S. Dist. LEXIS 5385 at *19, *21 (S.D.N.Y. Mar. 29, 2002); Stuart M. Grant and Diane Zilka, *The Current Role of Foreign Investors in Federal Securities Class Actions*, 1620 PLI/CORP 11, 36 (2007) (recounting the Second Circuit's declaration that the effects and conduct tests do not need to be applied separately).

32. Itoba Ltd. v. LEP Group PLC, 54 F.3d 118, 122 (2d Cir. 1995).

33. *Cf.* Grant & Zilka, *supra* note 31, at 18–19 (describing a case in which foreign investors and purchasers faced serious subject matter jurisdiction problems under the "conduct test," and the court ruled there were insufficient facts to confer subject matter jurisdiction).

34. 423 F. Supp. 2d 105, 106–07 (S.D.N.Y. 2005).

35. *In re Bayer AG*, 423 F. Supp. 2d at 106–07.

36. *Id.* at 111–13 (also reasoning that because U.S. investors controlled only 8% of Bayer AG's shares, the Court did not have subject matter over the dispute in this case).

37. *Id.* at 114.

Similarly, in *Paraschos v. YBM Magnex Int'l, Inc.*,[38] the court found that it lacked subject matter jurisdiction over claims brought by shareholders of a Canadian corporation alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, as well as negligent misrepresentation under state law, resulting from defendants' purported money-laundering scheme.[39] The court found that because the claims were brought by "a purported class of investors who are virtually all Canadian, against predominantly Canadian defendants, concerning a Canadian corporation whose stock was sold only on Canadian stock exchanges," and because 11 proceedings relating to the same alleged securities fraud dispute were pending in Canada, Canadian interests predominated.[40] Although the court recognized that some shares of the corporate defendant may have been held by U.S. investors, it found that dismissal was proper due to the absence of trading of the shares at issue on U.S. stock exchanges; and because the corporate defendant's prospectus indicated that its securities had not been registered under the U.S. Securities Act of 1933; and that its internal controls and financial reporting standards would comport with those generally applicable to Canadian public companies, thus putting any and all investors on notice that Canada would have "significant interests in the company and in any potential legal action concerning" it.[41]

In contrast, the court in *Nortel Networks Corp. Securities Litigation*[42] held that it had subject matter jurisdiction, for purposes of class certification, over foreign plaintiffs who traded on the Toronto Stock Exchange shares of the Canadian corporation Nortel Networks Corp. ("Nortel"), a supplier of Internet and other network services.[43] Plaintiffs alleged that they were misled and defrauded as a result of the artificial inflation of Nortel's revenue, which was used to fund an "aggressive growth-by-acquisition strategy, then misled investors by failing to write down the goodwill associated with its numerous US acquisitions despite substantial declines in their value."[44] Plaintiffs argued that because the vast majority of Nortel's customers and potential customers during the relevant period were located in the United States, subject matter jurisdiction should be extended to these foreign purchasers' claims.[45] The court agreed, holding that because defendants extended financing to numerous customers in the United States, whom they knew to be uncreditworthy, to artificially inflate revenues, their activities satisfied the test for subject matter jurisdiction.[46]

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38. 130 F. Supp. 2d 642, 647 (E.D. Pa. 2000).
39. *Paraschos*, 130 F. Supp. 2d at 643.
40. *Id.* at 645–47.
41. *Id*. at 646–47.
42. 4142 No. 01 Civ. 1855(RMB), 2003 WL 22077464, at *1 (S.D.N.Y. Sept. 8, 2003).
43. *In re* Nortel Networks, 2003 WL 22077464, at *8.
44. *Id.* at *7.
45. *Id.*
46. *Id.* at *7.

IV. Additional Grounds for Dismissal: The Doctrine of *Forum Non Conveniens*

A court confronted with an action with little or no connection to the United States may also decide not to hear the case under the doctrine of *forum non conveniens*,[47] which permits courts to decline exercising their jurisdiction where "dismissal would 'best serve the convenience of the parties and the ends of justice.'"[48] Although *forum non conveniens* "remains an exceptional tool to be employed sparingly,"[49] multiple courts have recently employed the doctrine to dismiss claims found to be centered in locations outside the United States.[50]

At the outset of an inquiry into whether the doctrine of *forum non conveniens* warrants dismissal, courts consider the deference to which the plaintiff's choice of forum is entitled.[51] The doctrine exists alongside the principle that a plaintiff's choice of forum should rarely be disturbed,[52] which is partially based on the assumption that a plaintiff's choice of forum is grounded in considerations of convenience.[53] "When the plaintiff is foreign, however, this assumption is much less reasonable . . . and a foreign plaintiff's choice [therefore] deserves less deference."[54] Courts currently afford a plaintiff's choice of forum a degree of deference that

47. *See* MICHAEL KARAYANNI, FORUM NON CONVENIENS IN THE MODERN AGE 1–3 (2004) (explaining that *forum non conveniens* gives a court "discretionary powers" to decide if another forum is better suited to host the case); *see also* Jinku Hwang, *Is the ACPA a Safe Haven for Trademark Infringers?—Rethinking the Unilateral Application of the Lanham Act*, 22 J. MARSHALL J. COMPUTER & INFO. L. 655, 691 (2004) (emphasizing that a court must possess subject matter jurisdiction before *forum non conveniens* avails).

48. Murray v. British Broad. Corp., 81 F.3d 287, 290 (2d Cir. 1996) (quoting Koster v. (American) Lumbermens Mut. Cas. Co., 330 U.S. 518, 527 (1947)).

49. Windt v. Qwest Commc'ns Int., Inc., Civ. Action No. 04–3026 (GEB), 2006 WL 2987097, at *4 (D.N.J. Oct. 17, 2006).

50. *See* Pollux Holding Ltd. v. The Chase Manhattan Bank, 329 F.3d 64, 76 (2d Cir. 2003) (granting defendant's motion to dismiss because witnesses could be compelled to appear only in a British court); Varnelo v. Eastwind Transp., Ltd., No. 02 Civ. 2084 (KMW) (AJP), 2003 WL 230741, at *26 (S.D.N.Y. Feb. 3, 2003) (explaining that the location of key witnesses in Russia strongly favored dismissal); Mary Elliott Rollé, *Unraveling Accountability: Contesting Legal and Procedural Barriers in International Toxic Tort Cases*, 15 GEO. INT'L ENVTL. L. REV. 135, 161–62 (2003) (acknowledging that *forum non conveniens* applies even to foreigners exercising their statutory right to sue in U.S. courts).

51. *See* Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1225–26 (3d Cir. 1995) (noting that a court must consider the plaintiff's right to sue in the United States); Kirch v. Liberty Media Corp., No. 04 Civ. 667 (NRB), 2006 WL 3247363, at *2 (S.D.N.Y. Nov. 8, 2006) (explaining that first, a court determines the "degree of deference" to give the plaintiff's choice of forum).

52. *See* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 6 (1972) (discouraging courts from disturbing a plaintiff's choice of forum unless the facts are "strongly" in the defendant's favor); *see also* E.E. Daschbach, *Where There's a Will, There's a Way: The Cause for a Cure and Remedial Prescriptions for* Forum Non Conveniens *as Applied in Latin American Plaintiff's Actions Against U.S. Multinationals*, 13 L. & BUS. REV. AM. 11, 13 (2003) (recognizing the initial "strong presumption" in plaintiff's favor). *But see* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (explaining that a presumption in favor of the plaintiff is rebuttable if the chosen forum would be "oppressive" to a defendant).

53. *See* Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp., 127 S. Ct. 1184, 1186–87 (2007) (advising courts to consider "convenience, fairness, and judicial economy"); *see also* Dmitry Gololobov, *Yukos Risk: The Double-Edged Sword —A Case Note on International Bankruptcy Litigation and the Transnational Limits of Corporate Governance*, 3 N.Y.U. J. L. & BUS. 557, 594 (2007) (listing possible factors that determine whether the present forum is convenient, such as location of witnesses, choice of law, and hardship for the defendant).

54. *See Piper Aircraft Co.*, 454 U.S. at 241.

moves along a "sliding scale."[55] Where the plaintiff has a "bona fide connection" with the United States and the chosen forum, the defendant will generally have difficulty obtaining dismissal on the grounds of *forum non conveniens*.[56]

In contrast, if the plaintiff's choice of forum is not supported by such a "*bona fide* connection" to the United States, "the choice of forum warrants less deference and it will be easier for defendant to prevail on a motion to dismiss."[57]

In *Kirch v. Liberty Media Corp.*,[58] for example, the court found that the German plaintiffs' choice of forum was entitled to minimal deference because their various tort claims allegedly arose from a German Bloomberg TV German-language broadcast of an interview of the CEO of Deutsche Bank discussing plaintiff KirchGroup's liquidity crisis.[59] The court found that although the interview was conducted in New York, "the inherently German nature of the dispute" cautioned against awarding great deference to plaintiff's choice of forum and so dismissed the suit.[60]

After determining the appropriate level of deference to which a plaintiff's forum selection is entitled, courts considering whether to dismiss on *forum non conveniens* grounds look first to whether an adequate alternative forum is available.[61] To show that an adequate alternative forum exists, it must be established that: (1) the defendant is amenable to process in the alternative forum; and (2) the subject matter of the lawsuit is cognizable in the alternative forum.[62]

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55. *See* Iragorri v. U. Tech. Corp., 274 F.3d 65, 71 (2d Cir. 2001); *In re* Assicurazioni General S.P.A. Holocaust Ins. Litig., 228 F. Supp. 2d 348, 351 (S.D.N.Y. 2002); *see also* Henry H. Perritt, Jr., *Providing Judicial Review for Decisions by Political Trustees*, 15 DUKE J. COMP. & INT'L L. 1, 32 (2004) (explaining that the "sliding scale" test analyzes the level of connection the plaintiff has with the forum).

56. *See* Iragorri, 274 F.3d at 72; *see also* Helen E. Mardirosian, Symposium, *Developments in the Law: Federal Jurisdiction and Forum Selection*, 37 LOY. L.A. L. REV. 1643, 1660 (2004) (listing factors that help determine a "bona fide connection"). *But cf.* John R. Wilson, *Coming to America to File Suit: Foreign Plaintiffs and the* Forum Non Conveniens *Barrier in Transnational Litigation*, 65 OHIO ST. L.J. 659, 688 (arguing that a foreign plaintiff would not likely have a "bona fide connection" with the forum because it generally has fewer contacts with the United States).

57. *See* Windt v. Qwest Commc'ns Int., Inc., Civ. Action No. 04–3026 (GEB), 2006 WL 2987097, at *3 n.11 (D.N.J. Oct. 17, 2006) (quoting *Iragorri*, 274 F.3d at 72).

58. No. 04 Civ. 667(NRB), 2006 WL 3247363 (S.D.N.Y. Nov. 8, 2006).

59. *Kirch*, 2006 WL 3247363, at *1–3.

60. *Id.* at *4.

61. *See* Rustal Trading US, Inc. v. Makki, 17 F. App'x 331, 335 (6th Cir. 2001); *see also Kirch*, 2006 WL 3247363, at *2 (explaining that after determining what level of deference the plaintiff's choice of forum deserves, the court must consider defendant's proposed "alternative forum"); Peter J. Carney, Comment, *International* Forum Non Conveniens: *"Section 1404.5"— A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 AM. U. L. REV. 415, 495 n.105 (1995) (enumerating instances where courts considered an alternate forum).

62. *See* The Tech. Dev. Co., Ltd. v. Onischenko, No. Civ.A. 05-4282(MLC), 2007 WL 1202412, at *3 (D.N.J. Apr. 25, 2007); Kultur Int'l Films Ltd. v. Covent Garden Pioneer, FSP., Ltd., 860 F. Supp. 1055, 1063 (D.N.J. 1994).

Although dismissal on the grounds of *forum non conveniens* is improper "where the alternative forum does not permit litigation of the subject matter of the dispute,"[63] it may be proper even when it would result in a change of law unfavorable to the plaintiff.[64]

If an adequate alternate forum is found to exist, the court must then balance certain public and private factors.[65] The private interests to be considered include: relative ease of access to evidence; availability of compulsory process for attendance of unwilling witnesses; the cost of attendance of willing witnesses; enforceability of a judgment once obtained,[66] and other relative "advantages and obstacles to a fair trial."[67] Public interest factors relevant to this inquiry include administrative difficulties resulting from court congestion, the local interest in resolving disputes at or near home, avoiding the imposition of jury duty on people of a community with no relation to the litigation, and avoiding problems of unfamiliarity with and application of foreign law.[68] Courts have stressed the importance of weighing all relevant factors, rather than placing central emphasis on any one factor, to maintain the "very flexibility" that makes the *forum non conveniens* doctrine so valuable.[69]

After concluding that the Netherlands was an adequate alternative forum, particularly in light of a related action pending before its courts, the court in *Windt v. Qwest Communications International, Inc.*[70] employed a balancing test of public and private factors and held that the claims brought by Dutch plaintiff-attorneys acting as bankruptcy trustees for a Dutch corporation should be dismissed on grounds of *forum non conveniens*. The fact that two defendants were domiciled in the United States, and that numerous board meetings and conference calls by defendants took place in the United States, did not establish that the dispute was "local" in nature in as much as the case concerned "allegations of fraud and mismanagement of a Dutch business entity by" a board member, executives, and the controlling holder of that corporation.[71] To hold otherwise, the court held, would render almost any transaction with even a

63. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981).

64. *Id.* at 247, 252 n.19; *see* De Leon, *supra* note 6, at 730 (stressing that differences in foreign and U.S. law are not relevant in a *forum non conveniens* analysis). *But see* Mardirosian, *supra* note 56, at 1670 (pointing out that courts dismiss cases for reasons other then a "'genuine concern' for convenience").

65. *See, e.g.*, Kirch v. Liberty Media Corp., No. 04 Civ. 667 (NRB), 2006 WL 3247363, at *2 (S.D.N.Y. Nov. 8, 2006); *see also* Mardirosian, *supra* note 56, at 1656 (defining private interests as those relating to the parties of the transaction); Rollé, *supra* note 50, at 159 (identifying public interest factors as those affecting the local society).

66. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). *But see* N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT'L ECON. L. 601, 672 (2006) (suggesting that applying private interests undermines "dynamic principles of adjudicatory comity").

67. *Gulf Oil*, 330 U.S. at 508.

68. *Id.* at 508–09; *see Kirch*, 2006 WL 3247363, at *8.

69. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249–50 (1981); *see also* Daschbach, *supra* note 52, at 42 (suggesting courts be flexible under *forum non conveniens*); Aaron J. Lockwood, Note, *The Primary Jurisdiction Doctrine: Competing Standards of Appellate Review*, 64 WASH. & LEE L. REV. 707, 739 (2007) (recognizing that there is no strict formula for *forum non conveniens*).

70. No. 04-3026 (GEB), 2006 WL 2987097 (D. N.J. Oct. 17, 2006).

71. *Windt*, 2006 WL 2987097, at *8.

remote connection to the United States "Americanized," thereby "making the U.S. federal court system the surrogate court for the entire modern world global economy,"[72] and thus essentially inviting the world to litigate its disputes in the United States without regard to the existence of substantial domestic connections therein. Because the actual dispute had little connection to the United States, the court held that the interests of having disputes settled locally and avoiding burdening jurors with the resolution of matters unrelated to the community would not be furthered by entertaining the case.[73]

In *Warlop v. Lernout*,[74] the court deemed Belgium an adequate forum and dismissed, under the doctrine of *forum non conveniens*, claims alleging securities law violations under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder brought by class action plaintiffs who had purchased shares of a corporate defendant on Europe's EASDAQ market.[75] Despite previously denying defendants' motion to dismiss claims brought by plaintiffs who purchased shares on the American NASDAQ exchange based on concerns about Belgium's "'lack of a class action mechanism and its failure to recognize the fraud-on-the-market theory,'" the court found that the balance of private factors "strongly support[ed] dismissal."[76] The court noted that although there were "much more difficult hurdles for plaintiffs in Belgium," dismissal under the doctrine of *forum non conveniens* was proper because the alleged fraud occurred primarily in Belgium, the primary witnesses and documents were located in Belgium, the lead plaintiffs and most class members were non-U.S. residents, and, "most significantly," all shares of stock at issue were obtained on the EASDAQ exchange.[77]

Thus, while a plaintiff seeking to litigate securities claims may find the U.S. legal system appealing for a number of reasons—including the availability of jury trials, the potential for punitive and/or treble damages, and the extensive discovery process[78]—a court may dismiss these claims under the doctrine of *forum non conveniens*, even where certain or all benefits unique to the U.S. legal system will no longer be available to the plaintiff or the plaintiff may otherwise be harmed by a change in applicable law, so long as an adequate alternative forum exists and dismissal would promote both convenience and justice.[79]

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72. *Id.*

73. *Id.* at *9.

74. 473 F. Supp. 2d 260, 261 (D. Mass. 2007).

75. *Id.* at 261.

76. *Id.* at 263.

77. *Id.* at 264.

78. *See* Diamond, *supra* note 10, at 805 n.3*; see also* Mardirosian, *supra* note 56, at 1669 (stating that U.S. courts are attractive forums because of their extensive discovery process and availability of jury trials).

79. *See* Kamel v. Hill-Rom Co., 108 F.3d 799, 804 (7th Cir. 1997); *see also* Kinney Sys. Inc. v. Cont'l Ins. Co., 674 So.2d 86, 93 (Fla. 1996) (holding that although the corporation's principal place of business was in the United States, this fact does not necessarily preclude *forum non conveniens*). *But see* John R. Schmertz & Mike Meier, *In Dispute Between BCCI and Pakistani State Bank Over $50 Million Loan, Second Circuit Remands to District Court for* Forum Non Conveniens *Analysis Where Pakistan May Be Alternative Forum and Pakistani Banking Laws Changed While Case Was Pending in Second Circuit*, 8 INT'L L. UPDATE 2, 2 (2002) (arguing that a court may dismiss a case on *forum non conveniens* grounds, even though it cannot make a definitive finding about the adequacy of the foreign forum).

Similarly in state courts, "whenever considerations of convenience, expense and the interest of justice dictate that litigation in the forum selected by the plaintiff would be unduly inconvenient, expensive or otherwise inappropriate,"[80] a court, on the basis of *forum non conveniens*, may decline to hear a case even where jurisdiction is present.[81] Where a forum state has substantial interest in the subject of the action, a *forum non conveniens* motion will often be denied.[82] Thus, in *Canadian Imperial Bank of Commerce v. Pamukbank Tas,* the Court denied defendant's motion to dismiss, holding that New York was the proper forum for a suit between a Canadian bank and a Turkish bank because the letter of credit being sued on was to be performed in New York and the state had a substantial interest in the transaction.[83] However, if there is little public interest in the suit, and a strong connection between the claims and the forum state does not exist, the court is more likely to grant the motion.[84] In *Finance & Trading Ltd. v. Rhodia S.A.*, for example, the Court dismissed an action against foreign defendants alleging fraudulent inducement to purchase stock on the Paris Stock Exchange because (1) the alleged meetings between the parties in a New York City hotel did not create a substantial nexus with the state because the transaction occurred in a foreign jurisdiction; (2) actions were pending in France that were similar to the instant case; and (3) a majority of documents and witnesses were French.[85]

Courts are, however, sometimes very reluctant to dismiss a case on the grounds of *forum non conveniens*, even when the public and private interests seem better served in the foreign jurisdiction.[86] Such was the case in *Buettner v. Bertelsmann*,[87] where two German entrepreneurs sued in a California state court for their equity stake in a European joint venture.[88] The court denied defendants' motion to dismiss on the basis of *forum non conveniens*, despite the fact that plaintiff and defendant were German citizens, the contract at issue was executed in Germany

80. Friedman v. Alcatel Alsthom, 752 A.2d 544, 550–51 (Del. Ch. 1999).

81. *See* M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry,* 39 VA. J. INT'L L 1069, 1086 n.54 (1999). *See generally* David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785, 795 n.54 (1993) (maintaining that this is true even though jurisdiction and venue are proper).

82. *See* Canadian Imperial Bank of Comm. v. Pamukbank Tas, 632 N.Y.S.2d 918, 922 (Sup. Ct. 1994) (holding that since New York had a substantial interest in the international letter of credit transaction, New York courts have jurisdiction); *see also* J. Zeevi & Sons Ltd. v. Grindlays Bank Ltd., 333 N.E.2d 168, 227 (N.Y. 1975) (stressing New York's supreme interest in outcome of the case).

83. *Canadian Imperial Bank of Comm.,* 632 N.Y.S.2d at 921–22.

84. *See* Fin. & Trading Ltd. v. Rhodia S.A., 816 N.Y.S.2d 7, 8 (App. Div. 2006); *see also* Martin v. Mieth, 321 N.E.2d 777, 779 (N.Y. 1974) (reminding that since *forum non conveniens* is based upon flexibility, courts are not required to entertain causes of action lacking a substantial nexus with New York).

85. *Fin. & Trading Ltd.*, 816 N.Y.S.2d at 8–9.

86. *See* Hwang, *supra* note 47, at 693 (establishing that a U.S. court is reluctant to dismiss a hijacking claim brought by a U.S. registrant against a foreign trademark under *forum non conveniens*); *see also* De Leon, *supra* note 6, at 731 (claiming that the application of *forum non conveniens* is almost impossible to predict because of its discretionary nature).

87. No. 1038215 (Cal. Super. Ct. Dec. 11, 2003).

88. *Buettner*, No. 1038215.

and written in German, all relevant documents were in German, and German law governed.[89] The court held that because the plaintiffs had left Germany and had been U.S. residents for several years before the suit, they were entitled to bring the case in the United States and enjoy the same benefits as other California residents.[90]

V. Concerns Related to a Finding of Jurisdiction

In considering whether subject matter jurisdiction exists, several courts have expressed concern that too restrictive an approach may render U.S. courts ineffective in addressing fraud in an increasingly global securities market.[91] On the other hand, a concern has been expressed that the increased exercise of subject matter jurisdiction over largely foreign claims may lead other countries to expand their exercise of jurisdiction over U.S. parties.[92]

Courts have also been troubled by the possibility that foreign courts may choose not to recognize the judgments of U.S. courts where the conduct and transaction(s) involved are substantially foreign in nature.[93] The fear of nonrecognition is not unfounded, as a recent decision by the Court of Appeal for Ontario illustrates. In *Currie v. McDonald's Restaurants of America Limited*,[94] a consumer matter alleging the manipulation of promotional games, the court held that a class action settlement approved by an Illinois state court was not binding on a Canadian plaintiff who had not participated in the Illinois proceedings.[95] The court found that the plaintiffs had "done nothing to invite or invoke Illinois jurisdiction," that customers of McDonald's restaurants in Ontario had "no reason to expect" that claims they wished to assert against McDonald's Canada would be adjudicated in the United States, and that the procedures adopted in the Illinois action were insufficient to afford Canadian plaintiffs in *Currie* with adequate notice of these proceedings.[96] After concluding that the Illinois judgment lacked *res judi-*

89. *See Bertelsmann Loses California Verdict,* N.Y. TIMES, Dec. 12, 2003, at C6; Jeff Leeds, *Jury Hits Bertelsmann With $250-Million Award for Pair,* L.A. TIMES, Dec. 12, 2003, at C2; *see also* Nora L. Tooher, *Two German Entrepreneurs Win $255 Million*, LAW. WKLY., 2004, at ¶ 53–54 (reasoning that the case would have been prohibitively expensive to bring in Germany).

90. *See* Leeds, *supra* note 89, at C2 (noting that both plaintiffs moved to California in the late 1990s).

91. *See* MCG, Inc. v. Great Western Energy Corp., 896 F.2d 170, 175 (5th Cir. 1990) (discussing the relaxed standards of the Third, Eighth, and Ninth Circuits for deciding subject matter jurisdiction in foreign transactions cases); Grunenthal GmbH v. Hotz, 712 F.2d 421, 424–25 (9th Cir. 1983) (opining that a restrictive approach might make the United States a haven for those who wish to defraud foreign securities purchasers).

92. *See* Blechner v. Daimler Benz A.G., 410 F. Supp. 2d 366, 372 (D. Del. 2006) (predicting that where U.S. courts increasingly grant jurisdiction on foreign claims, in reciprocity, more foreign jurisdictions will hear U.S. cases). *See generally* Press Release, Newswire Europe Including UK Disclose, Royal Dutch Shell PLC—1st Quarter Results (May 3, 2007) (referring to a recent development relating to the Royal Dutch/Shell Transport litigation brought in U.S. federal court, where Royal Dutch Shell announced that it settled 50 European institutional investors' claims in exchange for $450 million, thereby creating the potential for European litigants to forgo the U.S. class action mechanism and attempt to settle litigations locally. This settlement is not binding on U.S. investors, and we have yet to see how U.S. courts will react to this development).

93. *See* Joel P. Rochon, *The Transnational Class: A Canadian Perspective on Cross-Border Class Actions,* 1 ATLA ANN. CONVENTION REFERENCE MATERIALS ¶ 1 (2006) (noting the difficulties in obtaining decisions in U.S. courts with international finality when foreign claimants are involved).

94. 70 O.R. (3d) 53 (2004).

95. *Id.* at 54.

96. *Id.* at 57 (2004).

cata effect on the claims in Ontario,[97] the Ontario court held that the plaintiff was not precluded from pursuing a Canadian action against McDonald's on behalf of the Canadian class members he sought to represent.[98]

The decision in *Currie* may lead courts to curtail the extension of subject matter jurisdiction over certain "foreign" claims. However, some courts appear willing to risk the potential nonrecognition of their judgments in favor of extending subject matter jurisdiction over securities fraud claims.[99] For example, the court in *Cable & Wireless, PLC, Securities Litigation*[100] was unwilling to find a lack of jurisdiction over claims brought by foreign investors against a British telecommunications company despite defendants' argument that England might not recognize a U.S. judgment in the action, thereby exposing them to multiple suits.[101]

Similarly, despite the defendants' contention that lack of enforceability of any judgment made exercise of subject matter jurisdiction "futile and improper," the court in *Royal Dutch/Shell Transport Litigation*[102] held that it had subject matter jurisdiction over securities fraud claims brought by putative class members who were foreign nationals that purchased the securities of defendant corporations Royal Dutch (headquartered in The Netherlands) and Shell Transport (headquartered in England) on foreign exchanges.[103] The court found that although defendants had presented testimony from various experts that there was a "very real" concern that foreign courts would not enforce a U.S. judgment, these experts had not concluded that nonenforceability was a "near certainty," and their testimony therefore did not warrant dismissal.[104]

In the more recent case of *Vivendi Universal, S.A. Securities Litigation*,[105] the court examined to what extent any judgment in a class action would be granted preclusive effect in considering on a country-by-country basis whether a class action was the superior method of class certification for putative foreign class members.[106] The court reasoned: "The closer the likelihood of non-recognition is to being a 'near certainty,' the more appropriate it is for the Court to deny certification of the foreign claimants."[107] In its analysis, the court took evidence and reviewed at some length the prospect that a judgment in the class action would be granted pre-

97. *Id.* at 54.

98. *Id.*

99. *E.g.*, Cromer v. Berger, 205 F.R.D. 113, 134–36 (S.D.N.Y. 2001). *But see* Bersch v. Drexel Firestone, 519 F.2d 974, 996 (2d Cir. 1975) (holding that while a U.S. court may enter a judgment when there is a possibility that a foreign court may not recognize it, it should not do so when such recognition may be a near certainty).

100. 321 F. Supp. 2d 749 (E.D. Va. 2004).

101. *Id.* at 765–66.

102. 380 F. Supp. 2d 509 (D.N.J. 2005).

103. *In re Royal Dutch/Shell*, 380 F. Supp. 2d at 547.

104. *Id.* at 547.

105. 242 F.R.D. 76 (S.D.N.Y. 2007).

106. *In re Vivendi*, 242 F.R.D. at 95–96, 102–05. *See In re Vivendi Universal, S.A. Securities Litigation: The Long Arm of US Jurisdiction*, LATHAM & WATKINS LLP CLIENT ALERT (June 6, 2007) (arguing that it must be shown that the class action is superior to other available methods for the case's adjudication for plaintiffs from each country at issue).

107. *In re Vivendi*, 242 F.R.D. at 95.

clusive effect in five foreign jurisdictions.[108] Ultimately, it found that a class action was the superior method of dispute resolution for French, English, and Dutch shareholders, but not for German and Austrian shareholders, and thus certified a class that included the former.[109]

VI. Conclusion

More companies, foreign and domestic, are entering the global marketplace and turning to capital markets to raise the monies necessary for global competition. The price of admission, for those who turn to the U.S. markets, is the application of federal securities laws, attendant oversight of federal regulators, and the risk and potential exposure of securities class action lawsuits.

The risk of exposure to federal securities lawsuits, particularly those brought by foreign plaintiffs, incereases with the nexus to American capital markets and, critically, the warmth of the reception that American judgments may receive in the foreign jurisdictions that are home to those non–U.S. plaintiffs. It is this latter concern--the nonrecognition of U.S. judgments—that may keep the door closed to foreign plaintiffs who ask that U.S. federal courts find jurisdiction over every securities claim in the global marketplace.

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108. *Id.* at 95, 102–05.

109. *Id.* at 106.

The Global Partnership: The Final Blow to the Nuclear Nonproliferation Regime?

Joseph G. Silver*

I. Introduction

With the rise of globalization, or as journalist Thomas Friedman terms it, the flattening of the world,[1] states[2] are in the midst of leveling the playing field economically and technologically.[3] To thrive in this globalized world, states must be secure, efficient and profitable.[4] So, what do some states in the 21st century, either perennial or developing powers, believe will solve their security, efficiency, and profitability concerns? Nuclear energy.[5]

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1. *See* THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTIETH CENTURY 5–8 (2005) (positing that developing countries are able to compete for global knowledge work as technology becomes increasingly accessible worldwide, thus leveling the playing field and "flattening the world").

2. It is common practice among international law scholars and judges to use term "state" to refer to a nation or country, and not a state within the United States. *See* WEBSTER'S UNIVERSAL COLLEGE DICTIONARY 768 (perm. ed., rev. vol. 1997) (defining a "state" as a politically unified people occupying a definite territory or nation).

3. *See* FRIEDMAN, *supra* note 1, at 175–82 (explaining that new technology and outsourcing has allowed people around the world to compete through worldwide business collaboration). *But cf.* WILLIAM GRIEDER, ONE WORLD READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM 46–51 (1997) (contending that as the globalized market strives toward increased efficiency and production, profits decline as supply increases, thereby stagnating real development in poor industrializing countries).

4. *See* Sixth Conference of the Parties to the United Nations Framework Convention on Climate Change, The Hague, Holland, Nov. 20, 2000, *Second Session of the Ad Hoc Open-ended Intergovernmental Group of Experts on Energy and Sustainable Development*, ¶ 7 (suggesting that China's need for nuclear power is based on national interests in energy supply security, efficient energy, and industry demand); *see also The U.S. and India: An Emerging Entente? Hearing Before the Committee on International Relations*, 109th Cong. 16, 18 (2005) (statement of Nicholas Burns, Undersecretary of State for Political Affairs) (addressing the commercial benefits of modernizing India's infrastructure in part by allowing civil nuclear cooperation).

5. *See IAEA Voices Support for Indonesia's Nuclear Power Program*, JAPAN ENERGY SCAN, Dec. 11, 2006, ¶ 3 (promoting nuclear power as an adequate and reliable source of energy); *see also* UN International Atomic Energy Agency ("IAEA"), *Nuclear Power for Sustainable Energy Development: Background Paper for the Second Session of the Ad Hoc Open-ended Intergovernmental Group of Experts on Energy and Sustainable Development* at 3, 7 (Feb. 26–Mar. 2, 2001) (alluding to the energy supply security benefits of nuclear power).

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The nuclear nonproliferation regime, in place for over 30 years, bars states without nuclear weapon capabilities from accessing materials and equipment necessary to develop them.[6] However, when a state with a plethora of nuclear weapons and an unsteady economy marries a state with an insatiable thirst for nuclear energy and a growing economy, a breach of long-standing nonproliferation laws and policies may result.[7] The global partnership between the United States and India, consummated on July 18, 2005, achieves such dire results.[8]

Part II of this article describes the two primary sources of international law: treaties and customary international law ("C.I.L." or "custom"). Part III presents the centerpiece of the nonproliferation regime, the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT").[9] The motivation for the NPT precedes the description of its legal framework, objectives, and unfortunate shortcomings. Part IV analyzes three more integral parts of the nonproliferation regime: the Nuclear Suppliers Group ("NSG"), the Nuclear Non-Proliferation Act ("NNPA")[10] and the Atomic Energy Act ("AEA").[11] Part V discusses the reasons behind the United States–India global partnership and the United States' irreverence towards the non-proliferation regime. This section focuses on how the global partnership may result in the breach of the NPT, NSG, and AEA. Part VI concentrates on the potential repercussions of the global partnership; specifically, how it may provide states with a disincentive to adhere to their non-proliferation obligations.

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6. *See* Treaty on the Non-Proliferation of Nuclear Weapons art. I, July 1, 1968, 21 U.S.T. 483 (prohibiting the transfer of nuclear technology to non-nuclear countries); *see also* Jayantha Dhanapala, MULTILATERAL DIPLOMACY AND THE NPT: AN INSIDER'S ACCOUNT AT XIII, U.N. Doc. UNIDIR/2005/3, U.N. Sales No. GV.E.05.0.5 (2005) (stating the UN goal of preventing the use and spread of nuclear weapons); ONKAR MARWAH & ANN SCHULZ, NUCLEAR PROLIFERATION AND THE NEAR-NUCLEAR COUNTRIES, 3 (1975) (iterating that the nuclear nonproliferation treaty strives to hinder the development of nuclear weapons).

7. *See The U.S. and India: An Emerging Entente?*, *supra* note 4, at 13 (identifying the nonproliferation regime as a "stumbling block" to United States-India relations); *see also* Robert M. Lawrence, *The Nonproliferation Treaty and Nuclear Aspirants: The Strategic Content of the Indian Ocean*, *in* NUCLEAR PROLIFERATION AND THE NEAR-NUCLEAR COUNTRIES 59, 65–66 (Onkar Markwah & Ann Schulz eds., 1975) (explaining India's reluctance to follow the nonproliferation treaty).

8. *See* Orde F. Krittie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty Is Losing Its Deterrence Capacity and How to Restore It*, 28 MICH. J. INT'L L. 337, 398 (2007) (explaining that the agreement between the United States and India undermines the nuclear nonproliferation regime); *see also* William C. Potter, *Viewpoint: India and the New Look of U.S. Nonproliferation Policy*, 12 NONPROLIFERATION REVIEW 343, 344 (2005), http://cns.miis.edu/pubs/npr/vol12/122/122potter.pdf (opining that the agreement has the potential to harm the NPT, associated nonproliferation institutions, and elements of President Bush's own nonproliferation initiatives); *U.S.-India Civil Nuclear Cooperation Faces Congressional Scrutiny*, 100 AM. J. INT'L L. 717, 718 (John R. Crook ed., 2006) (recognizing that the agreement could weaken the NPT or undermine global nonproliferation efforts).

9. *See* Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 6 (establishing an agreement to prevent the spread of nuclear weapons and weapon technology and to further the goal of achieving nuclear disarmament).

10. *See* Nuclear Non-Proliferation Act, 22 U.S.C. § 3201 (2006) (establishing the United States' policies to prevent the proliferation of nuclear weapons and technology).

11. *See* Atomic Energy Act, 42 U.S.C. § 2011 (2006) (stating the policies of the United States as they pertain to atomic energy).

II. Sources of International Law

The principal sources of international law include treaties and C.I.L., the general principles recognized by civilized nations and judicial decisions and the teachings of the most highly qualified jurists.[12] The two primary sources are treaties and C.I.L.[13] Treaties are becoming more prevalent in the transnational community.[14] In fact, "[i]n recent years, bilateral and multilateral treaties have multiplied at an almost exponential pace. The United Nations Treaty Series . . . contains over 40,000 treaties. . . . "[15] Furthermore, "[c]ustom has served as a form of law since ancient times."[16] Throughout its illustrious history, custom has been "credited with establishing foundational rules [in international law] like diplomatic immunity and state responsibility, generating new human rights principles, supplementing treaty regimes, and . . . creating the obligation to adhere to treaties. . . ."[17]

A. Treaties: A Primary Source of International Law

"Treaties are agreements that are 'governed by international law.' When States enter agreements that meet certain formalities[,] . . . they put themselves under an obligation to comply with them."[18] "The notion of *pacta sunt servanca* requires that 'every treaty in force is binding

12. *See* Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060 (1945) (establishing the sources of international law available to the International Court of Justice ("ICJ")); *see also* JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM ORIENTED APPROACH, 31 (2002) (noting that Article 38, while not formally hierarchal, is nonetheless suggestive).

13. *See* Hiram E. Chodosh, *An Interpretive Theory of International Law: The Distinction Between Treaty and Customary Law*, 28 VAND. J. TRANSNAT'L L. 973, 976–77 (1995) (identifying treaties and C.I.L. as the chief sources of international law).

14. *See* John Norton Moore, *Enhancing Compliance with International Law: A Neglected Remedy*, 39 VA. J. INT'L L. 881, 890 (1999) (confirming the growing number of multilateral treaties); *see also* Martin S. Flaherty, *"External" Versus "Internal" in International Law*, 29 FORDHAM INT'L L.J. 447, 455 (2006) (emphasizing that the exponential growth of treaty law post–World War II leaves little room for international custom). Rosica Popova, *Saei V. Rio Tinto and the Exhaustion of Local Remedies Rule in the Context of the Alien Tort Claims Act: Short-Term Justice, But at What Cost?*, 28 HAMLINE J. PUB. L. & POL'Y 517, 527 (2007) (explaining that international law consists of an increasing number of bilateral and multilateral treaties).

15. Dunoff, *supra* note 12, at 33. *See* Mala Tabory, *Recent Developments in United Nations Treaty Registration and Publication Practices*, 76 AM. J. INT'L L. 350, 352–53 (1982) (commenting on the recent increase in the number of UN treaties).

16. Dunoff, *supra* note 12, at 74. *See* David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1375 (1996) (recognizing that ancient custom is the foundation of law); *see also* Jean Louis Bergel, *Principle Features and Methods of Codification*, 48 LA. L. REV. 1073, 1073 (1998) (acknowledging that the earliest codification systems, such as Hammurabi's Code, were a compilation of customs).

17. Edward T. Swaine, *Rational Custom*, 52 Duke L.J. 599, 561 (2002). *See also* Bergel, *supra* note 16, at 1073 (noting that earlier codes were essentially a conglomerate of customs governing many different types of legal areas); Andrea C. Loux, *The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century*, 79 CORNELL L. REV. 183, 183 (Working Paper 1993) (opining that the significance of custom is that it serves as the basis for all law while providing a legitimacy to the law as it evolved from the community).

18. Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT'L L. 113, 114–15 (2003). *See* Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 586 (2005) (defining treaties as contracts that create legally binding obligations on signatory states).

upon the parties to it and must be performed by them in good faith.'"[19] Because only parties to a treaty are bound by its obligations, while C.I.L. is potentially universally binding, the scope of a treaty is narrower.[20]

Without the consent of Congress, an international treaty does not become binding on the United States.[21]

> In most nations, legislative consent is a condition for national ratification of most legally binding international treaties. Under U.S. constitutional law, the legislature participates in this process in two ways: (1) the treaty process, in which two-thirds of Senators present must consent to the agreement; and (2) the congressional-executive agreement process, in which majorities in both Houses of Congress must approve the agreement.[22]

States agree to sign treaties for diverse reasons. First, a state may sign a treaty for signaling reasons.[23] "Signaling" means that a state intends to send a message about how it is going to act prospectively.[24] Second, a state may sign a treaty for reputation or legitimacy reasons.[25] Third,

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19. Goldsmith & Posner, *supra* note 18, at 115. *See* Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331, 1 I.L.M. 679 (requiring a treaty to be interpreted in good faith and performed by parties according to the ordinary meaning of its terms).

20. This restrictive rule renders treaties less likely to create international law that is binding on all states. Chodosh, *supra* note 13, at 977. *See* Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971, 971 (1986) (commenting that the extent to which C.I.L. is binding is controversial).

21. *See* Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 308 (2007) (stating that treaties require consent of two-thirds of the Senate).

22. Goldsmith & Posner, *supra* note 18, at 122.

23. *See* Jack M. Beard, *The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the Biological Weapons Convention*, 101 AM. J. INT'L L. 271, 288 (2007) (referring to the view that a treaty is the best way for a state to signal its intentions); *see also* Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 341 (stating that an investment treaty signals the receptivity signatory to foreign investments). Patrick Thornberry, *Confronting Racial Discrimination: A Cerd Perspective*, 5 HUM. RTS. L. REV. 239, 244 (2005) (warning that such signals may have undesirable effects).

24. Signaling sometimes occurred when new democracies signed human rights treaties. A new democracy may try to distance itself from a dismal human rights record and signal to other states that this is how they it is going to act. *See* Jeffrey C. Goldman, *Of Treaties and Torture: How the Supreme Court Can Restrain the Executive*, 55 DUKE L.J. 609, 629 (2005) (explaining that signaling notifies the judiciary of the political branches' intentions); *see also* Goldsmith & Posner, *supra* note 18, at 133 (noting that the committal language of a signal expresses the strength of a state's intended compliance).

25. A state may debase its own reputation if it does not sign a widely subscribed-to treaty. *See* Franck, *supra* note 23, at 341 (finding that entering into an investment treaty may enhance a national's credibility); *see also* Goldsmith & Posner, *supra* note 18, at 121 (emphasizing the tendency of nations to sign treaties in order to enjoy an increased reputation).

a state may sign a treaty to bind itself.[26] Fourth, a state may sign a treaty to attempt to bind how other states act.[27] Fifth, a state may sign a treaty for its own self-interest.[28] Finally, a state may sign a treaty to enhance cooperation within the international community.[29]

Scholars analogize treaties differently. "Some scholars draw analogies between treaties and domestic contracts. . . ."[30] Their basis for comparison is that "treaties create rights and obligations for the parties to them," much like contracts,[31] and treaties vary in specificity from "particulate quid pro quo arrangements relating to narrow or specific interests of the parties . . . to general [arrangements]. . . ."[32] On the other hand, some scholars do not subscribe to this contracts analogy, the main source of contention being that "treaty violations, though sometimes subject to self-help remedies, are not subject to reliable sanctions by independent third parties."[33] These scholars believe that "a better analogy to treaties is the nonbinding letter of intent, in which individuals exchange promises without consenting to legal enforcement."[34]

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26. This is commonly known as "precommitment." Precommitment tends to occur when the leader of a state is uncertain of its political future. Thus, the leader signs a treaty to lock the state onto a certain path. This is prevalent in states that are transforming from a dictatorship to a democracy. *See* Chris Downes, *Must the Losers of Free Trade Go Hungry? Reconciling WTO Obligations and the Right to Food,* 47 VA. J. INT'L L. 619, 665 (2007) (affirming that treaties are binding on the parties that enter into it); *see also* Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 TEX. L. REV. 2055, 2057–58 (2003) (recounting that states often use treaties to restrain future actions in order to improve their international welfare).

27. *See* Downes, *supra* note 26, at 665 (referring to the binding effect of treaties on its parties); *see also* Ratner, *supra* note 26, at 2058 (revealing how states use treaties to govern their treaty partners). *See generally* Jacob Dolinger, *Brasilian Supreme Court Solutions for Conflicts Between Domestic and International Law: An Exercise in Eclecticism*, 22 CAP. U. L. REV. 1041, 1085 (1993) (discussing the contractual nature of treaties).

28. *See* Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law*, 90 MINN. L. REV. 1720, 1758 (2006) (positing that states comply with international treaties only when it is in their rational self-interest); *see also* Cass R. Sunstein, *Of Montreal and Kyoto: A Tale of Two Protocols*, 31 HARV. ENVTL. L. REV. 1, 37 (2007) (referring to the self-interest played in producing the treaty).

29. *See* Goldsmith & Posner, *supra* note 18, at 118 (explaining that "[t]he primary purpose of a treaty . . . is to record the actions that count as cooperative moves . . . involving a mixture of cooperation and conflict . . . ."); *see also* John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139, 193–94 (1996) (theorizing that the degree of cooperation increases with each repeated international interaction).

30. *See* Goldsmith & Posner, *supra* note 18, at 118.

31. *See* DUNOFF, *supra* note 12, at 33; s*ee, e.g.*, Raustiala*, supra* note 18, at 587 (South Pacific Nuclear Free Zone; 2002 Moscow Treaty). *But see* Joshua Robbins, *The Emergence of Positive Obligations in Bilateral Investment Treaties*, 13 U. MIAMI INT'L & COMP. L. REV. 403, 438–39 (2006) (positing that the quid pro quo, or reciprocity factor, comes more from custom than contractual duty).

32. DUNOFF, *supra* note 12, at 33; *see also* PHILLIP C. JESSUP, A MODERN LAW OF NATIONS 123 (Archon Books 1968) (explaining that the international community needs nonuniformity, or variation, in contractual agreements).

33. Goldsmith & Posner, *supra* note 18, at 118. *See also* Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 487 (2005) (positing that there is no authoritative sovereign with the power to enforce laws in international law); *cf.* ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 25 (1995) (explaining that international law uses self-help, such as threats of counter-violations, to police itself).

34. Goldsmith & Posner, *supra* note 18, at 118. *Cf.* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 20 (4th ed. 2003) (clarifying that a signature on a treaty is just a part of the negotiation process and does not necessarily give rise to legally binding obligations); Setear, *supra* note 29, at 149 (explaining that a sovereign's signature alone usually does not bind the nation to the treaty).

Furthermore, they assert that treaties are a formal kind of communication like the letter of intent, because "[b]oth create a record, rely on more careful language . . . , and provide a springboard for future cooperation."[35] Moreover, "[n]either depends on external enforcement."[36]

The Vienna Convention on the Law of Treaties ("VCLT")[37] is "[a] [t]reaty [that] [g]overn[s] [a]ll [t]reaties."[38] When a state "enter[s] a treaty . . . , [it] provokes a special set of expectations about how the agreement will be interpreted, understood, and enforced."[39] Specifically, the VCLT "codifies the customs and practices concerning the interpretation of treaties."[40]

B. Customary International Law: A Primary Source of International Law

"According to Article 38 of the Statute of the International Court of Justice (ICJ), international custom amounts to 'general practice accepted as law.'"[41] This statute establishes the two

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35. "If this view is correct, then we must be careful how we interpret treaties and the international behavior that flows from them. When a firm complies with the terms of a letter of intent, it does so because it perceives an advantage in complying. The letter of intent announces a firm's intention to merge with another; subsequently the firms merge. We do not say that one firm merged because of the letter of intent, nor do we say that the letter of intent caused or forced the firm to merge. We say that the letter of intent laid the groundwork—clarified expectations—for the subsequent merger. Similarly, when the United States complies with its duties under the North American Free Trade Agreement (NAFTA), the most plausible explanation is that it perceives an advantage to be gained through a reciprocal reduction in trade and investment barriers. Nothing magical happened when the United States ratified NAFTA; the agreement simply clarified expectations prior to interaction." Goldsmith & Posner, *supra* note 18, at 118. *See* FERNANDO R. TESÓN, A PHILOSOPHY OF INTERNATIONAL LAW 84 (1998) (explaining that a government that does not care about future interactions has no reason to comply with the treaty).

36. Goldsmith & Posner, *supra* note 18, at 119.

37. The VCLT is a treaty itself. It was drafted by the International Law Commission at the United Nations and adopted in 1969. By 2002, 94 states had signed it. The United States, however, has not ratified the VCLT. Despite this fact, the United States consistently states that the VCLT is authoritative on C.I.L. *See generally* Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331, 340 (announcing that the treaty is designed to govern all treaties and many states, even those who have yet to ratify it).

38. The claim that the VCLT governs all treaties may be overreaching. Because the VCLT is a treaty, it is not universally binding, only binding on states that have signed and ratified it. Notwithstanding the fact that a state has not signed and ratified the VCLT, a state may be bound by the treaties' provisions if they have become C.I.L. *See* Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 437 (2004).

39. Goldsmith & Posner, *supra* note 18, at 129.

40. *Id. See generally* Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331, 340 (explaining what constitutes a treaty, the various ways a state can consent to a treaty, how a state can terminate a treaty, and how a state can interpret a treaty).

41. Swaine, *supra* note 17, at 567.

elements of C.I.L.: state practice and *opinio juris*.[42] These two elements are indispensable; without both, a principle cannot transform into C.I.L.[43]

State practice is the objective component of C.I.L.[44] State practice rises to the level necessary to create C.I.L. if the practice is general and consistent, widespread, and over the course of a long period of time.[45] State practice can take many forms, including: documentation of the state itself, public comments by officials of the state, legislative and executive acts, decisions of international and national tribunals, studies conducted by states and resolutions of the United Nations or international organizations.[46]

"By itself, state practice does not result in customary law. . . . Consistent state practice becomes law only when states follow the practice out of a sense of legal obligation[, *opinio juris*]. . . ."[47] *Opinio juris* is the subjective component of C.I.L.[48] Discerning a state's intent when it acts is problematic, as is trying to evidence that intent.[49] Thus, *opinio juris* must often

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42. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (hereinafter RESTATEMENT) (declaring that C.I.L. is a product of a state's general and consistent practice, followed out of a sense of legal obligation); *see also* Philip M. Moremen, *National Court Decisions as State Practice: A Transnational Judicial Dialogue?* 32 N.C. J. INT'L L. & COM. REG. 259, 267.

43. *See* Heather Cash, Note, *Security Council Resolution 1593 and Conflicting Principles of International Law: How the Future of the International Criminal Court Is at Stake*, 45 BRANDEIS L.J. 573, 590 (2007) (claiming that state practice and *opinio juris* must be met for C.I.L. to become binding); *see also* Jeff A. King, *Odious Debt: The Terms of the Debate*, 32 N.C. J. INT'L L. & COM. REG. 605, 616 (2007) (stressing that the two principles are necessary to establish a rule of C.I.L.).

44. When analyzing the state practice component of C.I.L., one must consider whether other states are participating in this practice. *See* DUNOFF, *supra* note 12, at 79 (acknowledging the role state practice plays in international law); *see also* Ioannis Lianos, *The Contribution of the United Nations to the Emergence of Global Antitrust Law*, 15 TUL. J. INT'L & COMP. L. 415, 434 (2007) (identifying state practice as an objective and material element of C.I.L.).

45. *See* Edwin Odhiambo Abuya, *Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective*, 19 INT'L J. REFUGEE L. 51, 82–83 (2007) (recognizing that state practice must meet certain criteria to give rise to C.I.L.); *see also* Daniel G. McCabe, Comment, *Resolving Conflicts Between Multilateral Environmental Agreements: The Case of the Montreal and Kyoto Protocols*, 18 FORDHAM ENVTL. L. REV. 433, 444 (2007) (noting that a consistent and general state practice will help resolve conflicts in C.I.L.).

46. *See Jones v. Kingdom of Saudi Arabia*, 45 INT'L LEGAL MATERIALS 1108, 1120 (U.K. House of Lords 2006) (discussing various types of state practice); *see also* Steven R. Ratner, *Land Feuds and Their Solutions: Finding International Law Beyond the Tribunal Chamber*, 100 AM. J. INT'L L. 808, 813 (2006) (presenting arbitration and judicial settlement as forms of state practice); *International Centre for Settlement of Investment Disputes*, 42 INT'L LEGAL MATERIALS 85, 108 (2003) (exemplifying how statutes may be a form of state practice).

47. DUNOFF, *supra* note 12, at 74.

48. *See* Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY L. REV. 859, 873 (2006) (defining *opinio juris* as a subjective mental state); *see also* Moremen, *supra* note 42, at 267 (stressing that the definition of custom entails a subjective sense of legal obligation); Leah M. Nicholls, Note, *The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and Its 161 Rules of Customary International Humanitarian Law*, 17 DUKE J. COMP. & INT'L L. 223, 237–38 (2006) (reiterating that *opinio juris* is the subjective component of C.I.L.).

49. *See* Ezequiel Lugo, *The Unfinished Business of American Democracy*, 24 WIS. INT'L L.J. 871, 896 (1999) (noting that courts often presume *opinion juris* exists); Swaine, *supra* note 17, at 568 (claiming that it can be quite difficult to prove a state's intent based on its acts); *see also* Christopher B. Puckett, Comment, *In This Era of "Smart Weapons," Is a State Under an International Legal Obligation to Use Precision-Guided Technology in Armed Conflict?*, 18 EMORY INT'L L. REV. 645, 702 (2004) (stating that *opinio juris* can be disproved, especially when it is ambiguous).

be inferred from the facts and circumstances of the state practice itself.[50] A state may reveal in its briefs and pleadings that it is acting out of a sense of legal obligation.[51] Another indicator is what the state judiciaries have said in opinions.[52] Judiciaries can speak authoritatively, and when they view something as a legal obligation, it is evidence of *opinio juris*.[53]

Who is bound by C.I.L.? "[A] rule of customary international law binds all states that do not object to the rule as it is forming."[54] A persistent objector, a state that objects to a C.I.L. from its inception and continues objecting in perpetuity, will not be bound.[55] A state can achieve persistent objector status by publicly objecting to a C.I.L., signing a treaty against a C.I.L., or not following a C.I.L.[56]

III. The Treaty on the Nonproliferation of Nuclear Weapons

A. The Catalyst for the Treaty on the Nonproliferation of Nuclear Weapons

After World War II, nuclear energy was perceived to be the ideal energy for the future.[57] As such, no state was willing to accept restrictions on its nuclear program, and suppliers

50. If a state is acting in a manner inconsistent with its interest, albeit economic, this may be enough circumstantial evidence to prove that a state is acting out of a sense of legal obligation. *See* DUNOFF, *supra* note 12, at 75; *see also* Jo Lynn Slama, Note, Opinio Juris *in Customary International Law* 15 OKLA. CITY U. L. REV. 603, 653 (1990) (stating that *opinio juris* must be ascertained by reference to objective factors such as protests, expressions of state policy, or acquiescence); *cf.* Marko Divac Oberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT'L L. 879, 898 (2005) (defining state practice as what a state does and says).

51. *See* RESTATEMENT, *supra* note 42 (indicating that C.I.L. is formed when countries act out of legal obligations).

52. *See* Statute of the International Court of Justice art. 38(1)(d) (stating that the ICJ shall consider judicial decisions when determining international law); *see also* Slama, *supra* note 50, at 652 (suggesting that the subjective view of *opinio juris* may be drawn from the state's national decision makers).

53. *See* RESTATEMENT, *supra* note 42 (stating that C.I.L. must be formed from a sense of legal obligation); *see also* DUNOFF, *supra* note 12, at 79 (defining *opinio juris* as a repetition of belief that forms a legal obligation); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1118 (1999) (reflecting that *opinio juris* occurs when a state believes so strongly in a perceived legal obligation that the obligation becomes binding on the state).

54. *See* David A. Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASH. L. REV. 957, 965 (1986) (recounting that a state that persistently objects to the formation of a rule of C.I.L. is not bound by the rule).

55. *Id.* at 957 (recognizing that a state that persistently resists a rule of C.I.L. is not bound by the rule); *see also* Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 142–43 (2005) (concluding that a country must make consistent and widely known objections to be considered a persistent objector).

56. *See* Guzman, *supra* note 55, at 142–43.

57. Alec Baer, *Nuclear Supplier Group and Its Time,* 2ND NSG INT'L SEMINAR ON THE ROLE OF EXPERT CONTROLS IN NUCLEAR NON-PROLIFERATION 3, 5 (1999), http://www.nsg-online.org/PDF/SeminarControl2.pdf. *See* Taylor Burke, *Nuclear Energy and Proliferation: Problems, Observations, and Proposals*, 12 B.U. J. SCI. & TECH. L. 1, 4 (2006) (discussing both Congress's and Eisenhower's interest in harnessing nuclear power as energy); *see also* Joseph P. Tomain, *Nuclear Futures*, 15 DUKE ENVTL. L. & POL'Y F. 221, 226 (2005) (describing atomic energy as an international "realpolitik" after World War II).

flooded the market to satisfy demand.[58] "[N]evertheless [there was] a feeling among . . . States . . . that to avoid a nuclear war between the United States and the USSR, some agreement was necessary."[59]

In 1947, after the Cold War began, the United States had a monopoly on nuclear armament.[60] However, it was not long-lasting; by 1953 the USSR had exploded a hydrogen bomb.[61] A nuclear USSR troubled the United States.[62] In the fall of 1953, President Eisenhower, wary of the possible consequences of proliferation, proposed the idea of Atoms for Peace to the United Nations General Assembly.[63]

The prospect of a nuclear world war, combined with the events that took place in the early 1960s, gave rise to the NPT.[64] The Cuban missile crisis in 1962, and China's explosion of a nuclear weapon put pressure on states to agree on a nonproliferation arrangement.[65] In 1965

58. *See* Baer, *supra* note 57, at 5 (attributing the excess supply to the lack of restrictions on nuclear programs); *see also* Tomain, *supra* note 57, at 227 (noting that suppliers were eager to enter the market because of the great potential for profit). *See generally* Jonathan A. Lesser, *The Used and Useful Test: Implications for a Restructured Electric Industry*, 23 ENERGY L.J. 349, 356 (2002) (observing the forecasts of increased supply in the nuclear energy field in the late 1950s).

59. *See* Baer, *supra* note 57, at 5.

60. *Id.* at 5–6.

61. *See* Micah Zenko, *Intelligence Estimates of Nuclear Terrorism*, 607 ANNALS AM. ACAD. POL. & SOC. SCI. 87, 90 (2006) (announcing that by August 1949, the USSR conducted its first successful atomic test, and the United States lost its short-lived nuclear monopoly).

62. *See* CIA ORE 91-49, *Estimate of the Effects of the Soviet Possession of the Atomic Bomb Upon the Security of the United States and Upon the Probabilities of Direct Soviet Military Action* (Apr. 6, 1950), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/assessing-the-soviet-threat-the-early-cold-war-years/5563bod3.pdf (informing the CIA of likely Soviet actions troublesome to the United States); *see also* Douglas F. Garthoff, WATCHING THE BEAR: ESSAY ON CIA'S ANALYSIS OF THE SOVIET UNION, ¶ 10 (Gerald K. Haines & Robert E. Leggett eds., 2007), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/watching-the-bear-essays-on-cias-analysis-of-the-soviet-union/article03.html#rfn5 (affirming that the United States equated an atom bomb-armed USSR with a greater threat of possible attack); Zenko, *supra* note 61, at 90 (noting that the CIA feared the United States would be attacked after the USSR tested its atom bomb).

63. *See* Baer, *supra* note 57, at 5; *see also* President Dwight D. Eisenhower, Atoms for Peace, United Nations General Assembly (Dec. 8, 1953), http://usa.usembassy.de/etexts/speeches/rhetoric/ikeatoms.htm (listing Soviet military action as a policy justification for the Atoms for Peace plan).

64. *See* Susan Carmody, Note, *Balancing Collective Security and National Sovereignty: Does the United Nations Have the Right to Inspect North Korea's Nuclear Facilities?,* 18 FORDHAM INT'L L.J. 229, 234–35 (1994) (explaining that during the 1960s, the rate of nuclear weapons proliferation increased, and the need for an international nuclear proliferation law gave rise to the NPT); *see also* Philip Gummett, *From NPT to INFCE: Developments in Thinking about Nuclear Non-Proliferation*, 57 INT'L AFF. 549, 550 (1981) (indicating that the NPT's momentum dates back to 1961).

65. *See* Carmody, *supra* note 64, at 240–41 (attributing increased fears of nuclear war and global desire for a nuclear nonproliferation pact to the Chinese explosion); *see also* Johann Hari, *The Best Way to Improve Britain's National Security Would Be to Reject Trident,* THE INDEPENDENT (London), March 12, 2007, at 36 (noting the NPT was created in the 1960s after the Cuban missile crisis); Baer, *supra* note 57, at 6 (reiterating that the Cuban missile crisis and China's nuclear explosion put pressure on the states to draft a nonproliferation treaty).

the United States and the USSR, independent of one another, proposed a draft of a nonproliferation treaty, and by 1970 the NPT was in force.[66]

B. Overview of the Legal Framework

> The NPT creates two separate categories of nations: nuclear weapon states, countries that manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967,[67] and non-nuclear weapon states. Under Articles I and II of the treaty, nuclear weapon states agree not to transfer or assist in the development of nuclear weapons or other nuclear explosive devices, and non-nuclear weapon states agree not to receive or seek the same.[68] Article III compels non-nuclear weapon states to enter into a subsidiary agreement with the International Atomic Energy Agency, . . . accepting the latter's safeguards system for the exclusive purpose of verification of the fulfillment of its obligations assumed under the NPT to prevent diversion of nuclear energy from peaceful uses to nuclear weapons.[69] In exchange, Article IV of the NPT provides that non-nuclear weapon states are granted the inalienable right to develop research, production and use of nuclear energy for peaceful purposes without discrimination.[70] It is this text in Article IV that grants non-nuclear weapon states the right to control the nuclear fuel cycle.[71]

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66. *See* James E. Dougherty, *The Non-Proliferation Treaty,* 25 RUSS. REV. 10, 11, 18 (1966) (describing the drafts of the independent nonproliferation agreements that the United States and the USSR composed); *see also* Baer, *supra* note 57, at 6 (affirming that in 1965 the United States and the USSR each proposed a draft of a nonproliferation treaty).

67. The United States, Russia, Britain, France, and China are the five nuclear weapon states under the NPT. *See* Treaty on the Non-Proliferation of Nuclear Weapons, *supra*, note 6, art. IX (defining nuclear weapon states); *see, e.g.*, Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94, AM. J. INT'L L. 677, 706 (2000) (listing the five nuclear weapon states under the NPT).

68. *See* Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 6, arts. I–II.

69. *See id.*, art. III.

70. *See id.*, art. IV.

71. *See* Amir Azaran, *NPT, Where Art Thou? The Nonproliferation Treaty and Bargaining: Iran as a Case Study,* 6 CHI. J. INT'L L. 415, 419 (2005).

Essentially, the NPT obligates the United States, a nuclear weapon state, to ensure that any cooperation it provides to a non-nuclear weapon state does not contribute to that state's capability to produce nuclear weapons.[72]

C. The Backbone of the Non Proliferation Regime

The NPT is generally regarded as the centerpiece of the nuclear nonproliferation regime;[73] the main instrument of international law aimed at controlling the spread of nuclear weapons.[74] "It entered into force in 1970 and is the most widely subscribed and successful arms control treaty in history, with one hundred eighty-nine states [party to it]."[75]

> The objectives of the 1970 Treaty were as follows: first, the five nuclear states would not transfer nuclear weapons to any state that did not possess such technology as of the date of the treaty, and also required them not to assist or encourage states to acquire nuclear weapons; second, the non-nuclear states agreed not to acquire nuclear weapons; third, the non-nuclear states agreed to allow verification of that pledge by placing all of their nuclear equipment and facilities under the safeguard system of the International Atomic Energy Agency (IAEA); fourth, the IAEA safeguards were enhanced by the obligation of all the parties not to provide nuclear materials or equipment for peaceful purposes to any non-nuclear state unless under the safeguards of the IAEA; fifth, parties to the NPT had a right to use nuclear energy for peaceful purposes, and to assist non-nuclear states, mainly developing countries, in gaining nuclear technology; and lastly, in exchange for a pledge by the non-nuclear states not to acquire nuclear weapons, the five nuclear states agreed to pursue good faith negotiations in ending the arms race and movement toward disarmament.[76]

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72. *See* SHARON SQUASSONI, CRS REPORT FOR CONGRESS—INDIA'S NUCLEAR SEPARATION PLAN: ISSUES AND VIEWS, 3 (2006), http://fpc.state.gov/documents/organization/62747.pdf (stating that the NPT requires the United States to ensure that its ability to produce nuclear weapons does not increase); *cf.* Brian L. Sutter, *The Nonproliferation Treaty and the "New World Order,"* 26 VAND. J. TRANSNAT'L L. 181, 202–03 (1993) (claiming that the NPT allows signatory states to help non-nuclear states develop peaceful uses of nuclear energy, as long as such assistance does not facilitate the proliferation of nuclear weapons); Raven Winters, Note, *Preventing Repeat Offenders: North Korea's Withdrawal and the Need for Revisions to the Nuclear Nonproliferation Treaty*, 38 VAND. J. TRANSNAT'L L. 1499, 1501 (2005) (affirming that the NPT subjects signatory states to IAEA mandates).

73. *See* Azaran, *supra* note 71, at 418; *see also* Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 YALE J. INT'L L. 507, 512 (2005) (labeling the NPT the cornerstone of modern nuclear nonproliferation regimes).

74. *See* Azaran, *supra* note 71, at 418; *see also* Erik A. Cornellier, Comment, *In the Zone: Why the United States Should Sign the Protocol to the Southeast Asia Nuclear-Weapon-Free-Zone*, 12 PAC. RIM L. & POL'Y J. 233, 240 (2003) (stating that the NPT was designed to prevent the spread of nuclear weapons to non-nuclear states).

75. David S. Jonas, *Variations on Non-Nuclear: May the "Final Four" Join the Nuclear Nonproliferation Treaty as Non-Nuclear Weapon States While Retaining Their Nuclear Weapons?*, 2005 MICH. ST. L. REV. 417, 418 (2005).

76. Craig T. Mierzwa, Comment, *The Indefinite Nuclear Nonproliferation Treaty: Substantial Accomplishments or Ambitious Hopes?*, 4 D.C.L. J. INT'L L. & PRAC. 555, 555–56 (1995).

"[The NPT's] central aim is to prevent the spread of nuclear weapons to states that did not possess them at the time of its inception, while also allowing those states to enjoy the benefits of peaceful nuclear energy."[77]

The IAEA is empowered by the NPT to establish and apply safeguard mechanisms.[78] It seeks to accomplish the NPT's twin aims: preventing the diversion of peaceful nuclear energy to the production of nuclear weapons and providing assistance for the development of peaceful nuclear technology.[79]

> To fulfill its requirement of accepting IAEA safeguards, a non[-]nuclear weapon state must complete negotiations with the IAEA within two years of ratifying the NPT. The result of the negotiations is a detailed agreement typically requiring the non[-]nuclear weapon state to establish an accounting system for various types of nuclear material and to inform the agency about any nuclear facilities. The agreement also establishes the process and scope of inspections.[80]

In the event a non-nuclear weapon state violates its agreement with the IAEA by not disclosing its quantities of nuclear material or the location of its nuclear facilities,[81] the IAEA can refer the matter to the UN Security Council, which in turn may impose sanctions on the violating state.[82]

D. The Shortcomings of the Treaty on the Non-Proliferation of Nuclear Weapons

Most commentators consider the NPT to be an overall success.[83] However, recent proliferation problems have sparked fresh criticism.[84] The first concern is the NPT's broad languages.[85] For instance:

> Nothing in the [NPT] prohibits a state from developing indigenous capacities for the production of fissionable materials or producing and stockpiling such materials or other components that might be used in nuclear weapons.

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77. Azaran, *supra* note 71, at 418.

78. *See id.* at 419 (stating that the NPT grants the IAEA power to create and apply certain safeguard mechanisms); *see also* Beard, *supra* note 23, at 316 (mentioning that compliance with specific NPT obligations is achieved by a safeguard agreement that requires non-nuclear weapons parties to negotiate with the IAEA).

79. *See id.* at 419; *see also* Walter Gary Sharp, Sr., *Proliferation Security Initiative: The Legacy of Operacion Socotora*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 991, 1009 (2007) (stressing the NPT objectives of preventing the spread of nuclear weapons and nuclear weapon technologies, promoting peaceful uses of nuclear power, and achieving a general and complete nuclear disarmament).

80. Azaran, *supra* note 71, at 419.

81. *See, e.g.*, Benjamin M. Greenblum, *The Iranian Nuclear Threat: Israel's Options Under International Law*, 29 HOUS. J. INT'L L. 55, 61 (2006) (pointing out Iran's violations).

82. *See* 8 U.S.T. 1093 art. XII(C) (granting the Security Council the power to enforce sanctions to noncomplying states under the NPT); *see also* Azaran, *supra* note 71, at 420.

83. *See* Azaran, *supra* note 71, at 420.

84. *See id.*

85. *See id.*

> These lacunae are particularly troublesome because the development of facilities for uranium enrichment and spent fuel processing . . . can be rationalized, albeit with greatly varying degrees of credibility, as being consistent with non-military nuclear power aspirations.[86]

"[This] captures the inherent tension in the NPT: by allowing indigenous production capabilities, including control of the fuel cycle, the NPT allows non[-]nuclear weapon states to reach the brink of developing nuclear weapons while still operating within their treaty obligations."[87] The implications of this tension are that a country can legitimately stockpile nuclear material,[88] withdraw from the NPT using the Article X exit provision,[89] and declare itself a nuclear power.[90] Furthermore, the broad language in the NPT gives states the legal right to enrich and reprocess uranium for peaceful purposes.[91] Affording states this right may negate the purpose of the NPT because nuclear material, equipment and enrichment technology "can be easily used to manufacture nuclear weapons. . . ."[92]

Another concern is that the NPT functions not as a global effort to halt the spread of nuclear weapons for the good of humanity, but as a tool to perpetuate the nuclear weapon states' monopoly on nuclear weapons.[93] This lack of altruism, coupled with the fact that nuclear weapon states have failed to comply with the NPT's disarmament provision,[94] has led

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86. *Id*. (quoting GEORGE RATHJENS, *Nuclear Proliferation Following the NPT Extension*, in IRAN'S NUCLEAR NON-PROLIFERATION REGIME: PROSPECTS FOR THE 21ST CENTURY).

87. *Id*.

88. *See, e.g.*, Azaran, *supra* note 71, at 420 (expressing that the NPT does not prohibit a state from stockpiling materials that could be used as nuclear weapons); *see also* James C. Kraska, *Averting Nuclear Terrorism: Building a Global Regime of Cooperative Threat Reduction*, 20 AM. U. INT'L L. REV. 703, 706, 769 (2005) (concluding that there are stockpiles of weapons of mass destruction and related materials, including weapons-grade plutonium and HEU, secured worldwide).

89. *See, e.g.*, Treaty on the Non-Proliferation of Nuclear Weapons art. 10, July 1, 1968, 21 U.S.T. 483 ("Each party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It should give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests").

90. *See* Azaran, *supra* note 71, at 420; *see also* Paul E. Boehm, *Decennial Déjà vu: Reassessing a Nuclear North Korea on the 1995 Supply Agreement's Ten-Year Anniversary*, 14 TUL. J. INT'L & COMP. L. 81, 81 (2005) (noting that North Korea not only withdrew from the NPT but it is now flaunting its nuclear arsenal).

91. *See, e.g.*, Azaran, *supra* note 71, at 424; *cf.* Winters, *supra* note 72, at 1511 (stressing that although North Korea claims that it intends to use its nuclear materials peacefully, its leaders have made statements to the contrary).

92. Azaran, *supra* note 71, at 424 (declaring that it is counterintuitive to claim that a nuclear explosive could be used for a peaceful nuclear explosion).

93. Azaran, *supra* note 71, at 421; *see also* Igor Levin, *Where Have All the Weapons Gone? The Commonwealth of Independent States' Struggle to Stop the Proliferation of Nuclear Weapons and the New Role of the International Atomic Energy Agency*, 24 N.Y.U. J. INT'L L. & POL. 957, 967 (1992) (noting that Iranian fundamentalists and Libyan extremists demand the right to possess weapons technology to break up Israel's monopoly on nuclear weapons in the Middle East).

94. *See* Jonas, *supra* note 75, at 433; *see also* William Epstein & Paul C. Szasz, *Extension of the Nuclear Nonproliferation Treaty: A Means of Strengthening the Treaty*, 33 VA. J. INT'L L. 735, 761 (1993) (discussing nuclear powers' failure to comply with the purpose of the NPT).

to political unrest within some non-nuclear weapon states.[95] As nuclear weapon states continue to selectively abide by the NPT to ensure their own security and military superiority,[96] non-nuclear weapon states are becoming increasingly skeptical of the NPT's effectiveness.[97]

"Although the NPT requires safeguards on items going to non-nuclear weapon states, it does not explicitly prohibit nuclear commerce with states outside the NPT."[98] This drafting oversight allows nuclear weapon states to afford technical assistance, nuclear materials, and equipment to nonparticipating NPT states.[99] Israel, Pakistan, and India, nonsignatory states to the NPT, possess nuclear weapons technology, despite lacking the IAEA safeguards necessary for nuclear cooperation under the NPT.[100]

IV. Other Pieces of the Nonproliferation Puzzle

A. India's Nuclear Explosion Gives Rise to the Nuclear Suppliers Group

On May 18, 1974, India exploded a nuclear device with the help of Canadian exports.[101] The Indian explosion demonstrated how nuclear technology and materials transferred for

95. *See* Helen M. Cousineau, *The Nuclear Non-Proliferation Treaty and Global Non-Proliferation Regime: A U.S. Policy Agenda*, 18 B.U. INT'L L.J. 407, 438–39 (1994) (explaining that many non-nuclear states are increasingly intolerant of the NPT because they view it as an unfair bargain that led to the demise of bipolar politics); *see also* Epstein & Szasz, *supra* note 94, at 761 (remarking on non-nuclear states' resentment toward NPT because of its discriminatory nature).

96. *See* George Perkovich, *Bush's Nuclear Revolution: A Regime Change in Nonproliferation*, 82 FOREIGN AFF. 2, ¶ 25 (Mar./Apr. 2003) (stating that the United States does not comply with all of its commitments under the NPT); Clara Portela, *The Role of the EU in the Non-Proliferation of Nuclear Weapons: The Way to Thessaloniki and Beyond*, 65 PEACE RES. INST. FRANKFURT 1, 18, 30 (2004) (discussing instances when Iran and North Korea have breached NPT obligations).

97. *See* Daryl G. Kimball, *New Reasons to Reject New Warheads*, ARMS CONTROL TODAY, Jan.–Feb. 2007, at 3 (discussing the view that the United States and other nuclear weapon powers do not intend to pursue NPT-related disarmament obligations); George P. Shultz et al., *A World Free of Nuclear Weapons*, WALL ST. J., Jan. 4, 2007, at A15 (acknowledging that non-nuclear weapon states are skeptical that the nuclear weapon states will neglect their obligations under the NPT).

98. SHARON SQUASSONI, CRS Report for Congress—U.S. NUCLEAR COOPERATION WITH INDIA: ISSUES FOR CONGRESS, at 3 (2005), http://fpc.state.gov/documents/organization/55785.pdf (last visited Nov. 5, 2007).

99. *See, e.g., id.* at 2 (discussing the nuclear materials, equipment and technical assistance the United States provided to India, a non-NPT state). *See* Henry D. Sokolski, *Towards an NPT-Restrained World that Makes Economic Sense*, INT'L AFF., May 2007, at 531 (noting that a loose interpretation of the NPT provisions suggests that NPT signatories may share their peaceful nuclear technology with non-NPT states).

100. *See* KURT M. CAMPBELL, THE NUCLEAR TIPPING POINT: WHY STATES RECONSIDER THEIR NUCLEAR CHOICES 33 (Brookings Institution Press 2004); *see also* David Krieger & Devon Chaffee, *Facing the Failures of the Nuclear Nonproliferation Treaty Regime*, THE HUMANIST, Sept.–Oct. 2003 at 7, 8–9 (reporting that many parties to the NPT now regard Israel, Pakistan, and India as legitimate nuclear powers).

101. *See* SQUASSONI, *supra* note 98, at 5 (discussing India's 1974 explosion of the nuclear device); s*ee also* Baer, *supra* note 57, at 3, 6 (noting that Canada provided India with nuclear materials and equipment, which India used to build indigenous reactors that produced plutonium for its weapons program). Gary Milhollin, *Stopping the Indian Bomb,* 81 AM. J. INT'L L. 593, 594–95 (1987) (commenting on India being the first country to detonate an atomic bomb made from "peaceful" nuclear imports).

peaceful purposes could be misused.[102] As a result, "[i]t . . . became clear to everybody that the NPT did not offer good enough protection against proliferation."[103] That explosion, "together with the growing (and lucrative) trade in nuclear supplies, moved a group of nuclear-exporting countries to establish" the NSG,[104] meant to prevent the transfer of sensitive nuclear technology and equipment to states that did not comply with NSG guidelines.[105]

NSG Guidelines, Part 1, "governs . . . export[s] . . . that are . . . designed or prepared for nuclear use. These include: (i) nuclear materials; (ii) nuclear reactors and equipment; (iii) non-nuclear material for reactors; (iv) plant and equipment for the reprocessing, enrichment and conversion of nuclear material and fuel fabrication and heavy water production; and (v) technology associated with each of the above items."[106] Guideline 1 requires the recipient facility to comply with IAEA safeguards.[107] NSG guidelines, Part 2, governs exports of nuclear-related, dual-use equipment and materials.[108] More specifically, this guideline governs the export of "items that can make a major contribution to an unsafeguarded nuclear fuel cycle or nuclear explosive activity, but which have non-nuclear uses as well. . . ."[109]

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102. U.S. Department of State, *The Nuclear Suppliers Group*, July 29, 2004, http://www.state.gov/t/isn/rls/fs/34729.htm. *See also* Frank C. Langdon, *Japanese Reactions to India's Nuclear Explosion*, PAC. AFF., Summer 1975, at 173.

103. Baer, *supra* note 57, at 3, 6.

104. Miguel Marín-Bosch, *A Commentary on the Nuclear Suppliers Group and Its Time*, *in* 2ND NSG INTERNATIONAL SEMINAR ON THE ROLE OF EXPORT CONTROLS IN NUCLEAR NON-PROLIFERATION, 18 (1999), http://www.nsg-online.org/PDF/SeminarControl2.pdf.

105. *Id*. at 18. The NSG was created by the United States in 1975. It was established to implement nuclear export controls. *See* SQUASSONI, *supra* note 98, at 2; *see also* Joyner, *supra* note 73, at 516 (providing that the NSG also sought to regulate transfers to non-nuclear weapon states).

106. International Atomic Energy Agency, INFCIRC/254/Rev. 8/Part 1, *Communications Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment, and Technology* 10 (2006), http://www.nuclearsuppliersgroup.org/PDF/infcirc254r8p1-060320.pdf (last visited Nov. 5, 2007).

107. *See* BUREAU OF NONPROLIFERATION, U.S. DEP'T OF STATE, THE NUCLEAR SUPPLIERS GROUP (2004), http://www.state.gov/t/isn/rls/fs/34729.htm ("The Part 1 nuclear control list is called the Trigger List because the export of such items triggers the requirement for IAEA safeguards"); *see also* International Atomic Energy Agency, INFCIRC/254/Rev. 8/Part 1, *Communications Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment, and Technology* 1 (2006), http://www.nuclearsuppliersgroup.org/PDF/infcirc254r8p1-060320.pdf (last visited Sept. 20, 2007); OFFICE OF THE SEC'Y OF DEF., DEP'T OF DEF., PROLIFERATION: THREAT AND RESPONSE 73 (2001) (reporting that the guidelines require nuclear exports be shipped to IAEA-compliant states).

108. *See* BUREAU OF NONPROLIFERATION, *supra* note 107; see also Gary K. Bertsch and Richard T. Cupitt, *Nonproliferation in the 1990s: Enhancing International Cooperation on Export Controls*, in WEAPONS PROLIFERATION IN THE 1990S, 119 (Brad Roberts ed., 1995) (noting that the NSG is one of four multilateral agreements that control the transfer of dual-use items).

109. WMD 411: Organizations and Regimes, Nuclear Suppliers Group (NSG), http://www.nti.org/f_wmd411/nsg.html. The NSG guidelines aim to ensure that nuclear trade for peaceful purposes does not contribute to the proliferation of nuclear weapons or other nuclear explosive devices. The NSG guidelines facilitate the development of trade in this area by providing the means whereby obligations to facilitate peaceful nuclear cooperation can be implemented in a manner consistent with international nuclear nonproliferation norms. *See* BUREAU OF NONPROLIFERATION, *supra* note 107.

Today, the NSG, with its 45 member states,[110] is a widely accepted, mature, and effective export-control arrangement that implements guidelines for control of nuclear and nuclear-related exports.[111] The NSG member states continue to pursue the aims of the NSG through voluntary adherence to the guidelines, which are adopted by consensus and exchanges of information on developments of nuclear proliferation concern.[112]

B. United States Law: The Nuclear Non-Proliferation Act and the Atomic Energy Act

The United States Congress responded to India's "peaceful" nuclear test in 1974 by passing the NNPA.[113] "The . . . [NNPA] seeks to limit the spread of nuclear weapons by, among other things, establishing criteria governing U.S. nuclear exports licensed by the Nuclear Regulatory Commission and taking steps to strengthen the international safeguards system."[114] The NNPA amended the AEA[115] to include "[an additional requirement] on U.S. nuclear coopera-

110. *See* http://www.nuclearsuppliersgroup.org/member.htm (listing all 45 current member states of the NSG). (Follow "Participants" hyperlink from the main page; last visited Nov. 5, 2007).

111. *See* Natasha Bajema & Mary Beth Nikitin, *Assessing Nuclear Maturity: Determining Which States Should Have Access to What Nuclear Technology*, 28 FLETCHER F. WORLD AFF. 157, n.24 (2004) (establishing that the goal of the agreement is to ensure legitimate nuclear trade consistent with international nuclear nonproliferation norms). *Compare* BUREAU OF NONPROLIFERATION, *supra* note 107 (asserting that the NSG guidelines provide effective export-control arrangement) *with* Daniel C. Rislove, Note, *Global Warming v. Non-Proliferation: The Time Has Come for Nations to Reassert Their Right to Peaceful Use of Nuclear Energy*, 24 WIS. INT'L L. J. 1069, 1077 (2007) (arguing that the NSG guidelines are not effective because five nonmember nuclear powers—China, India, Iran, Israel, and Pakistan—are still able to initiate nuclear energy programs inconsistent with the NSG).

112. *See* BUREAU OF NONPROLIFERATION, *supra* note 107; *see also* Jack I. Garvey, *The International Institutional Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the Proliferation Security Initiative*, 10 J. CONFLICT & SEC. L. 125, 144 (2005) (stating that the NSG does not adopt guidelines by voting); *The Prevention and Prosecution of Terrorist Acts: A Survey of Multilateral Instruments*, 62 THE RECORD 20, 57 (2006) (noting that the guidelines are followed voluntarily).

113. *See* SQUASSONI, *supra* note 98, at 1 (attributing the NNPA's enactment to India's nuclear test, which caused fears that nuclear power could be misused); Adam Packer, *Nuclear Proliferation in South Asia*, 38 COLUM. J. TRANSNAT'L L. 631, 641 (2000); *see also* Tahirih V. Lee, *The Effect of Chadha on the Creation of Nuclear Cooperation Agreements: The United States-China Agreement on Nuclear Energy*, 2 EMORY J. INT'L DISP. RESOL. 73, 92–93 (1987) (stating that the NNPA agreement was intended to prohibit using nuclear technology for military purposes).

114. NuclearPowerNow, *Nuclear Power Laws* ¶ 7 (2007), http://www.nuclearnow.org/nuclear-energy-power-laws.shtml ("The Nuclear Non-Proliferation Act of 1978 states U.S. policy for actively pursuing more effective international controls over the transfer and use of nuclear materials, equipment, and technology for peaceful purposes in order to prevent proliferation"). *See* DIANNE E. RENNACK, NUCLEAR, BIOLOGICAL, CHEMICAL AND MISSILE PROLIFERATION SANCTIONS: SELECTED CURRENT LAW, CSR Report for Congress RL31502 (CRS), at 32 (2003), http://ncseonline.org/nle/crsreports/03Feb/RL31502.pdf (describing the safeguards, incentives, and international cooperation that fueled the NNPA).

115. *See* Packer, *supra* note 113, at 641–42 (explaining that the NNPA amended the AEA after India's nuclear test); Eric M. Fersht, *Litigating for Nuclear Nonproliferation: Legal Claims in U.S. Federal Courts to Seek Suspension, Modification, or Termination of the United States–Japan Nuclear Cooperation Agreement*, 6 GEO. INT'L ENVTL. L. REV. 503, 521 (1994).

tion[,] . . . comprehensive (full-scope) safeguards on all nuclear material [exported to] non-nuclear weapon states. . . ."[116] The NNPA's purpose is to ensure that peaceful cooperation will not be diverted to weapons purposes.[117]

The AEA "is the fundamental U.S. law on both the civilian and the military uses of nuclear materials."[118] The AEA imposes strict requirements that the United States must comply with before it can participate in nuclear cooperation with any state.[119] One requirement is that non-nuclear weapon states maintain IAEA safeguards for all nuclear materials in all peaceful nuclear sites within its territory, under its jurisdiction, or carried out under its control anywhere.[120] The second requirement is that non-nuclear weapon states receiving nuclear materials and equipment from the United States not detonate a nuclear explosive device or abrogate an agreement imposing IAEA safeguards.[121] If the non-nuclear weapon state fails to comply, the United States has the right to terminate future exports and require the return of any nuclear materials and equipment transferred pursuant thereto and any special nuclear material produced through the use thereof.[122]

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116. SQUASSONI, *supra* note 72, at 1. India, along with Pakistan and Israel, are de facto nuclear weapon states. However, the signatory states to the NPT have in the past, and presently do, treat the de facto nuclear weapon states as non-nuclear weapon states for proliferation purposes. *See* RENNACK, *supra* note 114, at 32 (describing the various components of the NNPA, including the United States' need to license nuclear exports).

117. *See* SQUASSONI, *supra* note 72, at 1; *see also* Packer, *supra* note 113, at 641–42 (noting that the NNPA requires the United States nuclear supply to be maintained peacefully). *But see* Lee, *supra* note 113, at 81–82 (suggesting that the NNPA also seeks to enhance safety measures regarding nuclear materials while sustaining the nuclear material industry).

118. NUCLEARPOWERNOW, *supra* note 114, at ¶ 1 ("The Atomic Energy Act of 1954 declares U.S. policy for the development, use, and control of atomic energy. The Act authorizes the Nuclear Regulatory Commission to oversee the export of special nuclear materials and nuclear technology in accordance with bilateral and international cooperation agreements. . . ."). *See* RENNACK, *supra* note 114, at 32 (noting the presidential mandates governing the acquisition of nuclear materials).

119. *See* Fersht, *supra* note 115, at 521 (codifying the requirements the United States must observe before engaging in nuclear cooperation); *see also* Sutter, *supra* note 72, at 185, n.21 (pointing out the AEA's establishment of controls and safeguards).

120. *See* 42 U.S.C. § 2153(a)(2).

121. *See* 42 U.S.C. § 2153(a)(4).

122. *See* 42 U.S.C. § 2153(a)(4) (There are nine requirements for United States nuclear cooperation, or the exporting of nuclear materials. The other seven requirements include: "(1) safeguards continue in perpetuity; . . . (3) there is no transfer; . . . (5) there is no transfer of material or classified date; (6) physical security is maintained; (7) no enrichment or reprocessing without prior approval; (8) storage is approved by United States for plutonium and HEU [highly enriched uranium]; and (9) anything produced through cooperation is subject to all the above requirements"); *see also* SQUASSONI, *supra* note 72. I isolated two requirements in my research article. However, this isolation is by no means indicative of their greater importance. The recipient of nuclear materials from the United States must comply with all nine requirements unless the president exempts the cooperation agreement.

V. The Devolution of the United States Nuclear Nonproliferation Policy

A. United States Nuclear Export Policy Today: Bending International Agreements and United States Law

The nuclear nonproliferation regime's primary purpose is to prevent the spread of nuclear weapons to states that have not developed them.[123] "Since the 1950s these nonproliferation efforts have built up a broad international structure, including treaties, international organizations . . . and domestic legislation."[124] Until recently, the United States was a leading proponent of the nonproliferation regime, acting as an integral voice in its development and execution.[125] However, in one fell swoop the United States may have indelibly halted future nonproliferation gains or, worse, created a new policy.

On July 18, 2005, President Bush transformed the relationship between the United States and India.[126] Likewise, the president transformed the United States' nonproliferation policy.[127] The President issued a joint statement resolving to establish a global partnership between the United States and India "through increased cooperation on economic issues, on energy and the environment, on democracy and development, on non-proliferation and security, and on high-technology and space."[128] These means of achieving a global partnership do not conflict with the AEA, NPT, or NSG guidelines,[129] but President Bush's conspicuous statement that "he will work to achieve full civil nuclear energy cooperation with India"[130] disregards them all.

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123. *See* Mason Willrich, *The Treaty on Non-Proliferation of Nuclear Weapons: Nuclear Technology Confronts World Politics*, 77 YALE L.J. 1447, 1450 (1968). *But see* Cousineau, *supra* note 95, at 422 (arguing that despite its objective, the NPT actually accomplishes the opposite).

124. CARL E. BEHRENS, NUCLEAR NONPROLIFERATION POLICY, CONG. REP. IB98039, at 1 (2000), http://www.ncseonline.org/nle/crsreports/international/inter-57.cfm#_1_15 (last visited Oct. 7, 2007).

125. Domestically, the United States implemented export controls and licensing laws and regulations covering the transfer of nuclear weapons. *See* BEHRENS, *supra* note 124, at 1*; see also* Mark E. Newcomb, *Non-Proliferation, Self-Defense, and the Korean Crisis,* 27 VAND. J. TRANSNAT'L L. 603, 606 (1994) (claiming that the United States was one of the main countries to pursue a nonproliferation regime).

126. *See* James E. Hickey Jr., *Reviving the Nuclear Power Option in the U.S.: Using Domestic Energy Law to Cure Two Perceptions of International Law Illegality,* 35 HOFSTRA L. REV. 425, 434 (2006) (recognizing that the United States agreed to share advanced nuclear technology with India).

127. *See* John R. Bolton, *The Bush Administration's Forward Strategy for Nonproliferation*, 5 CHI. J. INT'L L. 395, (2005) (discussing the Bush administration's reinvention of the existing nonproliferation regime); *see also* Rislove, *supra* note 111, at 1070 (stating that the United States offended a fundamental part of the NPT by cooperating with India).

128. K. ALAN KRONSTADT, U.S.-INDIA BILATERAL AGREEMENTS IN 2005, CRS Report for Congress. at 1 (2005), http://fpc.state.gov/documents/organization/53616.pdf (last visited Nov. 5, 2007).

129. *See, e.g.*, Democratic Policy Committee, S. 3709, the United States–India Peaceful Atomic Energy Cooperation Act (2006) (highlighting the waivers made by President Bush and Congress to allow civilian nuclear cooperation between the United States and India); *see also* John R. Crook, *Congress Approves Authorizing Legislation for India Nuclear Agreement; President Issues Signing Statement*, 101 AM. J. INT'L L. 496, 498 (2007) (highlighting India's adherence to NSG guidelines).

130. Joint Statement Between President George W. Bush and Prime Minister Manmohan Singh, U.S.-India, July 18, 2005, http://www.whitehouse.gov/news/releases/2005/07/20050718-6.html. In the president's defense, he did agree to seek approval from Congress to adjust United States laws and policies. Also the president agreed to work with his friends and allies to adjust international treaties to enable full civil nuclear cooperation and trade with India.

India does not satisfy the nonproliferation criteria for nuclear cooperation under the AEA.[131] Specifically, India fails to maintain IAEA safeguards "with respect to all nuclear materials in all peaceful nuclear activities within [India]."[132] Presently, India does not have these comprehensive IAEA safeguards in place.[133] Instead, India has safeguard agreements that cover select facilities and materials.[134] Notwithstanding this clear violation of the AEA, the United States has agreed to nuclear cooperation with India.[135]

Exempting India from the full-scope safeguard requirement under the AEA may lead to a violation of the NPT,[136] because the United States may be indirectly assisting India's nuclear weapons program.[137] Under Article I of the NPT, the United States cannot enhance India's capability to produce nuclear weapons.[138] If Congress approves the president's exemption, the

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131. *See* SQUASSONI, *supra* note 98, at 17 (discussing India's noncompliance).

132. Atomic Energy Act, 42 U.S.C. § 2153 (2006) (declaring that a condition of nuclear supply from the United States is adoption of IAEA safeguards). *See* John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 100 AM. J. INT'L L. 717, 718 (2006) (remarking that 81% of India's current nuclear power reactors remain outside IAEA safeguards). *But see* Richard L. Williamson, Jr., *Law and the H-Bomb: Strengthening the Nonproliferation Regime to Impede Advanced Proliferation*, 28 CORNELL INT'L L.J. 71, 96 (1994) (admitting that India is not likely to violate IAEA safeguards despite certain unsecured portions of the country's nuclear capability).

133. *See* Ashton B. Carter, *America's New Strategic Partner?*, FOREIGN AFF., July–Aug. 2006, at ¶ 12 (stressing that more of India's nuclear facilities should be placed under IAEA safeguards); *see also* Hui Zhang & Frank N. von Hippel, *Eyes in the Sky—Watching for Weapons Work*, BULLETIN OF THE ATOMIC SCIENTISTS, July 2001, at 61 (remarking that India has not granted international access to check IAEA compliance); Dr. Anupam Srivastava, *Indian Economic Reforms*, *in* CORPORATE COUNSEL'S GUIDE TO DOING BUSINESS IN INDIA ch. 34, § 13, ¶ 13 (Kenneth A. Cutshaw et al. eds., 2d ed. 2007) (stating that India has enforced only facility-specific IAEA safeguards).

134. *See* Williamson, *supra* note 132, at 96 (listing the Indian nuclear facilities subject to IAEA safeguards); *see also* Bill Monahan, *Giving the Non-Proliferation Treaty Teeth: Strengthening the Special Inspection Procedures of the International Atomic Energy Agency*, 33 VA. J. INT'L L. 161, 189 (1992) (discussing India's non-IAEA safeguarded facilities).

135. SQUASSONI, *supra* note 72. In the United States' defense, India has agreed to place almost two-thirds of their nuclear reactors under IAEA safeguards. Regardless of this good faith offering, India does not satisfy the AEA. *See* Jennifer L. Jack, *Timeline of U.S.-India Nuclear Talks*, U.S. NEWS & WORLD REP., Aug. 28, 2007, ¶ 13 (discussing the progression of talks and agreements between the United States and India).

136. *See Recent Legislation, Foreign Relations Law—Nuclear Nonproliferation—Congress Authorizes the President to Waive Restrictions on Nuclear Exports to India, United States—India Peaceful Atomic Energy Cooperation Act of 2006, Pub. L. No. 109-401, Tit. I, 120 Stat. 2726,* 120 HARV. L. REV. 2020, 2021 (2006) (stating that the USI-PAECA allows the president to waive IAEA provisions because India is not a member of the NPT).

137. *See* Kevin M. Brew, *The Re-emergence of Nuclear Weapons as the Coin of the Realm and the Return of Nuclear Brinkmanship in South Asia: The Nuclear Sword of Damocles Still Hangs by a Thread*, 52 NAVAL L. REV. 177 (2005) (detailing United States plans to strengthen India's nuclear weapons program); *see also* Daryl G. Kimball, Introductory Note, *Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006 (P.L. 109-401)*, 49 INT'L L. MATERIALS 409, 411 (2007) (discussing the concerns surrounding the United States' assisting India's nuclear weapons program); Janadas Devan, *US-India Nuke Pact: A Historic Madness?*, STRAITS TIMES, March 24, 2006 (presenting reasons to fear that the United States may be indirectly assisting India with nuclear weapons).

138. *See* Treaty on the Non-Proliferation of Nuclear Weapons, art. 1, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

international uranium market, forbidden to India since 1992, will be open.[139] This will free up India's domestic uranium for its nuclear weapons program. Therefore, the United States will be indirectly assisting India's nuclear weapons program.

Nuclear cooperation with India violates NSG guidelines.[140] According to the NSG Guidelines, Part 1, nuclear supplier states "should transfer trigger list items or related technology to a non-nuclear-weapon state *only* when the receiving state has brought into force an agreement with the IAEA requiring the application of safeguards on all source and special fissionable materials in its current and future peaceful activities."[141] India is not in compliance with this guideline.[142] Thus, if the United States exports nuclear materials on the trigger list to India, the United States will be in direct violation of the NSG guidelines.

B. The Reasons Behind the Devolution of the Nonproliferation Regime

"From George Bush to a unanimous UN Security Council, all agree that the spread of [nuclear] weapons . . . is a dire threat to peace and security. . . . So why would Mr[.] Bush risk *knocking the stuffing* out of the Nuclear Non-Proliferation Treaty, the legal bar to the spread of the bomb, [United States legislation and NSG guidelines,] by offering to help NPT-outsider India hone its nuclear skills?"[143] In response, President Bush stated that the global partnership does three good things.[144] First, "[b]y offering civil nuclear co-operation, denied for decades, America hopes to cement its growing friendship with a peaceable democracy in a tricky neighborhood."[145] Second, "India will take on similar anti-proliferation commitments to the NPT's

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139. *See* Steve Fetter & Frank N. von Hippel, *Is U.S. Reprocessing Worth the Risk?*, ARMS CONTROL TODAY, Sept. 1, 2005, at 23 (indicating that the United States–India alliance would open up the uranium market to India); SQUASSONI, *supra* note 72 at 22 (noting that India has not had access to the international uranium market for years).

140. *See A Nuclear Test of Wills*, ECONOMIST, Apr. 26, 2007 (attributing the longtime bar against American trade with India to India's exclusion from the NPT and the NSG); *see also* Siddharth Vardarajan, *India Wary of U.S. Goalpost Shift on NSG Clearance*, HINDU, Aug. 12, 2007 (providing that until the NSG's policy on United States-India nuclear cooperation shifts, nuclear trade with India violates NSG guidelines).

141. International Atomic Energy Agency, *Communications Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment and Technology*, Information Circular (Feb. 23, 2005) http://www.nsg-online.org/PDF/infcirc254r7p1-050223.pdf. *See* David Sloss, *Do International Norms Influence State Behavior*, 38 GEO. WASH. INT'L L. REV. 159, 189 (2006) (articulating the policy of not sending any trigger list items to states that did not safeguard their nuclear facilities).

142. *See* Somini Sengupta, *India Debates Its Right to Nuclear Testing*, N.Y. TIMES, Apr. 21, 2007, at A7 (reporting that nuclear commerce with India is still not subject to NSG guidelines); *see also Foreign Relations Law—Nuclear Nonproliferation—Congress Authorizes the President to Waive Restrictions on Nuclear Exports to India, United States—India Peaceful Atomic Energy Cooperation Act of 2006, Pub. L. No. 109-401, Tit. I, 120 Stat. 2726*, 120 HARV. L. REV. 2020, 2025 (2006) (stating that states that are not members of the NPT do not have to comply with the NSG guidelines).

143. *America and a Nuclear India*, ECONOMIST, Oct. 22, 2005, at 16 (*emphasis added*).

144. *See Bend Them, Break Them: America and a Nuclear India*, ECONOMIST, Oct. 22–28, 2005, at 16 (making the statement directly).

145. *Id.*

official nuclear five. . . ."[146] Specifically, under this global partnership India has committed itself to a series of actions, including implementing strong and effective export control legislation, adhering to the NSG guidelines on exports, separating its civil and military facilities, placing all of its civilian facilities and activities under IAEA safeguards, and maintaining its nuclear testing moratorium.[147] "Lastly, more nuclear energy will allow India to power its economy without damaging the environment."[148] The ostensible purpose of facilitating India's transition to civil nuclear energy is laudable, especially because the environmental impact is one of the pressing concerns. However, to date, the United States' foreign relations have not been entirely altruistic. Is the global partnership an exception?

Is the underpinning of this global partnership political and economic gain? Yearning to preserve its position as global leader and concurrently realizing the transformation of the geopolitical landscape, the United States knows that it is imperative to foster a strong relationship with India.[149] "A rising concern for U.S. policymakers is China's growing global 'reach' and the consequences that China's increasing international economic, military, and political influence has for U.S. interests."[150] The United States' warming relations with India will serve to "offset Beijing's power, prevent Chinese hegemony and give the United States more nuanced opportunities for leverage in Asia."[151]

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146. *Id*. at 14, 16. There are degrees of similarity. Clearly, India has not taken upon itself the responsibilities of the five official nuclear powers. All five have stopped making fissile material for weapons and signed the nuclear test ban treaty. India intends to do neither. *See Joining the Nuclear Family: India and America*, ECONOMIST, Mar. 4–10, 2006, at 65 (noting that India did not sign the Nuclear Non-Proliferation Treaty); *see also Nuclear Confusion: Diplomacy and Proliferation*, ECONOMIST, Oct. 22–28, 2005, at 51 ("In talks leading up to the July deal, America had encouraged India to cap voluntarily its production of fissile material-highly enriched uranium and plutonium for bombs . . . . [Y]et it refused. . . .").

147. *See* Crook, *supra* note 129, at 497–98 (noting the standards that India has committed itself to, as well as the standards India has already achieved); *see also* Andrew K. Semmel, *Effective Multilateralism: The U.S. Strategy for Dealing with Nuclear Proliferation,* U.S. DEP'T OF STATE, http://www.state.gov/t/np/rls/rm/56942.tm (Nov. 14, 2005) ("In return, the United States will pursue the necessary changes to U.S. national laws and international regimes to allow full civil nuclear cooperation with India").

148. *Bend Them, Break Them*, *supra* note 144, at 16.

149. *See* Frederick M. Abbott, *A New Dominant Trade Species Emerges: Is Bilateralism a Threat*?, 10 J. INT'L ECON. L. 571, 574–75 (2007) (affirming the changing geopolitical landscape); *see also* Mira Kamdar, *India and the New American Hegemony*, 19 CONN. J. INT'L L. 335, 336 (2004) (citing the White House's documented national security strategy, and claiming that United States interests demand a strong relationship with India).

150. KRONSTADT, *supra* note 128, at 16.

151. *Id. See* Rislove, *supra* note 111, at 1070 (noting that the nature of the United States relationship with India is strategic); *see also* Lyle Goldstein, *China in the New Central Asia: The Fen (RMB) Is Mightier Than the Sword*, FLETCHER F. WORLD AFF., 2005, at 13, 30–31 (suggesting that improved relations with India would prevent Chinese hegemony).

The United States realizes the untapped economic potential of India's nuclear marketplace;[152] the prospect of monetary gain was the "core" of the global partnership.[153] Since most states honor their obligations to abide by international treaties and domestic legislation, India has no legitimate suppliers of nuclear materials and equipment.[154] Recognizing this is the perfect time to enter the lucrative Indian market, the United States is expediting the global partnership to ensure it "get[s] in ahead of Britain, France and Canada."[155] Aside from gaining access to India's nuclear market, nuclear cooperation will augment the United States' military exports to India.[156] Recently, "Pentagon officials . . . assert[ed] that India is likely to purchase up to $5 billion worth of conventional weapons from the United States."[157]

VI. The Repercussions of Bending the Nuclear Nonproliferation Regime for India

A. The Global Partnership's Effects on the Treaty on the Non-Proliferation of Nuclear Weapons and the Nuclear Suppliers Group

"Isn't the burgeoning friendship between the world's richest democracy and its biggest one a strategic benefit that outweighs the potential costs?"[158] If answered hastily, yes. If answered scrupulously, no.

The nonproliferation precedent set by the United States will gradually but inexorably lead to disaster. Rewarding India's recalcitrant and illegal conduct with civil nuclear cooperation,

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152. *See* Dr. Seema Gahlaut, *Export Control of Sensitive Technologies*, 2 CORP. COUNSEL'S GUIDE TO DOING BUS. IN INDIA 2d § 32:4, (2007) (acknowledging that Western companies see India's potential as a future market); *see also* Sumit Ganguly & Dinshaw Mistry, *The Case for the U.S.-India Nuclear Agreement*, 23 WORLD POL'Y J. 11 (2006) (stating that the agreement would result in commercial gains for the United States); Dr. Subroto Roy, *Our Energy Interests*, SUNDAY STATESMAN, Aug. 27, 2006 (stating that there is a "$1,000 billion" opportunity in India, with whom a nuclear deal would be worth at least $100 billion).

153. *See U.S.-India Atomic Energy Cooperation: The Indian Separation Plan and the Administration's Legislative Proposal Before the S. Foreign Relations Comm.*, 109th Cong. 10 (2006), http://www.senate.gov/~foreign/testimony/2006/RiceTestimony060405.pdf. (Remarks of Secretary of State Condoleezza Rice: "At its core, our initiative with India is not simply a government-to-government effort. . . . [T]he associated bilateral peaceful nuclear cooperation agreement now being negotiated, will permit U.S. companies to enter the lucrative and growing Indian market. . . .").

154. *See* Glenn Kessler, *India Nuclear Deal May Face Hard Sell*, WASH. POST, April 3, 2006 (stating that India's nuclear program is largely homegrown); *see also* Rislove, *supra* note 111, at 1075–77 (positing that the U.S.-India Civil Nuclear Cooperation Initiative may lead to other countries softening restrictions).

155. *See Nuclear Confusion, supra* note 146, at 31; *see also* Fareed Zakaria, *Nixon to China, Bush to India*, NEWSWEEK, Feb. 27, 2006 (concluding that the United States' agreement with India put pressure on France and other countries to enter into nuclear compacts).

156. *See* Ganguly & Mistry, *supra* note 152, at 11 (stating that conventional weapons will be given to India under the agreement); *see also* Sumit Ganguly & Manjeet S. Pardesi, *The Rise of India and the India-Pakistan Conflict*, 31 WTR FLETCHER F. WORLD AFF. 131, 143–44 (2007) (asserting that the United States understands the military significance of a partnership with India).

157. Kronstadt, *supra* note 128, at 2.

158. *America and a Nuclear India*, *supra* note 143, at 18.

despite the lack of full-scope safeguards, is a clear breach of the NPT.[159] Further, this breach, by one of the NPT's nuclear five, makes it more difficult to justify to non-nuclear weapon states that they must abide by the NPT's restrictive rules.[160] "What incentives do North Korea and Iran have to comply [after watching the global partnership unfold]?"[161] More so, it sets a dangerous precedent; states that are either outside the NPT or party to it will utilize this precedent to bargain with nuclear weapon states for nuclear cooperation.[162] "Why shouldn't Pakistan or Israel now seek similar bilateral deals outside the . . . (NPT)?"[163] Doubtless, this agreement will have devastating effects on the nonproliferation regime that will reverberate throughout the international community.

Bending the rules for India may have an adverse effect on the nonproliferation regime, but not on NSG states. If the global partnership between the United States and India is consummated, NSG members may try to "exploit the U.S. initiative for commercial purposes to pursue previously off-limit markets. . . ."[164] In the worst-case scenario, this partnership would cause the nuclear supplier states to compete ruthlessly to become the largest exporter of nuclear weapons, ensure a nuclear Middle East, and destroy the nonproliferation regime.[165]

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159. *See* William C. Potter & Jayantha Dhanapala, *The Perils of Non-Proliferation Amnesia*, HINDU, Sept. 1, 2007, at 13 (declaring that the United States' nonproliferation policy violates fundamental principles of the NPT); *see also Nuclear Arms Race*, BUS. RECORDER, Aug. 6, 2007 (recognizing that the United States abdicated its obligations under the NPT).

160. *See* Vejay Lalla, *The Effectiveness of the Comprehensive Test Ban Treaty on Nuclear Weapons Proliferation: A Review of Nuclear Non-Proliferation Treaties and the Impact of the Indian and Pakistani Nuclear Tests on the Non-Proliferation Regime*, 8 CARDOZO J. INT'L & COMP. L. 103, 113 (2000) (showing the discriminatory nature of Article III of the NPT, which compels non-nuclear states to abide by IAEA safeguards even though existing nuclear states are not so required); *see also* Philip Dorsey Iglauer, *A "Historic" US-India Deal?*, KOREA TIMES, Mar. 7, 2006 (admonishing that non-nuclear weapon states will be less likely to abide by NPT rules upon seeing the United States reward India's illegal conduct).

161. *Bush's India Deal a Backward Step*, TORONTO STAR, Mar. 7, 2006, at A18.

162. *See* Lewis Dunn, *Deterrence Today: Roles, Challenges and Responses* 14 (Institut Français des Relations Int'l Sec. Studies Ctr., Proliferation Paper, 2007), www.ifri.org/files/Securite_defense/Deterrence_Today_Dunn_2007.pdf (recognizing the possibility that nations may attempt to bargain with or even blackmail nuclear weapon states to attain nuclear cooperation).

163. *Bush's India Deal a Backward Step*, *supra* note 161, at A18.

164. Fred McGoldrick et al., *The U.S.-India Nuclear Deal: Taking Stock*, ARMS CONTROL TODAY, Oct. 12, 2005, http://www.armscontrol.org/act/2005_10/OCT-Cover.asp. *See Recent Legislation, Foreign Relations Law—Nuclear Nonproliferation—Congress Authorizes the President to Waive Restrictions on Nuclear Exports to India*, 120 HARV. L. REV. 2020, 2024–25 (2007) [hereinafter Recent Legislation] (recognizing that creating an exception for India may lead other nuclear powers outside the NPT to demand equal treatment or threaten to share sensitive nuclear technologies and secrets with others).

165. *See* Recent Legislation, *supra* note 164 at 2026 (demonstrating that competition among nuclear weapon nations can cause an arms race, resulting in many nuclear powers and collapsing the nonproliferation regime); *see also* Stephen Peter Rosen, *After Proliferation: What to Do If More States Go Nuclear*, FOREIGN AFF., Sept. 1, 2006, at 9 (discussing the potential for an arms race in the Middle East and Asia); Graham Allison, *The Nightmare This Time: A Nuclear Showdown with Iran Could Be This Generation's Cuban Missile Crisis*, BOSTON GLOBE, Mar. 12, 2006, at C1 (asserting that Iran and North Korea have threatened to erode the entire NPT regime, triggering other Middle Eastern states to partake in a multiparty nuclear arms race).

B. Instant Customary International Law?

Traditionally, C.I.L. is formed when two criteria are satisfied: state practice and *opinio juris*.[166] However, "[i]n today's rapidly growing and changing world community, states have accepted the need to adapt the method by which customary international law is made."[167] The ICJ deviated from the traditional view of C.I.L. development in the *North Sea Continental Shelf* cases.[168] In its opinion, "the ICJ prescribed a new course for customary international law. . . . The ICJ stated: . . . the passage of only a short period of time is not necessarily . . . a bar to the formation of a new rule of customary international law. . . ."[169] This ruling minimized the role of state practice, specifically the durational requirement, in the formation of C.I.L., and paved the way for instant C.I.L. [170] According to legal scholar Bin Cheng,[171] "states can advance a new customary international law, either in concert with other states or unilaterally, simply by evincing a new *opinio juris*. If other states do not object, and in fact follow suit, they will share the same *opinio juris*, thus forming a new rule of customary international law." [172]

Does the global partnership create instant C.I.L.? No. However, one cannot overlook the significance of the global partnership; exporting nuclear materials to India, a state outside of the NPT, in direct violation of domestic legislation and NSG guidelines, will at best destroy the NPT.[173] More states will be inclined to follow the United States' precedent—economics trumps nonproliferation—and the requisite state practice of selling nuclear arms to any state that can afford them will be achieved expeditiously.[174]

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166. *See* Mark A. Chinen, *Game Theory and International Law: A Response to Professors Goldsmith and Posner*, 23 MICH. J. INT'L L. 143, 146 (2001) (noting that C.I.L. "consists of general and consistent state practices followed out of a sense of legal obligation"); *see also* Benjamin Langille, Note, *It's Instant Custom: How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001* 26 B.C. INT'L & COMP. L. REV. 145, 145 (2003) (maintaining that two elements make up C.I.L.: (1) practice, and (2) *opinio juris*.

167. Langille, *supra* note 166, at 146.

168. *Id.* at 149. *See* Peter Prows, *Tough Love: The Dramatic Birth and Looming Demise of UNCLOS Property Law (And What Is to Be Done About It),* 42 TEX. INT'L. L. J., 241, 254–55 (2007) (explaining that the North Sea Continental Shelf cases accorded definitive weight to the practice of a small number of coastal states).

169. Langille, *supra* note 166, at 149.

170. *Id.*; *see also* North Sea Continental Shelf (F.R.G./Den. v. F.R.G./Neth.), 1969 I.C.J. 3, *43 (Feb. 20) (holding that the passage of a short time period does not bar the formation of a new rule of customary international law).

171. *See* BIN CHENG, INTERNATIONAL LAW: TEACHING AND PRACTICE xvii (1982) (noting that Professor Bin Cheng, Ph.D., L.L.D., and Hon. L.L.D., was Professor of Air and Space Law at the University of London and Chairman of the Air Law Committee of the International Law Association).

172. Langille, *supra* note 166, at 150 ("[L]egal scholar Bin Cheng officially introduced the notion of instant custom").

173. *See* Evan R. Berlack, *"End Use" Controls in the Export Administration Regulations and the Proposed Legislation to Revise the Export Administration Act*, 705 PLI 105, 110 (1994) (noting that India is one of a small but important group of NPT nonsignatories); *see also* Lalla, *supra* note 160, at 135 (warning that India's nuclear weapon testing may cause other Asian countries to develop independent nuclear deterrents and, consequently, an arms race that would threaten the nuclear nonproliferation regime).

174. *See generally* Milagros Alvarez-Verdugo, *Comparing U.S. and E.U. Strategies Against Weapons of Mass Destruction: Some Legal Consequences*, 11 ANN. SURV. INT'L & COMP. L. 119, 135 (2005) (recognizing the United States as an important actor in the campaign against nuclear nonproliferation); Kraska, *supra* note 88, at 706 (claiming that the United States has recently made significant progress in cooperative threat reduction of nuclear proliferation).

VII. Conclusion

The immeasurable damage the global partnership may have on the nonproliferation regime far outweighs its potential benefits. Undoubtedly, the United States will recognize economic gain as it ascends to the top of the nascent nuclear arms market. However, with ascension comes costs, the greatest being the subversion of the nonproliferation regime. The United States, perched atop the slippery slope it created, will have a bird's-eye view of the irreparable harm left in the wake of the global partnership.

Questions Concerning the Legality of the Use of Force in Southern Lebanon During the Israel-Hezbollah Conflict of 2006

José Javier Teurbe-Tolón*

In the post–Cold War world, the largest threat to the security of nations has been terrorist acts committed by nonstate actors.[1] In conducting the war on terror, the United States, under the leadership of President George W. Bush, adopted a doctrine of preemptive self-defense under which any group deemed to be a threat by the United States government can be attacked without authorization by the United Nations Security Council.[2] This doctrine has called into question the overall framework of international law, especially United Nations charter law.

Nonstate actors usually establish a base of operations within the boundaries of a sovereign state from which they plan and carry out terrorist actions in other countries.[3] For example, in Afghanistan, the Taliban regime sponsored and provided security for Osama Bin Laden and Al-Qaeda.[4] The United States invaded Afghanistan and justified its military activities in that

1. *See* Eric Lipton, *Homeland Report Says Threat from Terror-List Nations is Declining*, N.Y. TIMES, Mar. 31, 2005, at A9 (quoting an internal Department of Homeland Security Report claiming "ideologically driven non-state actors" are the biggest threat to the United States); Matthew B. Stannard, *Changing Course: Rumsfeld Out; Iraq Strategy, Pentagon Policy Will Be Shaken Up, Analysts Say*, S.F. CHRONICLE, Nov. 9, 2006, at A1 (reporting that nonstate actors have "supplanted state warfare as one of this century's biggest threats"); John-Alex Romano, Comment, *Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of State Necessity*, 87 GEO. L.J. 1023, 1038 (1999) (noting that terrorist groups have replaced armed rebel groups as the greatest threat to international peace and security).

2. *See* THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES, 13–16 (2002), http://www.whitehouse.gov/nsc/nss.pdf; *see also* Eric Schmitt & Elisabeth Bumiller, *Threats and Responses: Attack Strategy; Top General Sees Plan to Shock Iraq into Surrendering*, N.Y. TIMES, Mar. 5, 2003 at A1 (quoting President Bush's statement that he would disarm Iraq without UN approval).

3. *See* Vincent-Joel Proulx, *Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKLEY J. INT'L L. 615, 641–42 (2005) (discussing the imputation of terrorist activity on a "host-state"). *See generally* John Alan Cohan, *Formulation of a State's Response to Terrorism and State-Sponsored Terrorism*, 14 PACE INT'L L. REV. 77, 91–92 (2002) (describing the grounds on which a state is considered to support nonstate terrorist groups within its boundaries).

4. *See* Christopher Wren, *A Nation Challenged: World Forum; U.S. Advises U.N. Council More Strikes Could Come*, N.Y. TIMES, Oct. 9, 2001, at B5 (reporting on U.S. military action against the Taliban regime for protecting terrorists); Derek Jinks, *State Responsibility for Sponsorship of Terrorist Activity and Insurgent Groups: State Responsibility for the Acts of Private Armed Groups*, 4 CHI. J. INT'L L. 83, 85 (2003) (referring to the Taliban's complicity in Al-Qaeda's "armed attack" on the United States).

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country on the grounds that it was acting in self-defense after Al-Qaeda attacked the United States on September 11, 2001.[5]

However, in some situations a nonstate actor conducts unlawful acts of aggression within a state without the consent of that state.[6] An example of a major situation in which this type of relationship between a state actor and a nonstate actor seems to exist is the Israeli-Hezbollah conflict of 2006.[7] Israel has argued that they were exercising self-defense because Hezbollah's border incursion caused the death of Israeli soldiers, and Hezbollah agents kidnapped Israeli soldiers.[8] Israel certainly has a right to defend itself against the attacks by Hezbollah; however, questions exist as to the extent of Israel's response to the attack. This responsive action[9] caused the death of many Lebanese civilians, including children, as well as the destruction of property.[10]

At the end of the conflict, questions exist as to the legality of the use of force by both parties. Was Israel's use of force in Lebanon unlawful? If so, did it violate Lebanon's rights under international law? Was Israel justified in its actions because the Lebanese government failed to prevent Hezbollah from launching attacks from Lebanon against military and civilian targets located in Israel and because of the location of Hezbollah's military equipment and personnel within civilian areas? This article examines the evolution of the law of self-defense in the post-9/11 world. It includes case studies and secondary sources, such as journal articles and other scholarly pieces that are applied to the Israeli-Hezbollah conflict to examine the legality of a stronger state's response to a terrorist attack conducted from within a weaker state's boundaries. Part I is a brief description of the Israeli-Hezbollah conflict. Part II discusses the right of self-defense under the United Nations Charter. Part III analyzes the requirements of propor-

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5. *See* S.C. Res 1368 ¶ 3, 8, U.N. Doc S/RES/1368 (Sept. 12, 2001) (recognizing the right to self-defense and supporting efforts to respond to September 11 terrorist attacks); *see also* Wren, *supra* note 4, at B5 (commenting that the United States justified air strikes against Afghanistan as self-defense).

6. *See* Tel-Oren v. Libya, 726 F.2d 774, 806–08 (D.C. Cir. 1984) (discussing the distinction between the accountability of a state as opposed to a nonstate for support of terrorism); *see also* Catherine Tinker, *Is the United Nations Convention the Most Appropriate Means to Pursue the Goal of Biological Diversity?: Responsibility for Biological Diversity Conservation Under International Law*, 28 VAND. J. TRANSNAT'L L. 777, 785 (1995) (stating that acts of nonstate actors do not give rise to state responsibility).

7. *See* Warren Hoge, *U.N. Leader Calls for Lebanon's Borders to Be Secured*, N.Y. TIMES, Mar. 31, 2007, at A6 (discussing the movement of illegal weapons into Lebanon); *see also UN to Probe Alleged Israeli Targeting of Lebanese Civilians* (CBC News, television broadcast, Sept. 1, 2006) (alluding to the enforcement of UN resolutions that seek to halt the supply of weapons to entities in Lebanon without the consent of the Lebanese government). *But see* Asher Maoz, *Op-Ed, Hezbollah Allowed to Fester*, AUSTRALIAN, July 28, 2006, at 14 (stating that Lebanon consented to the use of its territory by fighters against Israel).

8. *See* Uri Dan, *Rockets Go Deep into Israel as Leb Reels Under Blitz*, N.Y. POST, July 14, 2006, at 4 (quoting President George W. Bush, who defended Israel's right to self-defense); *see also* Laura King & Rania Abouzeidi, *Warfare in Lebanon: Israel Blocks Lebanese Coast; Jets Make Hundreds of Raids as the Assault Widens*, L.A. TIMES, July 14, 2006, at A1 (citing the capture of Israeli soldiers as the cause of the Israeli-Lebanese conflict).

9. *See* King & Abouzeidi, *supra* note 8, at A1 (reporting heavy air strikes in southern Lebanon where Hezbollah is headquartered); *see also* Martin Chulov, *On the Road to Disaster*, WEEKEND AUSTRALIAN, July 15, 2006, at 23 (describing the destruction of targets in southern Lebanon).

10. *See* Dave Goldiner, *Rockets Blast Haifa, Killing 8*, DAILY NEWS (New York), July 17, 2006, at 3 (counting 150 civilian deaths during Israeli campaign against Hezbollah); Human Rights Watch, *Fatal Strikes: Israel's Indiscriminate Attacks Against Civilians in Lebanon*, Aug. 2006 (denouncing Israel's targeted strikes on civilian homes in southern Lebanon).

tionality and necessity, and whether the Israeli-Hezbollah conflict met these requirements. Part IV reviews International Court of Justice (hereinafter "ICJ") cases that deal with the proportionality requirement of self-defense. Part V discusses the rights of a state like Israel to exercise self-defense within the territory of a state from which a terrorist attack stemmed, and the duties of a host state toward controlling terrorist activities within its boundaries. Part VI analyzes the possible violations of *jus in bello* ("law in war"), the law that regulates conduct during an armed conflict, by Hezbollah and/or Lebanon regarding civilians in Lebanese territory.

I. History of the Israeli-Hezbollah Conflict of 2006

The Israeli-Hezbollah conflict began in July 2006 when Hezbollah fired Katyusha rockets at Israeli military posts across the border to divert attention from a Hezbollah incursion into Israeli territory, in which three Israeli soldiers were killed and two were kidnapped.[11] Israel sent a rescue mission into Hezbollah-controlled southern Lebanon, which failed to obtain its objective and suffered more casualties.[12] Israel then launched rockets and sent ground troops to attack Hezbollah targets located within the civilian infrastructure of southern Lebanon.[13] Hezbollah retaliated by launching Katyusha rockets into northern Israel.[14] The Lebanese government denied any connection with or support of the attacks made by Hezbollah operatives stationed within Lebanese sovereign territory.[15]

Israel's military action consisted of the following: 1) Israel's air force flew more than 12,000 combat missions;[16] 2) Israel's navy fired 2,500 shells;[17] and 3) Israel's army fired over

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11. *See* Donald Macintyre & Eric Silver, *Israel Widens Bombing Campaign as Lebanese Militia Groups Retaliate*, INDEPENDENT (London), July 14, 2006, at 2; Yaakov Katz et al., *Israel Vows to "Break" Hizbullah as Rocket Hits Haifa*, JERUSALEM POST, July 14, 2006, at 1; Greg Myre & Steven Erlanger, *Clashes Spread to Lebanon as Hezbollah Raids Israel*, N.Y. TIMES, July 13, 2006, at A1.

12. *See* Laura King & Vita Bekker, *Warfare in Lebanon; Israel Strikes Lebanon After Militants Capture 2 Soldiers*, L.A. TIMES, July 13, 2006, at A1; *see also* Myre & Erlanger, *supra* note 11, at A1 (indicating that the death toll for Israeli soldiers was its highest in years); Ravi Nessman, *Israeli Forces Enter Lebanon*, STAR-LEDGER (Newark, N.J.), July 13, 2006, at 1 (detailing how the Israeli rescue mission failed).

13. *See* Edward Cody & John Ward Anderson, *Deadliest Day Yet in Assault on Lebanon; Hezbollah Rockets Fired into Israel Kill Two Arab Boys*, WASH. POST, July 20, 2006, at A1; *see also Israel Hammers Targets Along 2 Fronts*, ORLANDO SENTINEL (Florida), July 13, 2006, at A1 (reporting the dispatch of Israeli ground troops into Lebanon and the bombing of southern Lebanon); Myre & Erlanger, *supra* note 11, at A1 (noting Israel's attack on 40 sites in southern Lebanon).

14. *See* Dave Goldiner, *Reign of Death in Israel & Leb. Wave of Civilian Fatalities from Rockets, Warplanes*, DAILY NEWS (New York), July 17, 2006, at 3; Macintyre & Silver, *supra* note 11, at 2.

15. *See* Fuad Siniora, Prime Minister, *Address to Lebanese People* (July 17, 2006), in MANILA TIMES, Aug. 2, 2006; Hassan Fatah & Steven Erlanger, *Turmoil in the Mideast: The Overview; Israel Blockades Lebanon; Wide Strikes by Hezbollah*, N.Y. TIMES, July 14, 2006, at A1. *See generally* Gareth Smyth, *Risks Rise for Iran as Conflict Continues*, FINANCIAL TIMES (London), Aug. 4, 2006, at 5 (maintaining that Lebanese Prime Minister Fuoad Siniora was seen as the leader who would disarm Hezbollah).

16. *See* Dahr Jamail, *Challenges 2006–2007: Lebanon Destroyed, Destabilised, Desperate for Change* ¶ 14, http://ipsnews.net/news.asp?idnews=36035.

17. *See* AMNESTY INT'L, ISRAEL/LEBANON: DELIBERATE DESTRUCTION OR "COLLATERAL DAMAGE"? ISRAELI ATTACKS ON CIVILIAN INFRASTRUCTURE, 6–7 (2006) (describing generally the infrastructural damage in Lebanon).

100,000 shells,[18] destroying large parts of the Lebanese civilian infrastructure.[19, 20, 21] During the conflict, Hezbollah fired between 3,970 and 4,228 rockets, about 95% of which were 4.8-inch Katyusha artillery rockets carrying up to a 66-pound warhead and having a range of up to 19 miles.[22] An estimated 23% of these rockets hit developed areas in Israel that were primarily civilian in nature.[23] The cities that were hit included Haifa, Hadera, Nazareth, Tiberias, Nahariya, Safed, Afula, Kiryat Shmona, Beit She'an, Karmiel, and Maalot; and dozens of Kibbutzim, Moshavim, and Druze and Arab villages; as well as the northern West Bank.[24] Hezbollah also engaged in guerrilla warfare from well-fortified positions with the Israel Defense Forces ("IDF").[25] These attacks by small, well-armed units caused serious problems for the IDF, especially where they fired hundreds of sophisticated Russian-made antitank guided missiles ("ATGMs").[26] Hezbollah destroyed 14 Israeli Merkava main battle tanks and damaged 50.[27]

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18. *See* Jamail, *supra* note 16, ¶ 14.

19. *See* Fatah & Erlanger, *supra* note 15, at A1 (describing the destruction of a main road in Beirut and the shutting down of the airport); *see also* Greg Myre & Steven Erlanger, *Turmoil in the Mideast: Escalation; Clashes Spread to Lebanon as Hezbollah Raids Israel*, N.Y. TIMES, July 13, 2006, at A1 (reporting the destruction of Lebanese roads and bridges by Israeli attacks); Nayla Razzouk, *Hezbollah Chief Vows "Open War" After Beirut Attack*, AGENCE FR. PRESSE ENGLISH WIRE, July 15, 2006 (noting that 20 bridges had been destroyed).

20. Four hundred miles of roads; 73 bridges; 31 targets such as Beirut International Airport, ports, water and sewage treatment plants; electrical facilities; 25 fuel stations; 900 commercial structures; up to 350 schools; and 2 hospitals were destroyed; as well as some 15,000 homes. *See* Sue Leeman, *Israeli War Crimes Alleged; Amnesty International Level Charge Says Massive Destruction "Deliberate,"* TORONTO STAR, Aug. 25, 2006, at A08 (reporting that 15,000 homes were destroyed in Lebanon after the war); *see also* AMNESTY INT'L, *supra* note 17, at 6–18 (detailing the specific damage the conflict wrought upon the Lebanese infrastructure). *But see* Human Rights Watch, *supra* note 10, at 14–15 (contending that Israel destroyed or damaged only 5,000 civilian homes).

21. Some 130,000 more homes were damaged. *See* AMNESTY INT'L, *supra* note 17, at 6–18 (asserting that tens of thousands of homes were damaged or destroyed). *But see* Laura King & J. Michael Kennedy, *Warefare in the Middle East; Lebanese Told to Leave the South; Israel Refuses to Say Whether its Warning Signals a Ground Invation,* LA TIMES, July 21, 2006, at A1 (quoting a military spokesman who contended houses had to be attacked because the rockets are stored there).

22. *See Major Attacks in Lebanon, Israel and the Gaza Strip*, N.Y. TIMES, Aug. 14, 2006, http://www.nytimes.com/packages/html/world/2006_MIDEAST_GRAPHIC/index.html (mapping the day-to-day attacks in Lebanon, Israel, and the Gaza Strip).

23. *Major Attacks in Lebanon, Israel and the Gaza Strip*, *supra* note 22 (showing the density of the population where the attacks were concentrated).

24. *Id*., *supra* note 22 (providing an interactive map showing cities attacked on various dates); *see Statement by Ambassador Dan Gillerman, Israel's Permanent Representative to the U.N. at a Meeting of the U.N. Security Council,* FED. NEWS SERV., Aug. 8, 2006, ¶ 7; The Israel Project, HEZBOLLAH-ISRAELI CONFLICT PRESS KIT, http://www.theisraelproject.org/site/c.hsJPK0PIJpH/b.1986691/k.52DC/HezbollahIsraeli_Conflict_Press_Kit.htm (last visited Oct. 4, 2007).

25. Orly Halpern, *Grumbling in the Ranks*, U.S. NEWS & WORLD REP., Aug. 28, 2006, ¶ 4; *see also* Gavin Rabinowitz, *Israel, Hezbollah Fight to a Draw*, WASH. POST, Aug. 15, 2006, ¶ 2, 12, http://www.washingtonpost.com / wp-dyn/content/article/2006/08/15/A R2006081500127_pf.html (explaining that Hezbollah was highly trained, had sophisticated weapons and home-turf advantage, and engaged in guerilla fighting tactics).

26. Alon Ben-David, *Israel Introspective after Lebanon Offensive*, JANE'S DEFENCE WKLY., Aug. 23, 2006, at 19–20 (opining that the antitank guided missiles used by Hezbollah emerged as the most serious threat to the IDF); *see also* Shashank Bengali, *Crisis in the Middle East: Guerilla Weapons Cache May Delay U.N. Force: Lebanon Says Its Troops Won't Part without Deal from Hezbollah*, HOUSTON CHRON., Aug. 16, 2006, at A (noting that Hezbollah had many Russian-made, wire-guided antitank missiles).

27. Ben-David, *supra* note 26, at 19–20.

Antitank mines destroyed 6 tanks.[28] Hezbollah caused additional casualties by using ATGMs to collapse buildings sheltering Israeli troops.[29]

On August 14, 2006, the United Nations brokered a cease-fire between the parties.[30] The cease-fire was part of United Nations Resolution 1701, which also called for an international weapons embargo against Hezbollah.[31] Despite this, hostilities continued between the two parties.[32] On September 8, 2006, Israel removed its naval blockade, thus satisfying a pertinent condition of the cease-fire.[33] On October 1, 2006, Israel completed its withdrawal of troops from southern Lebanon, with the exception of the village of Ghajar, where Israel will maintain a troop presence until Israel, the United Nations, and the Lebanese government make an agreement.[34] Israel continues to fly over Hezbollah-controlled southern Lebanon in preparatory and training missions.[35]

The conflict eventually ended with a cease-fire agreement between Israel and Hezbollah. The difficulty in assessing the end to the conflict is exacerbated by the fact that Israel was exercising its right of self-defense against Lebanon, but with a nonstate actor as the original aggres-

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28. *Id*.

29. *Still Haunted by Hezbollah War, Israel Reassesses Military Plans*, TURKISH DAILY NEWS, May 10, 2007, ¶ 10; *see* David Eshel, *Lebanon 2006: Did Merkava Challenge Its Match?*, ARMOR, Jan. 1, 2007, at 12.

30. *See* Tom Ruys, *Crossing the Thin Blue Line: An Inquiry into Israel's Recourse to Self-Defense Against Hezbollah*, 43 STAN. J. INT'L L. 265, 266 (2007); *see also* Hassan M. Fattah, *Hostilities in the Mideast: Destruction; as Cease-Fire Holds, Lebanese Dig for the War's Victims in the Rubble of Many Towns*, N.Y. TIMES, Aug. 16, 2006, at A9 (stating that the conflict came to a halt after a tenuous cease-fire).

31. *See Israel: Raid Targets Weapons Transfer* (CNN, television broadcast, Aug. 19, 2006), ¶ 10, http://www.cnn.com/2006/WORLD/meast/08/19/mideast.main.05/index.html; Sheldon Kirshner, *Israel Faces Uncertainty after Lebanon Withdrawal*, CANADIAN JEWISH NEWS, Oct. 12, 2006, at 11 (noting that UN Resolution 1701 ended the war and that Israel was banking on the UN embargo making it impossible for Syria and Iran to resupply Hezbollah).

32. *See Israel Reports Mortars Fired Inside Lebanon* (CNN television broadcast, Aug. 14, 2006), ¶ 1, http://edition.cnn.com/2006/WORLD/europe/08/14/monday/index.html (stating that the Israeli military reported four mortar rounds being fired in southern Lebanon hours after the cease-fire had begun); *see also Lebanon's President Urges UN to Enforce Israeli Cease-Fire*, VOA News, Sept. 28, 2007, ¶¶ 1–3, http://voanews.com/english/2007-09-28-voa19.cfm (reporting on the Lebanese claim that Israel had violated the UN resolution 500 times and the Israeli claim that Hezbollah had neither disarmed nor released two kidnapped soldiers); *Truce Is in Jeopardy, Israel Tells U.N. Chief*, FT. WORTH STAR TELEGRAM, Mar. 25, 2007, at A19 (stating that Israeli Defense Minister Amir Peretz notified the U.N. Secretary General that the cease-fire was in danger because Hezbollah militants continued to receive arms from Syria and had not yet released two captured Israeli soldiers).

33. *See* Hussein Dakroub, *Israel Ends Naval Blockade of Lebanon; Italian Vessels Take Over Monitoring ; "People Can Get Back to Their Business,"* TORONTO STAR, Sept. 9, 2006, at A18; *see also Syria's Ba'thist Regime Is Navigating Through Tough Times to Survive*, APS DIPLOMAT NEWS SERV., Sept. 11, 2006, ¶ 22 (stating that Israel's naval blockade was replaced by ships from France, Italy, and Greece).

34. *See* Yaakov Katz, *IDF Still Keeping Troops in Northern Ghajar; More Talks Next Week with UNIFIL, Lebanese Army on Solution for Village*, JERUSALEM POST, Oct. 13, 2006, at 3 (explaining that on October 1, 2006, the IDF withdrew its remaining troops from Lebanon, except for a small number that remained in Ghajar).

35. *See Lebanon—Israeli Planes Enter Lebanese Airspace*, PERISCOPE DAILY DEF. NEWS CAPSULES, Sept. 17, 2007, ¶¶ 1–4 (stating that the Lebanese army claims Israeli jets fly over Lebanese airspace while Israel maintains that the overflights are necessary to stop arms smuggling by Hezbollah); *see also Israel Continues Overflights of Lebanon*, VOICE AM. PRESS RELEASES & DOCUMENTS, Oct. 23, 2006, ¶¶ 1–6 (indicating Israeli overflights have been an almost daily occurrence since the U.N.-brokered cease-fire).

sor and target of the hostility.[36] However, it has been argued that a cease-fire, even if brokered by the United Nations Security Council, is not necessarily an official end to war in the technical sense; rather, it is a mere cessation of hostilities.[37] Based on Yoram Dinstein's reasoning that a state of war can persist for decades so long as no formal ending has occurred, Israel can reenter the sovereign territory of Lebanon without requiring that Lebanon or Hezbollah conduct another armed attack against Israel.[38]

II. The Right of Self-Defense Under the United Nations Charter

After World War II, the framers of the Charter of the United Nations sought to prevent the kind of global catastrophe that had just ended.[39] Article 2(4) of the Charter prohibits interstate aggressive action providing that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[40] The Charter allows two exceptions to the general provision against armed attack: (1) Security Council authorization and (2) self-defense.[41] Self-defense is codified by the Charter under Article 51:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time

36. *See* Andrea Strimling, *The Federal Mediation and Conciliation Service: A Partner in International Conflict Prevention*, 2 PEPP. DISP. RESOL. L.J. 417, 422 (2002) (discussing the difficulties encountered when utilizing traditional methods of obtaining cease-fire agreements when nonstate actors are involved); *see also* Michael Matza, *Coming Days Offer Crucial Test for Cease-fire: It Will Take Time for International Force to Move In, but Can Factions Hold Their Fire?,* KAN. CITY STAR, Aug. 15, 2006, at A4 (opining that the primary obstacle was the international community's attempt to implement a cease-fire agreement among a state, Israel, and a "non-state actor," Hezbollah).

37. *See* YORAM DINSTEIN, WAR AGGRESSION AND SELF-DEFENCE 53 (4th ed. 2005) (opining that a cease-fire, by definition, is an arrangement resulting from a transition period and not a peace treaty); *see also* David M. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT'L L. 801, 815 (1996) (stating that although the UN may enforce a cease-fire through various means, a peace treaty is the ultimate means by which parties come to an agreement and consent in a final and comprehensive way to end a conflict).

38. DINSTEIN, *supra* note 37, at 53.

39. *See* Anthony Clark Arend, Symposium: *The United Nations, Regional Organizations, and Military Operations: The Past and the Present*, 7 DUKE J. COMP. & INT'L L. 3, 27 (1996); Aaron Judson Lodge, *Globalization: Panacea for the World or Conquistador of International Law and Statehood?*, 7 OR. REV. INT'L L. 224, 286–87 (2005).

40. *See* U.N. Charter art. 2, para. 4.

41. *See* Christopher J. Borgen, *Whose Public, Whose Order? Imperium, Region, and Normative Friction*, 32 YALE J. INT'L L. 331, 339 (2007) (noting that the Security Council authorizes the use of force in some instances and the Charter of the United Nations allows a state to act in self-defense); see also Robert Gray Bracknell, *Real Facts, "Magic Language," the Gulf of Tonkin Resolution and Constitutional Authority to Commit Forces to War*, 13 NEW ENG. J. INT'L & COMP. L. 167, 189 (2007) (explaining the modern concept that the use of armed force is permissible for national and collective self-defense and upon authorization by the UN Security Council).

> such action as it deems necessary in order to maintain or restore international peace and security.[42]

Article 51 clearly states that self-defense can be invoked only if an armed attack occurs against a member state of the United Nations.[43] The article also requires states to report the exercise of self-defense to the Security Council, although in practice this does not always occur as "immediately" as the text of the article expresses.[44]

The principal requirement of an "armed attack" has been the subject of scholarly debate. Some scholars believe that the text of Article 51 does not allow for any form of self-defense unless the armed attack has already occurred.[45] Christopher Greenwood believes that although there is no explicit mention of anticipatory self-defense (self-defense invoked before an armed attack actually occurs), it has become accepted practice of states.[46] However, Greenwood stresses that the lawful invocation of anticipatory self-defense requires an imminent threat of the use of force by another state.[47]

Another approach is to allow a form of anticipatory self-defense called interceptive self-defense, which has a much higher threshold. Interceptive self-defense allows a state to use force before an armed attack has occurred, but only if the opposing state's attack is already in the process of occurring and the attacking force can no longer refrain from attacking.[48] Dinstein

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42. U.N. Charter art. 51.

43. *See* U.N. Charter art. 51.

44. *Id*. *See generally* James Thuo Gathii, *Recent Case, Armed Activities on the Territory of the Congo (Congo v. Uganda)*, 101 AM. J. INT'L L. 142, 143 (2007) (providing Uganda as an example of a country that had failed to report its activities to the Security Council in conformance with Article 51); John Quigley, *The United Nations Security Council: Promethean Protector or Helpless Hostage?*, 35 TEX. INT'L L.J. 129, 134 (2000) (noting that when the United States attacked Sudan and Afghanistan with missiles in 1998, it informed the Security Council of its actions by letter on exactly the same day).

45. *See* Christopher Greenwood, *International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7, 14–15 (2003) (discussing the different scholarly views on the definition of "armed attack" under Article 51); Emanuel Gross, *Combating Terrorism: Does Self-Defense Include the Security Barrier? The Answer Depends on Who You Ask*, 38 CORNELL INT'L L.J. 569, 576 (2005) (explaining that some believe Article 51 is unambiguous; requiring a state to wait until it is attacked before using self-defense).

46. Greenwood, *supra* note 45, at 15; *see also* David Tal, *Israel's Concept of Preemptive War*, 57 SYRACUSE L. REV. 601, 601–02 (2007) (explaining that history has shown that nations have not been deterred from preemption).

47. Greenwood, *supra* note 45, at 14 (2003) (noting that the nuclear age necessitates an interpretation allowing anticipatory self-defense when an attack is imminent). *But see* Lucy Martinez, *September 11th, Iraq and the Doctrine of Anticipatory Self-Defense*, 72 U. MISSOURI–KAN. CITY L. REV. 123, 131–33 (2003) (arguing that the legality of anticipatory self-defense has never been expressly ruled on by the ICJ).

48. DINSTEIN, *supra* note 37, at 187; *see* Greenwood, *supra* note 45, at 14; David B. Rivkin et al., *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century*, 5 CHI. J. INT'L L. 467, 483–84 (2005) (acknowledging that the attack must be "unavoidable" and discussing different standards to determine an attack as such).

states that an example of a lawful use of interceptive self-defense occurred during the Six Day War of 1967,[49] when Israel was the first to open fire, but only because Egyptian, Syrian, and Jordanian troops had lined up outside of Israel's border with heavy artillery in order to attack Israel.[50]

Article 51 of the Charter of the United Nations also allows for a right of collective self-defense. A victim state has a right to seek assistance from other nations when a belligerent state conducts an armed attack against the victim state.[51] Collective self-defense can be invoked only if an armed attack has occurred against a victim state.[52]

As with customary international law, Article 51 self-defense must still follow the conditions of necessity, proportionality, and immediacy (discussed further below). This focus is particularly relevant in hostilities short of war. The first category of measures that fall short of war is what Dinstein calls an "on-the-spot reaction."[53] An on-the-spot reaction occurs when a small military unit from one state fires on a unit of another state without being ordered to do so by the government of that state.[54] The unit fired upon then retaliates and opens fire.[55] According to Dinstein, this response is a lawful use of self-defense under Article 51.[56] However, in *Corfu Channel*,[57] the Court did not recognize the right of the British ships in the case to retaliate quickly upon being fired on as a legitimate use of self-defense.[58] For on-the-spot reaction, the

49. DINSTEIN, *supra* note 37; *see* Rivkin, *supra* note 48, at 484 (suggesting that although the argument can be made that Israel's use of force in 1967 was lawful, the test of when such force may be used is difficult to apply when states are in the throes of such aggression); *see also* Michael N. Schmitt, *Clipped Wings: Effective and Legal No-Fly Zone Rules of Engagement*, 20 LOY. L.A. INT'L & COMP. L. REV. 727, 759–60 (1998) (acknowledging Dinstein's argument that interceptive self-defense is consistent with Article 51 of the Charter of the United Nations and, therefore, lawful).

50. *See* DINSTEIN, *supra* note 37, at 192 (discussing the differences between a lawful act of self-defense, where the attacking state's unlawful attack has become unavoidable although no shots have been fired, and preemptive self-defense, where a state attacks despite there being no imminent threat of an armed attack). *But see* Mary Ellen O'Connell, Essay, Recent Book on International Law Review Essay: *Re-Leashing the Dog of War: International Law and the Use of Force*, 97 AM. J. INT'L L. 446, 453 (2003) (arguing that Israel's use of force in the 1967 conflict was unlawful).

51. U.N. Charter art. 51; *see* DINSTEIN, *supra* note 37, at 268 (declaring that a victim state must ask for help from a third-party state); George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 CORNELL INT'L L.J. 321, 375 (1998) (discussing the right to collective self-defense under Article 51).

52. U.N. Charter art. 51; *see* Walker, *supra* note 51, at 369 (stating that under Article 51 states must first be subjected to an armed attack before collective self-defense may be applied).

53. DINSTEIN, *supra* note 37, at 219–20 (providing a discussion of hostile measures short of war, meaning they are not enough to constitute an armed attack for a state to invoke the right of self-defense).

54. *Id.*; *see* William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counter-Terror Operations*, 30 VA. J. INT'L L. 421, 476 (1990) (recognizing that on-the-spot reprisals happen as an immediate reaction to an armed attack).

55. *See* DINSTEIN, *supra* note 37, at 219–20 (distinguishing between a single unit that reacts to an aggression as opposed to the entire military of a state); *see also* Emmanuel Gross, *The Laws of War Waged Between Democratic States and Terrorist Organizations: Real or Illusive?*, 15 FLA. J. INT'L L. 389, 454 (2003) (indicating that the reaction must be immediate; it cannot be a later military reprisal).

56. DINSTEIN, *supra* note 37, at 219–20 (arguing that this type of defense is also customary international law).

57. 1949 I.C.J. 4, 31 (Apr. 9).

58. *Id.* at 31.

victim unit must respond immediately without consulting any high government officials.[59] Furthermore, once the original attack has been repelled, the right of self-defense closes and the victim unit's state cannot retaliate lawfully.[60]

The next form of action that falls short of war is a defensive armed reprisal,[61] which is not a lawful use of self-defense.[62] The difference between a defensive armed reprisal and an on-the-spot reaction is that the response occurs at a different time and place from the original act of aggression.[63] This includes the unit reporting to a higher authority within the state, and that higher authority preparing a retaliatory strike against the original aggressor.[64] Because no further attack from the original aggressor is imminent and the incident was isolated, there is no longer a right of self-defense available to the victim state.

III. The Requirements of Self-Defense Under Customary International Law

First and foremost, it is important to note that the Charter of the United Nations does not, on its face, contain any specific rule warranting only proportionate and necessary measures of self-defense.[65] However, it has been established that the conditions of necessity and proportionality must be recognized when applying Article 51 of the Charter, as well as customary

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59. *See* DINSTEIN, *supra* note 37, at 221 (remarking that the situation is of such an immediate nature there is no time to consult with any government officials). *See generally* David Kaye, *Adjudicating Self-Defense: Discretion, Perceptions and the Resort to Force in International Law*, 55 COLUM. J. TRANSNAT'L L., 134, 163 (2005) (reasoning that on-the-spot reactions must be judged on their individual basis in regard to whether they proportional).

60. *See* DINSTEIN, *supra* note 37, at 221 (positing that such an action of self-defense does not cover events in other areas or those in the future); Gross, *supra* note 55, at 454 (clarifying that any reprisal that happens beyond the imminent threat cannot be characterized as an on-the-spot reaction).

61. *See* James A. Green, *Docking the* Caroline*: Understanding the Relevance of the Formula in Contemporary Customary International Law concerning Self-Defense*, 14 CARDOZO J. INT'L & COMP. L. 429, 462 (2006); *see also* John W. Head, *The Unites States and International Law After September 11*, 11 KAN. J.L. & PUB. POL'Y 1, 6 (2001) (discussing the legality of defensive armed reprisal under Article 51); Alan D. Surchin, *Terror and the Law: The Unilateral Use of Force and the June 1993 Bombing of Baghdad*, 5 DUKE J. COMP. & INT'L L. 457, 492 (1995) (outlining the criteria necessary for a defensive armed reprisal to be considered reasonable under the confines of Article 51).

62. *See* DINSTEIN, *supra* note 37, at 222; *see also* Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1, 35 (2003) (denouncing defensive armed reprisal as at odds with Article 51); J. Nicholas Kendall, *Israeli Counter-Terrorism: "Targeted Killings" Under International Law*, 80 N.C. L. REV. 1069, 1082 (2002) (noting that international law views a defensive armed reprisal as an illegal act).

63. *See* DINSTEIN, *supra* note 37, at 222 (analyzing the similarities and the differences between the two self-defense actions); *see also* Brown, *supra* note 62, at 36 (noting that if the state were allowed to wait to react, as in a defensive armed reprisal, the amount of force used in retaliation is more likely to be disproportional to the original force); Kendall, *supra* note 62, at 1082 (suggesting that defensive armed reprisals are punitive measures divorced from a pure act of self-defense because they occur at a later time).

64. *See* DINSTEIN, *supra* note 37, at 222; *see also* Green, *supra* note 61, at 462 (discussing the problem of proportionality in such an attack, because heavier involvement by officials may elevate the response to a full-scale attack).

65. *See* DINSTEIN, *supra* note 37, at 208 (citing *Nicaragua*); *see also* Michael Nabati, *Export of the Rule of Law: Dorothy Schramm Winner: International Law at a Crossroads: Self-Defense, Global Terrorism, and Preemption*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 771, 778 (2003) (stressing that proportionality to an armed attack is not an express provision of Article 51).

international law.[66] There is also a third condition of immediacy that must be applied as a con dition precedent to the lawful exercise of self-defense.[67] "Immediacy signifies that there must not be an undue time lag between the armed attack and the exercise of self-defense."[68] Dinstein argues that this condition of immediacy is not to be strictly construed, because oftentimes in the practice of states, it is essential for the governing bodies of a victim state to calculate the situation and respond carefully in order to satisfy the conditions of necessity and proportionality that are required for their response to be lawful.[69]

1. The Condition Precedent of Necessity

The condition of necessity requires three separate conditions. The first is that the state invoking self-defense must establish in a definite manner that an armed attack was launched by a particular state (or nonstate actor within a state, as will be discussed below), and the aggressor state responsible for the attack launched upon the victim state.[70] For example, if a neutral merchant vessel is bombed, it is crucial to make certain that the state that will receive a response is the very state that attacked and not a separate state.[71] Second, the state invoking self-defense must verify that the attack was indeed an armed attack and not a less aggressive method to which self-defense cannot be invoked.[72] Dinstein states that the verification requires the victim state to ensure they were the specific target of the attack, and that it was not merely an accidental and isolated incident resulting from a separate conflict between other states.[73] The third and final requirement of necessity is that the victim state ascertain the existence of the necessity to rely on a forceful response because no other realistic means of redress is available.[74] Finally,

66. *See* Oil Platforms (U.S. v. Iran), 2003 I.C.J. 11, 86 (noting that the conditions of necessity and proportionality are a well-settled doctrine of customary international law); *see also* Amy E. Eckert & Manooher Mofidi, *Doctrine or Doctrinaire—The First Strike Doctrine and Preemptive Self-Defense Under International Law*, 12 TUL. J. INT'L & COMP. L. 117, 128 (2004) (illustrating that there are three concepts at play in the doctrine of self-defense: necessity, proportionality, and imminence); Nabati, *supra* note 65, at 778 (noting that Caroline first set out the requirements of necessity and proportionality under customary international law).

67. *See* Eckert & Mofidi, *supra* note 66, at 128.

68. DINSTEIN, *supra* note 37, at 210.

69. DINSTEIN, *supra* note 37, at 210; *see also* Robert J. Beck & Anthony Clark Arend, *"Don't Tread on Us": International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L.J. 153, 205 (1994) (describing the flexibility of the immediacy requirement).

70. DINSTEIN, *supra* note 37, at 209 (listing hypothetical situations where the condition of necessity is met); *see also* Brown, *supra* note 62, at 3 (emphasizing the need to identify the party responsible for the attack before invoking self-defense).

71. DINSTEIN, *supra* note 37, at 209.

72. *Id.*; *see* Richard Falk, *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 106, 109 (1987).

73. DINSTEIN, *supra* note 37, at 209; *see* Georges Abi-Saab, *Position Paper and Memoranda: The 9.11 Atrocity*, 1 CHINESE J. INT'L L. 304, 308 (2002) (referring to the specific armed attack necessary for a victim state to invoke self-defense).

74. DINSTEIN, *supra* note 37, at 209; *see* Lt. Comdr. Michael Franklin Lohr, *Legal Analysis of U.S. Military Responses to State-Sponsored International Terrorism*, 34 NAVAL L. REV. 1, 16 (1985) (noting that self-defense will be effective only if the use of force is preceded by actual necessity).

force should not be considered necessary until peaceful measures are found wanting or when they clearly would be futile.[75]

In the context of the Hezbollah-Israeli conflict, the question of necessity is blurred because the attack was not conducted by Lebanon but by a nonstate actor within Lebanon.[76] However, merely judging by the attack's severity and nature, setting aside its architect, it seems the condition of necessity should be met. If the border incursion that caused the death of several Israeli soldiers and the kidnapping of others did not alone satisfy the requirement of an armed attack, it seems quite clear that the firing of Katyusha rockets at Israeli forces across the border constituted an armed attack.[77]

It can be argued that, as to the third requirement, Israel had no option other than the use of force. Israel will not negotiate with terrorists and the Lebanese government could not control the actions of Hezbollah on Lebanese territory; therefore, negotiations between Israel and Lebanon would undoubtedly be futile. Also, it appears that during the conflict not much was done publicly in terms of diplomatic negotiations with Hezbollah or Lebanese leaders to resolve the conflict peacefully.[78] The almost immediate response was to send in a rescue mission.[79] However, the failure of this mission may have indicated to Israel that all methods short of the use of force had been exhausted at that point.[80] Israel also asked the Lebanese government to intervene,[81] although it seems relatively clear that the Lebanese government lacked the

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75. DINSTEIN, *supra* note 37, at 210 (*citing* Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1626 (1984)). *But see* Gina Heathcote, *Article 51 Self-Defense as a Narrative: Spectators and Heroes in International Law*, 12 TEX. WESLEYAN L. REV. 131, 137 (2005) (suggesting that a state need not explore less violent means of halting the use of force).

76. *See* Eckert & Mofidi, *supra* note 66, at 144 (maintaining the difficulty in assessing necessity when the aggressor is a nonstate actor). *See generally* Sean D. Murphy, *Agora, ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ*, 99 AM. J. INT'L L. 62, 66 (2005) (discussing to the use of self-defense against a nonstate actor).

77. *See* T.D. Gill, *The Temporal Dimension of Self-Defense: Anticipation, Pre-Emption, Prevention and Immediacy*, 11 J. CONFLICT & SECURITY L. 361, 365 (2006) (defining an armed attack); *see also* Erin Natalino Ronzitti, *The Expanding Law of Self-Defense*, 11 J. CONFLICT & SECURITY L. 343, 350 (2006) (listing examples of different armed attacks).

78. *See* Joseph Cirincione, Annotation*, Repairing the Regime: Preventing the Spread of Weapons of Mass Destruction*, 33 N.Y.U. J. Int'l L. & Pol. 1235, 1243 (2001); *see also Mideast Conflict Timeline*, CNN television broadcast), http://www.cnn.com/interactive/world/0607/timeline.lebanon.israel/frameset.exclude.html (last visited Oct. 19, 2007) (describing the immediate violent response by the Israeli armed forces).

79. *See* Tom Cooney, *Terrorists and Their Planners Are Lawful Targets,* IRISH TIMES, July 18, 2006, http://www.spme.net/cgi-bin/articles.cgi?ID=835; *see also* Victor Kattan, *Israel, Hezbollah and the Conflict in Lebanon: An Act of Aggression or Self-Defense?*, 14 No. 1 HUM. RTS. BRIEF 26, 26 (2006) (describing the Israeli rescue mission); Ruys, *supra* note 30, at 269 (expressing that the IDF summoned a rescue mission to rescue the captured soldiers and engaged in fierce fighting with Hezbollah gunmen).

80. *See* Emma Sabry, *The Real Aim of Lebanon War Finally Revealed*, Apr. 27, 2007, http://www.envirosagainstwar.org/know/read.php?itemid=5432 (last visited Oct. 19, 2007) (referring to Middle East analysts who believe Israel used Hezbollah's capture of two soldiers as an excuse for launching the deadly offensive in Lebanon). *See generally* Kattan, *supra* note 79, at 26 (describing the forceful intentions of an Israeli army chief of staff).

81. *See* W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 52 (1999); *see also* Achilles Skordas, *Hegemonic Intervention as Legitimate Use of Force*, 16 MINN. J. INT'L L. 407, 447 (2007) (noting that the Lebanese government was called upon to "secure its borders"). *See generally* David Wippman, *The Nine Lives of Article 2(4)*, 16 MINN. J. INT'L L. 387, 396 (2007) (describing the mutual goal of the Israeli and Lebanese governments of thwarting Hezbollah).

military strength to coerce Hezbollah into returning the kidnapped Israeli soldiers.[82] Although questionable, it is likely that Israel satisfied the condition of necessity when exercising a right of self-defense against Hezbollah within Lebanon's sovereign territory.[83]

2. The Requirement of Proportionality

The second condition precedent to the right of self-defense is proportionality. Because of the severity of aggressive state action, whether an armed attack or an act short of war, proportionality sets a standard of reasonableness to which states must adhere.[84] The doctrine of proportionality requires a response of force to be proportionate to the aggression that precipitated such force.[85] Although civilian casualties are accepted as inevitable during an armed conflict,[86] those caused by a military strike should not be excessive in relation to the anticipated military advantage gained by that strike.[87] The American Society of International Law in one edition of ASL INSIGHTS states, "proportionality" in the context of self-defense could mean either that the intensity of the self-defending force must be about the same as the intensity defended against, or it could mean that the force, even if more intensive, is permissible so long as it is not designed to do anything more.[88]

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82. *See* Ruys, *supra* note 30, at 269 (describing the Lebanese armies as one of the weakest in the Middle East); Shai Feldman, *The Hezbollah-Israel War: A Preliminary Assessment*, http://www.brandeis.edu/centers/crown/publications/MEB/MEB10.pdf (last visited Oct. 19, 2007) (proclaiming that the Lebanese government was "not strong enough to dismantle Hezbollah's military infrastructure").

83. *See* Kimberly N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors*, 56 INT'L & COMP. L.Q. 141, 154 (2007) (positing that force is sometimes necessary against nonstate actors). *But see* Kattan, *supra* note 79, at 28 (stating that Israel's failure to demonstrate a necessity for force makes its justification of self-defense invalid).

84. DINSTEIN, *supra* note 37, at 210; *see* Christopher D. Belelieu, *The Headscarf as a Symbolic Enemy of the European Court of Human Right's Democratic Jurisprudence: Viewing Islam Through a European Legal Prism in Light of the Sahin Judgment*, 12 COLUM. J. EUR. L. 573, 593 (2006). *But see* Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law: In Comparative Perspective*, 42 TEX. INT'L L.J. 371, 385 (2007) (suggesting that the proportionality test goes beyond reasonableness).

85. *See* Ryan Schildkraut, Note, *Where There Are Good Arms, There Must Be Good Laws: An Empirical Assessment of Customary International Law Regarding Preemptive Force*, 16 MINN. J. INT'L L. 193, 207 (2007); Randy W. Stone, Comment, *Protecting Civilians During Operation Allied Force: The Enduring Importance of the Proportionate Response and NATO's Use of Armed Force in Kosovo*, 50 CATH. U. L. REV. 501, 503 (2001). *But see* Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 532 (2003) (arguing that proportionality requires only that a victim state use the force necessary to "defeat an ongoing attack or deter or preempt a future attack").

86. *See* Christopher C. Joyner, *"The Responsibility to Protect": Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 VA. J. INT'L L. 693, 704 (2007) (acknowledging that "many innocent civilians" are casualties of armed conflicts); Dakota S. Rudesill, *Precision War and Responsibility: Transformational Military Technology and the Duty of Care under the Laws of War*, 32 YALE J. INT'L L. 517, 530 (2007) (affirming that civilian casualties are unavoidable).

87. *See* Andenas & Zleptnig, *supra* note 84, at 403 (explaining that the military advantage gained and civilian damage done must be assessed to apply the principle of proportionality); Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 391 (1993) (affirming there must be a balance "between the achievement of a military goal and the cost in terms of lives").

88. Frederic Kirgis, *Some Proportionality Issues Raised by Israel's Use of Armed Force in Lebanon*, 10 AM. SOC'Y INT'L L. ¶ 5, Aug. 27, 2006, http://www.asil.org/insights/2006/08/insights060817.html (last visited Oct. 19, 2007).

A state exercising its right of self-defense is required to refrain from conducting not only direct and deliberate attacks on civilians and civilian objects, but also attacks that are indiscriminate.[89] An indiscriminate attack is one where, although the attacker is not actually trying to harm the civilian population, the injury of civilians is of no concern.[90] However, under the Law of Armed Conflict there is no difference between an indiscriminate attack and one aimed at the civilian population.[91] For an attack to be indiscriminate requires consideration of the attacker's state of mind.[92] In the case of the Israeli-Hezbollah conflict, there are two key prohibitions at issue. First, an attacker is prohibited from firing blindly, without a clear idea of a target's nature, into enemy territory.[93] Second, an attacker may not fire imprecise missiles against military objectives near or intermingled with civilians.[94] Dinstein points to the firing of Scud missiles in the Gulf War of 1991 as an example of firing imprecise missiles at military objectives intermingled with civilian objects.[95] The same can be said of the Katyusha rockets fired by Hezbollah into Israel.

When gauging proportionality, identification of a military objective as such does not preclude the possibility that civilians or civilian objects can be hit.[96] Civilians may be located inside a military objective, they may near a military objective, or a technical malfunction can cause a weapon to deviate towards civilians or civilian objects.[97] "The principle of proportionality further restricts attacks against impeccable military objectives owing to anticipated disproportionate injury and damage to civilians or civilian objects."[98] Additional Protocol I of the Geneva Conventions of 1949 prohibits: "An attack which may be expected to cause incidental

89. *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 117 (3d ed. 2005); *see also* William H. Taft IV, Symposium, *Reflections on the ICJ's Oil Platforms Decision*, 29 YALE J. INT'L L. 295, 303 (2004) (suggesting that indiscriminate attacks are not immune even in the use of self-defense).

90. *See* DINSTEIN, *supra* note 89, at 117 (*quoting* H.M. Hanke, *The 1923 Hague Rules of Air Warfare*, 33 irrc 12, 26 (1993)); *see also* Comdr. J.W. Crawford III, *The Law of Noncombatant Immunity and the Targeting of National Electrical Power Systems*, 21 Fall FLETCHER F. WORLD AFF. 101, 107 (1997) (establishing a "precise definition of an indiscriminate attack").

91. *See* DINSTEIN, *supra* note 89, at 117 (affirming that an indiscriminate attack is the same as a premeditated attack against civilians).

92. *Id*.; *see also* Jeff Goodwin, *A Theory of Categorical Terrorism*, 84 SOC. FORCES 2027, 2038 (2006) (emphasizing the assessment of how an attacker weighs the costs and benefits of its acts).

93. *See* DINSTEIN, *supra* note 89, at 118; accord STEFAN OETER, THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 175 (Dieter Fleck ed. 1995) (asserting that blind fire into adversary controlled territory is outlawed).

94. *See* DINSTEIN, *supra* note 89, at 118; *see also* Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295, 354 (2007) (demonstrating that bombardment in a populous area of multiple military objectives in a city, town, or village is forbidden).

95. DINSTEIN, *supra* note 89, at 118.

96. *Id*. at 119; *cf*. Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 16 (2004) (asserting that civilian presence may not always be a significant influence on a potential decision to attack a military objective); *Israel/Lebanon Deliberate Destruction or "Collateral Damage"? Israeli Attacks on Civilian Infrastructure*, AMNESTY INT'L, Aug. 23, 2006, at 4, http://web.amnesty.org/library/pdf/MDE180072006ENGLISH/$File/MDE1800706.pdf (recognizing that civilian objects may, in some circumstances, be considered military objectives and, thus, subject to attack).

97. *See* DINSTEIN, *supra* note 89, at 119.

98. *Id*. at 120.

loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[99] However, not every attack causing civilian death or the destruction of civilian objects is on its face disproportionate. Even extensive civilian casualties may be acceptable if they are not excessive in light of the concrete and direct military advantage anticipated.[100] Dinstein gives the example of the bombing of a naval shipyard where there are thousands of civilian employees as being not necessarily disproportionate and unlawful.[101]

Dinstein argues that by analyzing Protocol I, one can deduce it is not the actual outcome of an attack that must be measured to ascertain proportionality; rather, it is the initial expectation and anticipation of the attacker that matters.[102] There is no concrete answer to how to analyze the state of mind of the attacker; however, there is a consensus that the attacker must act in good faith and must not ignore the facts of the situation.[103] In fact, the attacker is required to evaluate all the available information regarding a prospective attack.[104] Dinstein states that the destruction of an entire village to eliminate a single sniper is disproportionate, but if it were instead an artillery battery within the village, the destruction may be warranted.[105]

To protect civilians, the attacking party must take certain precautions. It must: 1) do everything feasible to verify their targets are military objectives; 2) choose means and methods of attack with a view to avoiding or, at least, minimizing incidental injury to civilians and civilian objects; and 3) refrain from launching a disproportionate attack.[106] Protocol I requires that an attack be canceled or suspended if it becomes apparent that the objective is not military or that the principle of proportionality cannot be observed.[107]

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99. *Id*. (*citing* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, Law of Armed Conflict 621, 651).

100. *Id*. at 121; *see also* Watkin, *supra* note 96, at 16 (positing that if the military objective is sufficiently important, civilians may be injured or even killed).

101. DINSTEIN, *supra* note 89, at 121.

102. DINSTEIN, *supra* note 89, at 121; *see* Daryl A. Mundis & Fergal Gaynor, *Current Developments at the Ad Hoc International Criminal Tribunals*, 2 J. INT'L CRIM. JUST. 642, 644 (2004).

103. *See* DINSTEIN, *supra* note 89, at 122 (quoting L.C. Green, *Aerial Considerations in the Law of Armed Conflict*, 5 aasl 89, 104 (1980)); *see also* OETER, *supra* note 93, at 181 (affirming that an attacker should take "constant care" to spare civilian lives).

104. *See* DINSTEIN, *supra* note 89, at 122 (quoting F. Kalshoven, *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity*, 86 pasil 39, 44 (1992)); *accord* OETER, *supra* note 93, at 174 (establishing that an attacker must use "all available means of intelligence").

105. DINSTEIN, *supra* note 89, at 122–23.

106. *Id*. at 125 (summarizing Article 57(2)(a) of Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, Law of Armed Conflict 621, 654–55).

107. *Id*. at 126 (citing Article 57(2)(b) of Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, Law of Armed Conflict 621, 655); *see also Israel/Lebanon Deliberate Destruction or "Collateral Damage"? supra* note 96, at 4 (articulates that, when in doubt of the objective's nature, an attacker should presume a potentially affected target is a civilian).

Proportionality has been widely accepted, especially in ICJ decisions, as an essential element of self-defense under customary international law.[108] After Operation Just Cause, the 1989 full-scale invasion of Panama, many criticized the United States' response as being disproportionate to the threats of Panamanian dictator Manuel Noriega.[109] The United States' response to Iraq's armed invasion of Kuwait during the 1991 Persian Gulf War arguably offended proportionality principles.[110] In 1995, NATO ordered air strikes in certain parts of Bosnia-Herzegovina to end a humanitarian crisis in that country.[111] In 1998, the United States claimed self-defense after conducting missile strikes against targets in Sudan and Afghanistan to prevent future attacks by Al-Qaeda.[112] The United States chose these targets in an attempt to limit collateral damage to civilians and comply with the rules of necessity and proportionality.[113]

These examples seem to raise a cloud of uncertainty as to the reality of proportionality. Other non-United States examples further this point. In 1999, Russia invaded neighboring Chechnya because Russia believed Chechnya housed terrorists who attacked Russian cities.[114] In launching these cross-border invasions, the Russian government was accused of failing to

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108. *See* Mireille Delmas-Marty, *The Paradigm of the War on Crime Legitimating Inhuman Treatment?*, 5 J. INT'L CRIM. JUST. 584, 590 (2007) (attributing the analysis of proportionality in international customary law directly to an examination of the ICJ); *see also* Stone, *supra* note 85, at 512 (discussing proportionality as viewed by the majority opinion in the Case Concerning Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 14, 146).

109. *See* Stone, *supra* note 85, at 513; *see also* Ved P. Nanda, *Agora: U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists?*, 84 AM. J. INT'L L. 494, 497 (1990) (illuminating the criticism the United States faced for failing to engage in a proportional response in Panama). *But cf.* Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516, 524 (1990) (promoting the United States' action in Panama as a removal of a tyrannical leader).

110. Stone, *supra* note 85, at 513–14. However, Dinstein argues that the response to Iraq's attacks on Kuwait was not necessarily based on Article 51 or customary international law of self-defense. Rather, the preliminary blockades ordered by the Security Council were exercises of a hybrid between Article 41 economic sanctions and Article 42 military sanctions. If it does fall within this hybrid, it is a measure taken under the Security Council's power to authorize collective security measures and not from Article 51 self-defense powers. DINSTEIN, *supra* note 37, at 296. *But see* Corn, *supra* note 94, at 355 (positing that there was a balance established in a target-by-target basis in the first Persian Gulf War).

111. Stone, *supra* note 85, at 514; *see* Ryan C. Hendrickson, *War Powers, Bosnia, and the 104th Congress*, 113 POL. SCI. Q. 241, 247 (1998) (describing the bombing raids as under the authority of NATO); *see also* Michael P. Roch, *Military Intervention in Bosnia-Hercegovina: Will World Politics Prevail Over the Rule of International Law?*, 24 DENV. J. INT'L L. & POL'Y 461, 472 (1996) (revealing that the purpose of the air strikes in Bosnia was to enforce the resolution ordering relief convoys to pass through to Muslim enclaves).

112. Stone, *supra* note 85, at 514; *accord* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 95 (2002) (revealing that the United States attacked a Sudanese pharmaceutical plant and an alleged training camp in Afghanistan); *see also* John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 573 (2003) (describing the military force employed by the United States in Afghanistan and Sudan as "anticipatory self-defense").

113. Stone, *supra* note 85, at 514; *see also* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 161, 163 (1999) (illustrating that the timing and method of attack were vigilantly designed in light of necessity and proportionality). *But see* Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 539 (1999) (expressing that the U.S. justifications for Sudan were "troubling").

114. Stone, *supra* note 85, at 514; *see also* Richard C. Paddock, *Russia Takes Page From NATO Playbook*, L.A. TIMES, Sept 29, 1999, at A1 (reporting that at the time of publication, Russian planes were bombing Chechnya for the sixth day in a row).

take necessary precautions to promote the safety of Chechnyan civilians.[115] Just as in an earlier situation between Israel and Hezbollah, when Israeli military forces conducted retaliatory air strikes against Hezbollah guerrilla targets in southern Lebanon,[116] in the 2006 conflict, the Israeli government permitted military strikes against targets located in predominately civilian areas.[117] This previous conflict begins to shed some light not only on Israel's history of obedience (or disobedience) to proportionality, but also the way Hezbollah conducts its military operations from heavily populated areas.[118] The reasonableness standard may alleviate Israel's responsibility for the extent of civilian casualties if Hezbollah did not abide by its duty under *jus in bello* to separate its military locations from civilian-populated centers.[119]

IV. Proportionality as Interpreted by the International Court of Justice

Proportionality has often been at issue before the ICJ, which is the most respected court in deciding matters of international law. In the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the Court ruled on the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law.[120] The Court stated,

> [t]he proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defense in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defense, must, in order to be lawful, also meet the requirements of the law applicable in armed conflicts, which comprise in particular the principles and rules of humanitarian law.[121]

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115. *See* Duncan B. Hollis, *In Chechnya—Addressing Internal Matters with Legal and Political International Norms*, 36 B.C. L. REV. 793, 803 (1995) (noting that Russian bombers killed thousands by attacking civilian targets); James P. Terry, Article, Essay & Note, *Moscow's Corruption of the Law of Armed Conflict: Important Lessons for the 21st Century*, 53 NAVAL L. REV. 73, 199 (2006) (stating that hundreds and thousands of Chechnyan refugees fled the city of Grozny).

116. Stone, *supra* note 85, at 515; *see also* Adir Waldman, Comment, *Clashing Behavior, Converging Interests: A Legal Convention Regulating a Military Conflict*, 27 YALE J. INT'L L. 249, 250 (2002) (clarifying that Israel's collateral damage to Lebanese civilians resulted from Hezbollah guerillas launching operations from civilian areas).

117. *See* Barak, 2 *Ministers Empowered to Strike Lebanese Civilian Targets*, Feb. 16, 2000, http://www.cnn.com/2000/WORLD/meast/02/16/lebanon.israel.02 (reporting on the Israeli government's February 2000 decision to attack Hezbollah guerillas in civilian areas).

118. *See* Human Rights Watch, *supra* note 10 (providing Israeli claims that civilian casualties resulted from Hezbollah military operations launched from civilian areas); AMNESTY INT'L, *supra* note 17 (describing Hezbollah's use of human shields); *see also* Greg Myre, *Offering Video, Israel Answers Critics on War*, N.Y. TIMES, Dec. 5, 2006, at A1 (describing evidence of Hezbollah rocket placements).

119. *See* Part VI.

120. Legality of the Threat or Use of Nuclear Weapons (United Nations) 1996 I.C.J. 226, 265; *see also* Clark B. Lombardi, Symposium, *Islam and International Law: Islamic Law in the Jurisprudence of the International Court of Justice: An Analysis*, 8 CHI. J. INT'L L. 85, 109 (2007) (discussing the Court's analysis of the permissibility of the use of nuclear weapons).

121. Nuclear Weapons, 1996 I.C.J. at 245.

The Court held that although the use of nuclear weapons would generally be contrary to the rules of humanitarian law,[122] "the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake."[123] Because nuclear weapons represent an extreme use of force, and the Court did not limit itself to a scenario in which the attacking party used nuclear weapons, the Court left open the possibility that when dealing with the very survival of a state, proportionality would not be necessarily confined to weighing the destructive intensity of defensive force against the intensity of the force defended against.[124]

In the earlier decision, *Military and Paramilitary Activities in and Against Nicaragua*,[125] the I.C.J. also wrestled with proportionality in response to Nicaragua's Sandinista government's aggressive advances against several Central American countries, primarily El Salvador.[126] In this case, the United States aided and funded nonstate paramilitary groups within Nicaragua and other Central American countries to stop the spread of Communism in the region.[127] The Court addressed the question of whether the assistance to the contras might meet the criterion of proportionality.[128] The Court found it could "not regard the United States activities . . . those relating to the mining of the Nicaraguan ports and the attacks on ports, oil installations, etc., as satisfying that criterion [of proportionality].[129] The Court continued, "Whatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid."[130] The Court concluded its analysis of proportionality by stating, "The Court must also observe that the reaction of the United States in the context of what it regarded as self-defense was continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated."[131]

A more recent decision involving proportionality is *Oil Platforms*.[132] This case grew out of damage to a U.S. Navy frigate by a mine in the Persian Gulf during the Iran-Iraq war that raged during the 1980s.[133] In response to the mining, the United States launched Operation

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122. *Id.*; *see* Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 A.J.I.L. 417, 418 (1997); Hilary K. Josephs, *The Remedy of Apology in Comparative and International Law: Self-Healing and Reconciliation*, 18 EMORY INT'L L. REV. 53, 72 (2004).

123. Nuclear Weapons, 1996 I.C.J. at 245.

124. *See* Kirgis, *supra* note 88, ¶ 8 (stating that under an extraordinary circumstance in which a state's existence is at stake, the Court will not rule out the use of nuclear weapons).

125. 1986 I.C.J. 14 (June 27).

126. *Id.*

127. *Id.* at 21; *see also* Jeffrey Michael Smith, *Three Models of Judicial Institutions in International Organizations: The European Union, The United Nations, and The World Trade Organization*, 10 TULSA J. COMP. & INT'L L. 115, 140 (2002) (outlining the ways the United States opposed the Nicaraguan government to stop the spread of communism).

128. Military and Paramilitary Activities, 1986 I.C.J. at 122.

129. *Id.* at 122.

130. *Id.*

131. *Id.*

132. Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 162 (Nov. 6).

133. *Id.* at 175.

Praying Mantis, shelling two Iranian oil platforms, which apparently were being used as radar stations, as well as destroying several Iranian naval vessels and aircraft.[134] The Court stated that the United States bore the burden of proving lawful self-defense:

> Therefore, in order to establish that it [the United States] was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defense, the United States had to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as "armed attacks" within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force.[135]

The Court, by determining the lawfulness of the United States' exercise of self-defense, weighed in on the customary law requirements of proportionality and necessity.[136] The Court held that the party claiming self-defense always has the burden of showing that its exercise was indeed lawful.[137]

The I.C.J., while analyzing the proportionality question, stated that it "cannot close its eyes to the scale of the whole operation," which involved, *inter alia*, the destruction of two Iranian frigates and a number of other naval vessels and aircraft.[138] The Court continued, "As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither 'Operation Praying Mantis' as a whole, nor even that part of it that destroyed the . . . platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defense."[139]

In *Armed Activities on the Territory of the Congo*,[140] the Court found that Uganda's support of rebel forces within the border of the Democratic Republic of the Congo was not a lawful exercise of its right of self-defense.[141] Although the Court did not rule on the issue of proportionality, it stated that "the taking of airports and towns many hundreds of kilometres from

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134. *Id*. at 162; *see also* James A. Green, *The Oil Platforms Case: An Error in Judgment*, 9 J. CONFLICT & SECURITY L. 357, 363 (2004) (citing U.S. contention that measures taken were legitimate actions of self-defense); E. Thomas Sullivan, *The Doctrine of Proportionality in a Time of War*, 16 MINN. J. INT'L L. 457, 465 (2007) (commenting on the U.S. response to attacks on a Kuwaiti vessel and the *U.S.S. Roberts*).

135. Oil Platforms, 2003 I.C.J. at 186.

136. *See* Pieter H. F. Bekker, *Freedom of Commerce and Military Exclusion under Bilateral Treaty of Friendship—Use of Force—Self-Defense—"Armed Attack"—Necessity and Proportionality*, 98 AM. J. INT'L L. 550, 552 (2004) (discussing the Court's finding of applicability of the criteria of necessity and proportionality).

137. Oil Platforms, 2003 I.C.J. at 189 (discussing the burden placed on the United States and all nations seeking to exercise the right of self-defense).

138. *Id*. at 198 (noting the importance of considering the scale of the whole operation when assessing proportionality).

139. *Id*.

140. 2005 I.C.J. LEXIS 2, at *5 (Dec. 2005)

141. *Id*. (holding that Uganda's military intervention was extremely unlawful and was in violation of the prohibition against the use of force in certain situations); *see also* Laurence Juma, Article, *The War in Congo: Transnational Conflict Networks and the Failure of Internationalism*, 10 GONZ. J. INT'L L. 97, 161 (2007) (explaining that countries such as Uganda deliberately armed local groups to help them fight the Democratic Republic of the Congo).

Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defense. . . ."[142]

In these pronouncements, the I.C.J. seemed to focus primarily on weighing the intensity of the defensive force against the intensity of the force defended.[143] However, the Court left open the possibility that where the stakes are higher, such as when the preservation of a state is at risk, the Court would consider the overall defensive purpose in its proportionality assessment.[144]

In the Israeli-Hezbollah conflict, was Israel's response appropriate? At first glance, it would appear that Israel did not base its response on the I.C.J.'s rationale in prior proportionality cases, because Israel fired into heavily populated areas with the result of high civilian casualties.[145] However, if Hezbollah had housed weapons and command organizational structure in civilian objects, did Israel have any effective means of destroying those weapons and that command structure without harming civilians?

The exception to proportionality carved out in *Nuclear Weapons*, that a state can use disproportionate force, applies only where the existence of the state is at stake, so it seems that this exception did not apply to Israel in this conflict.[146] That is, there was no threat that Israel would cease to exist unless it used indiscriminate weapons against Hezbollah.[147]

Israel's response to Hezbollah's aggression is comparable to *Oil Platforms*. Much like the mine that damaged a U.S. naval vessel, Hezbollah's original attacks caused minimal damage to

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142. Armed Activities, 2005 I.C.J. LEXIS at *5.

143. *See* Lutz Eidam, *Making Comparative Criminal Law Possible*, 54 BUFF. L. REV. 235, 243 (2006) (referring to the system of determining proportionality of attacks as "balancing evils"); *see also* Kirgis, *supra* note 88, ¶ 10 (defining proportionality as applied in above-mentioned cases).

144. *See* Douglas Guilfoyle, *The Proliferation Security Initiative: Interdicting Vessels in International Waters to Prevent the Spread of Weapons of Mass Destruction?*, 29 MELB. U. L. REV. 733, 758 (2005) (indicating that the Court may look at the risks of the original attack and the potential consequences); *see also* Saad Gul, *Burning the Barn to Roast the Pig? Proportionality Concerns in the War on Terror and the Damadola Incident*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 49, 66 (2006) (reasoning that proportionality should be measured by balancing risks and probable harms).

145. *See* Gregory E. Maggs, *How the United States Might Justify a Preemptive Strike on a Rogue Nation's Nuclear Weapon Development Facilities Under the U.N. Charter*, 57 SYRACUSE L. REV. 465, 493 (2007) (reasoning that Israel's use of force in retaliation against Hezbollah was quite disproportionate); Ruys, *supra* note 30, at 292 (arguing that Israel's retaliatory attacks against Hezbollah were unnecessary to their exercise of self-defense); Skordas, *supra* note 81, at 443 (showing that Israel grossly violated the principle of proportionality when it attacked Lebanon).

146. Nuclear Weapons, 1996 I.C.J. at 245 (holding that an act in self-defense must be proportional to the armed attack, and that the response must be necessary).

147. *See* Bonnie Docherty, *The Time Is Now: A Historical Argument for a Cluster Munitions Convention*, 20 HARV. HUM. RTS. J. 53, 69 (2007) (claiming that Israel was not justified in using cluster munitions because Hezbollah had not posed a great enough threat).

Israeli military targets or Israeli people in general.[148] Even though Hezbollah fired Katyusha rockets into Israel, the Israeli ground and air response extending deep into Lebanese territory seemed excessive compared to the original act of aggression.[149] In fact, the Israeli lack of proportionality seems comparable to the United States response against Iranian oil platforms, which was deemed unlawful and disproportionate by the I.C.J.[150]

Nicaragua seems to illustrate that the Court views proportionality very narrowly. Since Nicaragua's aggression consisted of what the Court deemed to be mere border incidents,[151] the United States' response, which included attacks on ports, was already enough to make the use of self-defense unlawful.[152] Viewed solely in light of this case, it appears that a full-scale ground attack, coupled with the firing of missiles and the use of aircraft, is disproportionate to the kidnapping of two soldiers and the firing of a small number of Katyusha rockets into Israeli territory. This same rationale applies when comparing the conflict with the Court in *Democratic Republic of the Congo*, declaring that had it decided the issue of proportionality—the full-scale attacks on towns and ports by Ugandan forces—would have been found to be disproportionate to the small-scale border incursions that were conducted by the Democratic Republic of the Congo.[153]

When viewed in light of these cases, Israel's use of force within the sovereign territory of Lebanon was disproportionate to Hezbollah's initial use of force within Israeli territory. Based on previous decisions, it would appear likely that the I.C.J. would rule that Israel's response was indeed unlawful.

V. The Right to Exercise Self-Defense Against a State Harboring Terrorists

In the case of Hezbollah and Israel, Israel invoked its right of self-defense against Lebanon in response to the armed attack by Hezbollah, a nonstate actor conducting operations from within the sovereign territory of Lebanon.[154] First, although historically an armed attack must be conducted by a state, there is no language in Article 51 of the Charter of the United Nations

148. *See* Michael R. Fowler, *The Relevance of Principled Negotiation to Hostage Crises*, 12 HARV. NEGOT. L. REV. 251, 258 (2007) (outlining the small-scale attacks by Hezbollah on Israel); *see also* James Kraska, *Torts and Terror: Rethinking Deterrence Models and Catastrophic Terrorist Attack*, 22 AM. U. INT'L L. REV. 361, 374–75 (2007) (referring to Israel's counterattack against Hezbollah as a surprising one, which came at an inopportune time and was of great magnitude).

149. *See* Green, *supra* note 61, at 459; *see also* Maggs, *supra* note 145, at 493 (stressing that Israel's response caused a greatly uneven amount of damage).

150. *See supra* text accompanying notes 133–40

151. *See* Military and Paramilitary Activities, 1986 I.C.J. at 16.

152. *See* Treaty of Friendship, Commerce, and Navigation, U.S.-Nicar., June 21, 1867, 15 Stat 549 (discussing an agreement between the United States and Nicaragua regarding seaports); *see also* Robert J. Delahunty, *Executive Power v. International Law*, 30 HARV. J. L. & PUB. POL'Y 73, 110 (2006) (explaining the various violations that the United States committed by attacking Nicaragua).

153. *See* Armed Activities, 2005 I.C.J. LEXIS at *12–13; *see also* Gathii, *supra* note 44, at 148 (stating that Uganda did not act proportionally when it attacked the territory of the Democratic Republic of the Congo).

154. *See* supra Part I.

to that effect.[155] Because the perpetrator is not required to be a state, nonstate actors can carry out the attack.[156] Greenwood recognizes there is no question that terrorist attacks can constitute an armed attack and justify a military response.[157] The right of forcible self-defense in another state's sovereign territory in response to an attack by a nonstate actor has its roots in the *Caroline* Incident.[158] Here, a group of nonstate actors began to attack British strongholds in Canada across Niagara Falls.[159] The British retaliated by attacking and burning an American vessel named the *Caroline*.[160] Although the case discussed other issues, it is noteworthy that this may be an early instance where a state invaded the sovereign territory of a host state in response to an armed attack conducted by nonstate actors residing within that host state.[161] Greenwood states, "The *Caroline* dispute itself shows that an armed attack need not emanate from a state."[162] He adds that the nonstate group in *Caroline* was not supported by the United States and that the United States "certainly" could not be regarded as responsible for the acts of this group of nonstate actors.[163] Furthermore, at no point in the discussion about the *Caroline* Incident was it suggested that the fact that a nonstate actor conducted the armed attack would achieve a different result than if the armed attack had emanated from the state itself.[164]

Both Dinstein and Greenwood also argue that the international reaction to the events of September 11, 2001 ("9/11"), where Al-Qaeda operatives, conducting operations from Afghanistan, hijacked airplanes and crashed them into the World Trade Center in New York City, exemplifies the international community's acceptance of an armed attack being conducted by a nonstate actor.[165] The international community accepted the United States' lawful use of force in self-defense in and against Afghanistan, where the Taliban was harboring Al-

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155. DINSTEIN, *supra* note 37, at 204; *see also* Zeray W. Yihdego, *Ethiopia's Military Action Against the Union of Islamic Courts and Others in Somalia: Some Legal Implications*, 56 INT'L & COMP. L. Q. 666, 669 (2007) (suggesting that Article 51 allows self-defense when facing an attack from a state-sponsored armed group).

156. DINSTEIN, *supra* note 37, at 204); *see also* Niaz A. Shah, *Self-Defence, Anticipatory Self-Defence and Pre-Emption: International Law's Response to Terrorism*, 12 J. CONFLICT & SECURITY L. 95, 104–05 (2007) (discussing how the Charter rules cover armed attacks by nonstate actors).

157. Greenwood, *supra* note 45, at 16; *see* Christopher B. Hynes et al., *National Security*, 41 INT'L LAW 683, 686 (2007).

158. *See* Yoram Dinstein, *Self-Defense in an Age of Terrorism*, 97 AM. SOC'Y INT'L L. PROC. 141, 147 (2003) (citing the *Caroline* Incident as a stepping-stone to responses to terrorist attacks); *see also* Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 535 (2002) (analyzing the *Caroline* Incident and its affect on the interpretation of Article 51).

159. *See* R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 84 (1938) (discussing the events leading up to and during the *Caroline* Incident of 1837).

160. *See* Jennings, *supra* note 159, at 84 (discussing the British response and destruction of the *Caroline*).

161. See United Nations War Crimes Commission, Law Reports of Trials of War Criminals 16 (1997).

162. Greenwood, *supra* note 45, at 17.

163. *Id*. at 17. *But see* Maria Benvenuta Occelli, *"Sinking" the* Caroline*: Why the* Caroline *Doctrine's Restrictions on Self-Defense Should Not Be Regarded as Customary International Law*, 4 SAN DIEGO INT'L L. J. 467, 471 (noting that prior to the *Caroline* Incident, the insurgents were successful in gaining American support).

164. *See* John Altenburg & Greg Travalio, *Terrorism, State Responsibility, and the Use of Military Force*, 4 CHI. J. INT'L L. 97, 115 (2003) (suggesting that in Webster's correspondence an element of self-defense is necessity). *See generally* Edward Collins Jr. & Martin A. Rogoff, *The* Caroline *Incident and the Development of International Law*, 16 BROOK. J. INT'L L. 493, 498 (1990) (outlining Webster's formula on self-defense as including necessity and proportionality).

165. DINSTEIN, *supra* note 37, at 207; Greenwood, *supra* note 45, at 17.

Qaeda.[166] However, Antonio Cassese argues that the post-9/11 state practice of allowing individual and collective self-defense against a state that harbors terrorism creates problems in duration and scope.[167] He argues that before 9/11, several nations were still opposed to expanding self-defense to allow responses to actions by nonstate actors.[168] Cassese believes that when dealing with a group like Al-Qaeda, with cells located across the world, it may require the invasion of dozens of nations for several decades to put a full end to its threat of attacks.[169] Cassese argues this expansion of the right of self-defense will cause an increase in aggressive force worldwide.[170]

Another requirement for the right of self-defense to be invoked in situations involving nonstate actors is that the attack must originate within the sovereign territory of another state, not from within the victim state itself.[171] As Dinstein points out, the fact that a nonstate actor perpetrated an armed attack from within a state does not implicate the government of that state in the attack.[172] "Terrorists or armed bands who do not qualify as *de facto* organs of [a state] may still use [that state's] territory as either a springboard for striking at [the victim state] or as a haven for regrouping (or both)."[173] A nonstate actor, such as Hezbollah, can establish its base of operations within the territory of a state.[174] Currently, Hezbollah has set up its base of operations within southern Lebanon, which is clearly within Lebanon's recognized territorial boundary.[175] Dinstein describes the usual pattern of nonstate actors: (1) the establishment of a base within a host state, without being inspired or directed by the host state's government; (2) emerging when the opportunity presents itself for hit-and-run attacks against the target state; and (3) returning to the host state for shelter.[176] As is the case in Lebanon, the Lebanese government tolerates the use of its soil by Hezbollah against Israel, but it does not (arguably) actively sponsor or encourage those actions against Israel.[177] However, when exercising self-

166. *See* DINSTEIN, *supra* note 37, at 207–08 (suggesting the Security Council recognized and reaffirmed the United States' right to self-defense).

167. Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 998 (2001); *see also* Carsten Stahn, *Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51 (1/212) of the UN Charter, and International Terrorism*, 27 Fall FLETCHER F. WORLD AFF. 35, 47 (2003).

168. Cassese, *supra* note 167, at 996 (discussing that in contrast to several nations, primarily the United States, Israel, and South Africa espoused the expansion of self-defense to include armed attacks by nonstate actors).

169. *Id.* at 997–98; *see* Maryann Cusimano Love, *Globalization, Ethics, and the War on Terrorism*, 16 NOTRE DAME J. L. ETHICS & PUB. POL'Y 65, 66 (2002).

170. Cassese, *supra* note 167, at 998; *see also* Ruys, *supra* note 30, at 282; Stahn, *supra* note 167, at 47 (warning that the use of self-defense against nonstate actors risks limitless attacks on states).

171. Cassese, *supra* note 167, at 205.

172. DINSTEIN, *supra* note 37, at 205. *But see* Anthony Clark Arend & Robert J. Beck, *"Don't Tread on Us": International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L. J. 153 (1994) (explaining that if a state merely tolerates terrorism, it may be subject to self-defense).

173. DINSTEIN, *supra* note 37, at 205.

174. *Id.*; *see also* Ruys, *supra* note 30, at 281 (noting that Hezbollah has operations in over 50 states).

175. *See* Ruys, *supra* note 30, at 283.

176. DINSTEIN, *supra* note 37, at 205; *see also* Walter Gary Sharp, Sr., *The Use of Armed Force Against Terrorism: American Hegemony or Impotence*, 1 CHI. J. INT'L L. 37, 38 (2000) (declaring that all nonstate actors operate within the sovereign territory of at least one state).

177. DINSTEIN, *supra* note 37, at 205; *see also* Steven R. Weisman, *U.S. Called Ready to See Hezbollah in Lebanon Role*, N.Y. TIMES, Oct. 3, 2007 at 1 (noting that Hezbollah is a strong force in Lebanon).

defense within the boundary of a host state from which a terrorist attack originated, any forcible measures must take place within the territory of the state where the attackers were headquartered or took refuge, even if the terrorists' attacks were not sanctioned or condoned by the host state.[178]

The I.C.J.'s decision in C*orfu Channel* laid out the duty of the host state. In this case, a British ship suffered damage from a mine laid in the Corfu Channel.[179] When British ships attempted to salvage the damaged vessel, the rescue ships also sustained damage but were able to escape.[180] The British then sent a minesweeper to clear out the mines from the channel.[181] The Court stated that "every State [has an] obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[182] This rationale lays the groundwork for the responsibility a state incurs for the conduct of nonstate actors within that state's sovereign territory.[183] As noted below, Lebanon willingly allowed Hezbollah to operate from its territory leaving Israel no other option other than retaliating within Lebanon's territorial boundaries.

Another illustrative example is the *Tehran* case, where a strong-arm group of several hundred people overran the United States Embassy compound in Tehran.[184] The militants also seized several buildings in the embassy compound, including the various residences.[185] "In the course of the attack, all the diplomatic and consular personnel and other persons present in the premises were seized as hostages, and detained in the Embassy compound; subsequently other United States personnel and one United States private citizen seized elsewhere in Tehran were brought to the compound and added to the number of hostages."[186] Because the Iranian government did not direct the actions of the perpetrators, they qualify as nonstate actors.[187]

As the hostage situation continued, the Iranian government did nothing to alleviate the situation or open negotiations with the United States.[188] The Court held that because Iran knew of the occurrences at the United States Embassy and did nothing to alleviate the situation, the Iranian government failed to comply with its obligations under international law.[189] Dinstein discusses the holding by stating, "If the authorities of one state are required under international law to take appropriate acts in order to protect the interests of another state, and while they have the means at their disposal to do so, completely fail to comply with their obli-

178. DINSTEIN, *supra* note 37, at 205; *see also* Trapp, *supra* note 83, at 142.

179. Corfu Channel (U.K. v. Ireland) (Merits), 1949 I.C.J. 4, 17 (1949).

180. *Id*. at 18.

181. *Id*. at 13.

182. *Id*. at 22.

183. *See* Arend & Beck, *supra* note 172, at 211–12 (explaining that if a state merely tolerates terrorism, it may be subject to self-defense); Ruys, *supra* note 30, at 282 (indicating that a state may use self-defense against another state that harbors terrorists).

184. Diplomatic and Consular Staff (U.S. v. Iran), 1980 I.C.J. 3, 12 (May 1980).

185. *Id*.

186. *Id*.

187. *Id*. (describing the invading group as "Muslim Student Followers of the Imam's Policy").

188. *Id*. at. 32.

189. *Id*. at 40–41.

gations, the inactive state bears international responsibility towards the other state."[190] Furthermore, a state has a duty of vigilance in fulfilling the international obligation stated by the Court in *Tehran*.[191] Because a state has a duty not to tolerate or permit, on its soil, the preparation for an attack against another state, the host state has international responsibility for its wrongful act of omission.[192]

In the case of Israel's response to Hezbollah's attacks in Israel's territory, it is necessary to look closely at the requirements of self-defense against armed attack by nonstate actors.[193] Clearly, Hezbollah is a nonstate actor that conducted an armed attack against Israel from within the sovereign territory of another state.[194] Lebanon, willingly or unwillingly, permitted and tolerated the existence of Hezbollah's headquarters and military supplies on Lebanese soil. Members of Hezbollah held seats in the Lebanese government.[195] Lebanon lacked the military might to stop Hezbollah from conducting cross-border attacks against Israel.[196] The Lebanese government could not or would not stop Hezbollah, perhaps out of fear that such actions might have led to another civil war.[197] Consequently, because Hezbollah perpetrated an armed attack against Israel, and Lebanon did nothing to stop it, Lebanon failed to comply with its responsibility under international law. Israel therefore was entitled to use force in self-defense by taking action within Lebanese territory in the areas controlled and/or used by Hezbollah.

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190. DINSTEIN, *supra* note 37, at 206; *id*. at 31–32; *see also* Michael C. Bonafede, *Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism after the September 11 Attacks*, 88 CORNELL L. REV. 155, 193–94 (2002) (stating that a government must take appropriate steps to protect another state as long as it has the capacity to do so).

191. *See* DINSTEIN, *supra* note 37, at 206; *see also* John Quigley, *State Responsibility for Ethnic Cleansing*, 32 U.C. DAVIS L. REV. 341, 355 (1999) (restating the rule that a state must exercise "superior vigilance" over military acts where there is a potential for military harm).

192. DINSTEIN, *supra* note 37, at 206; *see* David Bederman, *Contributory Fault and State Responsibility*, 30 VA. J. INT'L L. 335, 343 (1990) (discussing a similar finding by the 1961 Harvard Draft); Jennifer Lane, *The Mass Graves at Dasht-e Leili: Assessing U.S. Liability for Human Rights Violations During the War in Afghanistan*, 34 CAL. W. INT'L L. J. 145, 159 (2003) (noting that a state is responsible for acts of omissions by the nonparty state).

193. *See* Ruys, *supra* note 30, at 285 (finding that states are not exposed to the force of self-defense on the basis of a nonstate actor); *see also* Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415, 437 (2006).

194. *See* Part I; Daveed Gartenstein-Ross, *A Critique of the Terrorism Exception to the Foreign Sovereign Immunities Act,* 34 N.Y.U. J. INT'L L. & POL. 887, 934 (2002) (stating that Hezbollah is a nonstate actor that often attacks Israel)

195. *See* John Alan Cohan, *Necessity, Political Violence and Terrorism*, 35 STETSON L. REV. 903, 962 (2006) (noting that in 2005, Hezbollah had 15 seats in parliament).

196. *See* Ruys, *supra* note 30, at 269 (describing the Lebanese armies as one of the weakest in the Middle East); Feldman, *supra* note 82 (proclaiming that the Lebanese government was "not strong enough to dismantle Hezbollah's military infrastructure").

197. *See* Nicholas Blanford, *Mass Beirut Sit-In Strokes Fears of Renewed Civil War*, TIMES (UK), Dec. 11, 2006, at 29 (positing that mass destruction in the recent past has paralyzed the population). *But see Curfew in Beirut Lifts, but Tensions Linger—Hopes Arise that Fears of Strife Will Stir Accord*, MEMPHIS COM. APPEAL, Jan. 27, 2007, at A4 (detailing the progovernmental stance that will not bow down if a civil war occurs).

VI. Protection of Civilians

Under the Additional Protocols of the Geneva Conventions of 1949 (Geneva Protocol I), a sovereign government is required to protect its civilians against attacks from others. Parties are required by Article 58 of Protocol I to the maximum extent feasible: 1) to endeavor to remove civilians and civilian objects under their control from the vicinity of military objectives; 2) to avoid locating military objectives within or near densely populated areas; and 3) otherwise to protect civilians and civilian objects against the dangers of military operations.[198] Furthermore, "the deliberate intermingling of civilians and combatants designed to create a situation in which any attack against combatants would necessarily entail an excessive number of civilian casualties is a flagrant breach of the Law of International Armed Conflict."[199] This is stated explicitly by Geneva Protocol I: "The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations."[200]

There is a question about the actions of the attacker in a situation where the party being attacked has placed its potential military targets in an area occupied densely by civilians, or civilian objects, with the intent to prevent or hinder its opponent from proceeding with its attack. Geneva Protocol I provides that the principle of proportionality must still be adhered to even if the other side has unlawfully created a situation where civilians are being used as shields.[201] In such a situation, it is necessary, as in all situations involving the potential for civilian casualties, to weigh the potential military advantage of an attack against resulting civilian casualties to satisfy the requirement of proportionality.[202] However, under customary international law, any civilian casualties that result from an illegal attempt to use them to shield combatants or a military objective are the responsibility of the belligerent state placing innocent civilians at risk.[203]

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198. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 1125 U.N.T.S. 3 entered into force Dec. 7, 1978 [hereinafter Geneva Protocol I]; *See* DINSTEIN, *supra* note 89, at 129.

199. DINSTEIN, *supra* note 89, at 129.

200. *Id*. at 130.

201. DINSTEIN, *supra* note 89, at 131; *see generally* Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 541 n.115 (2005) (citing the U.S. military's official position on human shields); *Joint Publication 3-60, Joint Targeting at E-2* (Apr. 13, 2007), http://www.dtic.mi l/doctrine/jel/new_pubs/jp3_60.pdf (detailing military tactics regarding human shields).

202. DINSTEIN, *supra* note 89, at 131.

203. *Id*.; *see also* W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 163 (1990) (shifting the burden directly onto the attacker in situations where there are innocent civilian casualties); Andrew D. McClintock, *The Law of War: Coalition Attacks on Iraqi Chemical and Biological Weapon Storage and Production Facilities*, 7 EMORY INT'L L. REV. 633, 647 n.44 (1993).

In the case of Lebanon, it is its duty to protect the civilians within its territory from outside aggression, even those in areas controlled by Hezbollah.[204] If, in fact, Hezbollah used civilians to shield military objectives, under customary international law, that would have alleviated Israel of the responsibility for those civilians.[205] However, under Geneva Protocol I, the situation would still need balancing.[206]

VII. Conclusion

It seems that several issues are raised as to the legality of force by Hezbollah and Israel during the Israeli-Hezbollah conflict of 2006. First, although it may appear that Israel's response was disproportionate to the initial acts of aggression by Hezbollah, one must also consider that Hezbollah used Lebanese civilians and civilian installations to house its personnel and store its weapons. This interspersing of military and civilians was designed to result in civilian casualties and the destruction of civilian infrastructure. Lebanon's inability (or lack of desire) to control Hezbollah's actions from within its territory also alleviates some of Israel's responsibility. Israel has a right to respond to Hezbollah's aggression, subject to the proportionality of that response.

In the modern world, where terrorism is a major focus of international politics, small states that are being used by terrorists to launch attacks, house troops, or store equipment may need additional legal protections. It may be necessary to create new rights to reduce or minimize the damage that can result when such a host state is caught in the middle of military hostilities between the terrorists and their "targets." Certainly, these new rules would apply in a case where the host state has made a good faith effort to prevent the terrorists' activities but is simply incapable of taking effective military or other action to force the terrorists to relocate.

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204. *See* John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law,* 15 PACE INT'L L. REV. 283, 349 (2003) (recognizing the responsibility of a state to protect its own citizens in any circumstances); Heike Krieger, A *Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study*, 11 J. CONFLICT & SECURITY L. 265, 283–84 (2006) (detailing the European Union's stance on a state's duty to protect its citizens).

205. *See* William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L. J. 639, 839 (2004) (stating that defending forces have a duty to mitigate their civilian casualties); *see also* Waldman, *supra* note 116, at 262 (noting that Article 51(7) honors the prohibition of using citizens as shields for military objectives).

206. *See* Marco Roscini, *Targeting and Contemporary Aerial Bombardment*, 54 INT'L & COMP. L.Q. 411, 420 (2005) (discussing the balancing test the U.S. military uses when contemplating attacks on cities or villages); *see also* J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying Armed Forces*, 57 A.F. L. REV. 155, 182–83 (2005) (analyzing the use of the principle of proportionality); Stone, *supra* note 85, at 503–04 (defining the principle of proportionality as a balancing of the military advantage and the collateral damage to nonmilitary personnel).

Estate of Thomson v. Toyota Motor Corp. Worldwide

2007 U.S. Dist. LEXIS 44344 (N.D. Ohio June 19, 2007)

The United States District Court for the Northern District of Ohio dismissed claims against defendants, a foreign car manufacturer and a U.S. rental car agency, arising from an auto accident in South Africa for lack of personal jurisdiction and for *forum non conveniens*, even though the plaintiffs were domiciled in Ohio.

I. Holding

In *Estate of Thomson v. Toyota Motor Corp. Worldwide,*[1] the federal District Court for the Northern District of Ohio addressed two motions filed by the defendants. Defendant Toyota Motor Corporation Worldwide ("TMC") filed a motion to dismiss all claims against it "under Rule 12(b)(2) of the Federal Rules of Civil Procedure for lack of personal jurisdiction and under Rule 12(b)(3) for improper venue; or, in the alternative, to dismiss for forum non-conveniens."[2] Defendant Thrifty Rent-A-Car Services, Inc. ("Thrifty") filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure "for failure to state a claim upon which relief can be granted."[3]

The court dismissed all claims against TMC for improper venue and lack of personal jurisdiction[4] and dismissed all claims against Thrifty for forum non conveniens,[5] thus not having to decide TMC's motion to dismiss on failure to state a claim. Although Thrifty did not raise the issue of forum non conveniens, the court raised the issue on its own. The court ruled that South Africa, the location where the accident took place and where the evidence and witnesses are located, would be a more appropriate venue.[6]

II. Facts and Procedure

On October 3, 2005, in Port Elizabeth, South Africa, Jerame Miller was driving a Toyota Condor rented by his wife from "Thrifty Car Rentals," when he lost control of the car and it crashed.[7] Plaintiffs claimed the left rear drum of the vehicle "malfunctioned and seized."[8] Plaintiffs further asserted that the accident occurred when the bonded lining of the brake shoe

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1. Estate of Thomson v. Toyota Motor Corp. Worldwide, 2007 U.S. Dist. LEXIS 44344 at *1 (N.D. Ohio June 19, 2007).
2. *Id*. at *1–2.
3. *Id*. at *2.
4. *Id*.
5. *Id*. at *2.
6. *Id*. at *15.
7. *Id*. at *2.
8. *Id*.

came unglued and wedged between the brake shoe and the brake drum, rendering the vehicle uncontrollable.[9] The passengers in the Toyota, particularly Colleen Miller and Dorothy Thompson, were seriously injured in the accident.[10] Dorothy Thompson died on October 9, 2005, as a result of the injuries she sustained from the accident.[11]

On October 9, 2006, plaintiffs Colleen Miller and the Estate of Dorothy Thompson filed suit against TMC and Thrifty in the federal District Court for the Northern District of Ohio.[12] On April 16, 2007, TMC filed a motion to dismiss all claims for lack of personal jurisdiction and improper venue or, alternatively, for forum non conveniens.[13] On January 3, 2007, Thrifty filed a motion to dismiss for failure to state a claim.[14] On June 19, 2007, the court dismissed all claims.[15]

III. The Court's Analysis

A. Personal Jurisdiction over TMC

The court could gain personal jurisdiction over a nonresident defendant if (1) the defendant consented to the process;[16] (2) the defendant is subject to specific jurisdiction, because the case or controversy arose out of the defendant's minimum contacts with the state;[17] and (3) the defendant is subject to general jurisdiction, based on his consistent and systematic contacts with the forum state.[18]

The main issue was whether the court had general jurisdiction over TMC.[19] The court found that TMC's contacts with the state of Ohio were not sufficiently consistent and systematic for the court to have general jurisdiction over the defendant. The court found TMC to be a Japanese company, with its principal place of business in Japan, which did not import, market, or sell Toyota motor vehicles in Ohio or anywhere in the United States.[20] Therefore, TMC should not reasonably anticipate being haled into court in the United States.

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9. *Id*.
10. *Id*.; *see also* Leila Samodien, *Weather Stalls Chopper Crash Site Probe,* CAPE ARGUS, (allAfrica Global Media, S. Africa), Oct. 5, 2005, at 1, 2005 WLNR 16159318.
11. *Thompson*, 2007 U.S. Dist. LEXIS 44344 at * 2 (N.D. Ohio, June 19, 2007) at*2.
12. *Id*. at *2–3.
13. *Id*. at *3.
14. *Id*.
15. *Id*. at *15.
16. *Id*. at *3; *see* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704 (1982) (stating that parties may agree in advance to submit to the jurisdiction of a given court or intentionally waive personal jurisdiction).
17. *Thomson*, 2007 U.S. Dist. LEXIS 44344 at *3; *see* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (indicating that personal jurisdiction may arise out of a corporation's minimal contacts with the state).
18. *Thomson*, 2007 U.S. Dist. LEXIS 44344 at *4–7; *see* Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 415 (1984) (looking at whether Helicol's contacts with the state of Texas were continuous and systematic enough to grant the court general jurisdiction).
19. *Thomson*, 2007 U.S. Dist. LEXIS 44344 at *4–7.
20. *Id*. at *4–5.

Plaintiffs argued that although TMC did not conduct business in the United States, a related company, Toyota Motor Sales, U.S.A. Inc. ("TMS"), did conduct business in Ohio.[21] Plaintiffs contended that common use of the name "Toyota" blurs the line between these two subsidiary companies, and that in fact they were "alter egos" of each other.[22] Plaintiffs believed that, as a result of this blur, TMS's minimal contacts with Ohio should be sufficient to establish personal jurisdiction over TMC.[23]

The court rejected plaintiffs' argument, pointing out that Sixth Circuit cases and Ohio law require a demonstration of financial dependency between corporations and a demonstration of nonobservance of corporate formalities in order to find that a subsidiary is an "alter ego" of the parent corporation.[24] The Sixth Circuit takes into account several additional factors, such as (1) having the same employees and corporate officers; (2) engaging in the same type of business; (3) keeping the same address and phone line; (4) having the same assets; (5) finishing the same jobs; (6) having one set of books, tax returns and financial statements; and (7) exerting control over daily affairs of each corporation.[25] The court found that TMC presented sufficient evidence to prove that many of these factors did not exist and that TMC and TMS were in fact separate and distinct companies.[26] As a result, the court did not have general jurisdiction over TMC. The court concluded that it must dismiss the claims against TMC, because it did not have personal jurisdiction over the defendant.[27]

B. Forum Non Conveniens

Thrifty's motion to dismiss for failure to state a claim was based on the assertion that it does not have rental operations in South Africa. The court did not decide this motion, because it dismissed the claims against Thrifty for forum non conveniens.[28] The court stated that it had wide discretion to apply the doctrine of forum non conveniens[29] and could consider the defense *sua sponte*.[30]

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21. *Id*. at *5.

22. *Id*. at *5–6; *see* Microsys Computing, Inc. v. Dynamic Data Systems, LLC, 2006 U.S. Dist. LEXIS 53397 at *20 (N.D. Ohio Aug. 2, 2006) (describing that the Sixth Circuit requires a demonstration of financial dependency and nonobservance of corporate formalities to find that a subsidiary is an "alter ego" of a parent company); *see also* Taylor Steel, Inc. v. Keeton, 417 F.3d 598, 607–08 (6th Cir. 2005) (discussing how a company could be found to be an alter ego if there is evidence that corporate formalities have not been followed).

23. *Thomson*, 2007 U.S. Dist. LEXIS 44344 at *4–6.

24. *Id*. at *5; *see Microsys*, 2006 U.S. Dist. LEXIS 53397 at *20 (discussing how Ohio looks at factors such as "whether corporate formalities are observed" and "whether a corporation is financially independent"); *see also* LeRoux's Billyle Supper Club v. Ma, 77 Ohio App.3d 417, 422–23 (Ohio App. 6th Dist. 1991) (indicating the factors that Ohio uses for disregarding a corporate entity, including whether the corporation has followed corporate formalities and whether it is financially independent).

25. *Thomson*, 2007 U.S. Dist. LEXIS 44344 at *5–6; *Microsys*, 2006 U.S. Dist. LEXIS 53397 at *20.

26. *Thomson*, 2007 U.S. Dist. LEXIS 44344 at *6.

27. *Id*. at *7.

28. *Id*.

29. *Id*. at *7–8.

30. *Id*.; *see* Ferens v. John Deere Co. 494 U.S. 516, 537 (1990) (Scalia J., dissenting) (stating that there are some cases where the systematic costs of trying a case in the current forum are so severe that a district court judge should dismiss the case *sua sponte* for forum non conveniens).

The court evaluated four factors in deciding whether to consider a forum non conveniens defense. These factors include: (1) whether there was an alternative forum;[31] (2) whether there were private interest factors dictating a change in venue;[32] (3) whether there were public interest factors dictating a change in venue;[33] and (4) whether choice-of-law rules suggest that another forum would be proper.[34]

First, the court considered whether there was an appropriate alternative forum for litigating this case.[35] The court found that that South Africa was an appropriate forum, because it was the place where the injury occurred and could provide adequate relief to the plaintiffs.[36]

Second, the court had to balance the private interests of the litigants with the public interests of Ohio and South Africa to determine whether the case should be dismissed for forum non conveniens.[37] The court found that private interest factors weighed heavily in favor of litigating in South Africa.[38] The Supreme Court set out a list of private factors that a court could consider in *Gulf Oil Corp. v Gilbert*,[39] by stating,

> the factors pertaining to the private interests of the litigants included the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive."[40]

Here, South Africa was the location where documents, medical records, and witnesses were located.[41] On top of that, the court noted that South Africa had specifically declared that, as provided for in Article 23 of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial matters, it would not execute pre-trial discovery of common law coun-

31. *Thomson*, 2007 U.S. Dist. LEXIS 44344 at *8–9; *see* Piper Aircraft Co. v. Reyno 454 U.S. 235, 241 (1981) (indicating that the Supreme Court will look at whether there is an alternative forum available).

32. *Thomson*, 2007 U.S. Dist. LEXIS 44344 at *9–11; *see Piper*, 454 U.S. at 241 (stating that the Court has laid out a number of private interest factors that lower courts should consider when deciding whether to dismiss a case for forum non conveniens).

33. *Thomson*, 2007 U.S. Dist. LEXIS 44344 at *11–12; *see Piper*, 454 U.S. at 241 (describing some of the public interest factors that the Court has laid out for determining whether to dismiss a case for forum non conveniens).

34. *Thomson*, 2007 U.S. Dist. LEXIS 44344 at *12–14; *see Piper*, 454 U.S. at 259–60 (discussing how choice of law is only one factor to be looked at and that it is not a determinative factor by itself).

35. *Thomson*, 2007 U.S. Dist. LEXIS 44344 at *8; *see Piper*, 454 U.S. at 259–60.

36. *Thomson*, 2007 U.S. Dist. LEXIS 44344 at *8.

37. *Id.* at *8–9; *see Piper*, 454 U.S. at 241 (indicating the Court had given lower courts a number of private and public interest factors to help them decide whether the current forum is inappropriate).

38. *Thomson*, 2007 U.S. Dist. LEXIS 44344 at *9.

39. 330 U.S. 501 (1947).

40. *Id.* at 508 (citing Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929)).

41. *Thomson*, 2007 U.S. Dist. LEXIS 44344 at *9.

tries.[42] The court found that these factors would create real difficulties in trying the case in the United States.

Third, the court also found that public interest factors favored dismissal.[43] In *Gulf Oil Corp. v. Gilbert*, the Supreme Court set out the public interest factors that a court should consider, explaining,

> The public factors bearing on the question included the administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.[44]

Here, the result of the litigation would affect cars manufactured and operated in South Africa.[45] Also, American jurors in Ohio would be burdened by the litigation.[46] There were no public interest factors that suggested the litigation should take place in Ohio.

Lastly, the court considered which choice of law rules to apply in this case.[47] The Supreme Court has held that dismissal of the case for adjudication in a foreign court is favored when there is a need to apply foreign law.[48] In Ohio, federal courts will apply the law of the place where the injury occurred, unless another state has a more significant relationship to the lawsuit.[49] The court concluded that South African law should be applied because South Africa was where the injury occurred, and no other place had a more significant relationship to the lawsuit.[50]

After taking into account all these factors, the court held that South Africa was the more appropriate venue for this case.[51] Therefore, the court dismissed the case against Thrifty on forum non conveniens grounds.[52]

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42. *Id*. at *10; *see* Art. 23 of the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, 23 U.S.T. 2555 (1972) (stating "a Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries").

43. *Thomson*, 2007 U.S. Dist. LEXIS 44344 at *11.

44. 330 U.S. at 509.

45. *Thomson*, 2007 U.S. Dist. LEXIS 44344 at *12.

46. *Id*.

47. *Id*. at *12–15.

48. *Id*. at *14; *see Piper*, 454 U.S. at 260 (mentioning that the need to apply foreign law pointed toward dismissal).

49. *Thomson*, 2007 U.S. Dist. LEXIS 44344 at * 12–13; *see* Morgan v. Biro Manufacturing, 15 Ohio St. 3d 339, 342 (stating that there is a presumption that the law where the injury occurred will govern); *see also* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 495–6 (1941) (acknowledging that the law of the state where the forum is located should govern).

50. *Thomson*, 2007 U.S. Dist. LEXIS 44344 at *14.

51. *Id*. at *13–15.

52. *Id*.

III. Conclusion

The court ruled that it did not have personal jurisdiction over TMC, and that it would not exert its jurisdiction over Thrifty. This is the proper ruling, because TMC had no contacts with the state of Ohio or the United States. It is important that corporations that have no reasonable expectation of being tried in U.S. courts not be brought into those courts for accidents that occur in other countries. Even if the court had ruled that it had personal jurisdiction over TMC, it still could have dismissed the case on forum non conveniens grounds. The same considerations that caused the court to dismiss the case against Thrifty also apply to TMC.

The court was correct in deciding that South Africa was the proper venue for the litigation. This case would pose numerous difficulties if tried in an Ohio district court. Aside from the need to apply South African law, all evidence and witnesses were located in South Africa. Because South Africa has stated that it will decline to execute the U.S. pretrial discovery, evidence would not be obtained until the time of trial.[53] The discovery stage of litigation would become far less effective and cause further burdens to the court.

Finally, South Africa's interest in the outcome of the case clearly outweighs any interest that Ohio might have had in the decision. The court correctly decided that South Africa is the place where the case should be heard. South Africa is the place where the accident occurred and where the witnesses and evidence are located, as well as the jurisdiction whose interests will be most affected by the ruling.

William Schleifer

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53. *See supra* note 42.

Ehrenfeld v. Bin Mahfouz

489 F.3d 542 (2d Cir. 2007)

The United States Court of Appeals for the Second Circuit certified the question of whether New York's long-arm statute, N.Y. Civil Practice Laws & Rules 302(a)(1), confers personal jurisdiction over a nondomiciliary whose only contact with the state were documents related to the foreign lawsuit where a New York resident was a named party.

I. Holding

In *Ehrenfeld v. Bin Mahfouz*,[1] the United States Court of Appeals for the Second Circuit affirmed in part a ruling from the Southern District of New York granting defendant's (Bin Mahfouz's) motion to dismiss based on lack of personal jurisdiction under CPLR 302 (a)(3)[2] and denying plaintiff's (Ehrenfeld's) motion for jurisdictional discovery. The court also certified to the New York Court of Appeals the question whether personal jurisdiction existed under CPLR 302(a)(1).[3] The court held that the district court properly exercised its discretion to deny jurisdictional discovery, because the plaintiff did not establish a prima facie case for jurisdiction,[4] and that personal jurisdiction did not exist under CPLR 302(a)(3), because the plaintiff failed to identify a specific tortious act, either under New York law or under that of another jurisdiction, that could be the basis for the claim.[5] However, the court could not establish whether personal jurisdiction existed under CPLR 302(a)(1), which confers jurisdiction based on business transactions within the state or by contacts with the state, because state-court precedent did not yield a clear answer for contacts of the kinds presented in this case.[6] Therefore, the question of whether personal jurisdiction could be established based on the defendant's written contacts was certified to the New York Court of Appeals.[7]

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1. 489 F.3d 542 (2d Cir. 2007).
2. *Id*. at 550 (stating that under CPLR 302(a)(3), the plaintiff must state a cause of action that arises under a "tortious act"). Under Fed. R. Civ. P. Rule 12(b)(2), a defense may be asserted that the court does not have jurisdiction over the person.
3. *Id*. at 548 (providing that jurisdiction is conferred under CPLR 302(a)(1) when a nondomiciliary person or his or her agent conducts business within the state or the cause of action arises out of transactions conducted within the state).
4. *Id*. at 550.
5. *Id*. at 551.
6. *Id*. at 548.
7. *See* Ehrenfeld v. Bin Mahfouz, 2007 N.Y. Slip Op. 5586; 2007 N.Y. LEXIS 1622 (June 28, 2007) (certifying the case under CPLR 302(a)(1) to the New York Court of Appeals as a matter of first impression); Ehrenfeld v. Bin Mahfouz, 9 N.Y.3d 838, 872 N.E.2d 866, 840 N.Y.S. 2d (2007) (accepting the certified question for later decision).

II. Facts and Procedural History

Plaintiff Rachel Ehrenfeld is the author of a book published in the United States in 2003 entitled *Funding Evil: How Terrorism Is Financed—and How to Stop It*.[8] Defendant Khalid Salim Bin Mahfouz is the former president and chief executive officer of the National Commercial Bank of Saudi Arabia and a citizen of Saudi Arabia.[9] In her book, Ehrenfeld alleges that Bin Mahfouz helped to finance terrorism.[10] Based on this allegation, Bin Mahfouz sued Ehrenfeld for libel in the United Kingdom.[11] Ehrenfeld failed to appear in the case and a default judgment was entered against her, which stated that she "must refrain from publishing, or causing or authorizing the further publication" of the disputed statements about Bin Mahfouz in *Funding Evil* within the jurisdiction of the British court system.[12]

Bringing suit in federal court based on diversity jurisdiction under 28 U.S.C. § 1332, Ehrenfeld sought a declaratory judgment that "[Bin] Mahfouz could not prevail on a libel claim under the laws of New York and the United States, and that the [British] judgment is not enforceable in the United States on constitutional and public policy grounds."[13] Bin Mahfouz moved to dismiss the case for lack of personal jurisdiction and subject matter jurisdiction.[14] The district court dismissed for lack of personal jurisdiction and did not address the issue of subject matter jurisdiction.[15] Ehrenfeld appealed the judgment.

III. Discussion

A. Ripeness and Constitutional Due Process

In reaching its decision, the court addressed two preliminary matters in the parties' arguments: ripeness and constitutional due process. Bin Mahfouz argued that the court did not have subject matter jurisdiction because the case was not "ripe."[16] The court observed that there are two prongs to the ripeness doctrine, namely, Article III limitations on judicial power and prudential power to exercise jurisdiction. The argument in the present case dealt with the latter prong.[17] For a case to be "ripe" in the constitutional sense, it must present a "concrete dispute" that is distinguishable and current within the meaning of Article III.[18] However, the court can rule that a case is not prudentially ripe, in that it would be more sensible to decide

8. 489 F.3d at 545; *see also* RACHEL EHRENFELD, FUNDING EVIL: HOW TERRORISM IS FINANCED—AND HOW TO STOP IT (2003).

9. 489 F.3d at 545.

10. *Id.*

11. *Id.*; *see also* Bin Mahfouz v. Ehrenfeld, [2005] EWHC 1156 (QB).

12. *Id.*

13. *Id.*

14. *Id.* (asserting both Fed. R. Civ. P. Rule 12(b)(1) lack of subject matter jurisdiction and Fed. R. Civ. P. Rule 12(b)(2) lack of personal jurisdiction).

15. 489 F.3d at 545.

16. *Id.*

17. *Id.* (citing Nat'l Park Hospitality Ass'n v. DOI, 538 U.S. 803, 808 (2003)).

18. 489 F.3d at 546.

the case at a later date without impeding the parties' constitutional rights.[19] In addressing Bin Mahfouz's argument, the court held that the English judgment was a final order that clearly prevented Ehrenfeld from publishing the defamatory statements about Bin Mahfouz.[20] Therefore, because there was a final judgment and Ehrenfeld had taken no steps to comply with the order, the case was prudentially ripe under the standards set out in *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisémitisme*.[21]

The second preliminary issue the court addressed was whether personal jurisdiction on the facts of this case satisfied constitutional due process.[22] The court held that this inquiry was a two-part process.[23] First, the court must determine whether the defendant can be subjected to service of process under the state's laws, and if so, then whether assertion of that jurisdiction is cohesive with due process.[24] Because the first part of the inquiry concerning whether the court had personal jurisdiction over the defendant had yet to be answered, there was no need to address the second part of the inquiry at this time.[25]

B. Jurisdictional Discovery

When a district court denies jurisdictional discovery, its judgment is reviewed only for abuse of discretion.[26] Ehrenfeld argued that the district court improperly denied her claim for jurisdictional discovery by requesting her to make a prima facie case of jurisdiction without allowing discovery.[27] She also claimed that the process could have revealed facts that would have made it possible to establish personal jurisdiction under CPLR 302(a)(1).[28] The district court held that she was required to make a prima facie showing of jurisdiction before the court would grant her discovery.[29] The appellate court affirmed this ruling, emphasizing that the prima facie showing is not a bright line standard, but that the court does have discretion as to when to grant discovery in such cases.[30]

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19. *Id*.

20. *Id*. at 547.

21. *See* 433 F.3d 1199 (9th Cir. 2006) (holding that a question was not fit for judicial decision when foreign orders were only interim orders that could be changed before enforcement in the United States); *see also* Dan Dietrich, *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisémitisme*, 15 N.Y. INT'L L. REV. 83 (2002) (summarizing this case in the recent decision).

22. 489 F.3d at 547.

23. *Id*.

24. *See* Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996) (holding that in a diversity action the court must conduct a two-part inquiry to determine whether the requirements of due process have been met).

25. 489 F.3d at 547.

26. *Id*. at 550.

27. *Id*.

28. *Id.*

29. *Id*.

30. *See* Janzini v. Nissan Motor Corp., 148 F.3d 181 (2d Cir. 1998) (noting that the Second Circuit has prevented jurisdictional discovery when a prima facie case was not established in a case involving a foreign defendant).

C. Personal Jurisdiction in New York

The appellate court reviews all questions of statutory interpretations de novo.[31] The court examined whether personal jurisdiction existed under two separate sections of New York State's long-arm statute, CPLR 302(a)(1) and 302(a)(3).

1. Personal Jurisdiction Under CPLR 302(a)(1)

CPLR 302(a)(1) confers personal jurisdiction over a nondomiciliary person who conducts any business transactions within the state, either in person or through an agent, where the cause of action arises out of those in-state transactions.[32] When such a nondomiciliary person purposefully conducts business in New York, he or she then invokes the benefits and protections of the state's laws.[33] Federal courts have held that even noncommercial activities may suffice to establish the existence of those business transactions.[34] In certain circumstances, a single transaction may be enough to establish personal jurisdiction under the statute, provided the defendant purposefully engaged in the activity, and there is a significant relationship between the activity and the claim.[35] Although a single "cease and desist" communication sent to a state resident may not be sufficient to establish jurisdiction, jurisdiction may be established when that communication is coupled with other transactions used to secure business.[36]

Ehrenfeld enumerated several contacts that Bin Mahfouz had had with New York, which she claimed were sufficient to establish jurisdiction. These included the service on Ehrenfeld stating the claims in the British court (similar to a cease-and-desist letter), at least six letters and e-mails dealing with the British case, four occasions of personal service of documents relating to the British case delivered by Bin Mahfouz's agents, and receipt by mail and e-mail of the judgment issued by the English court. Additionally, she argued that Bin Mahfouz operates a Website[37] that may be accessed in New York, and that his lawsuit was designed to halt her research and writing in New York.[38]

The New York courts have not addressed whether such contacts are sufficient to establish personal jurisdiction in the state.[39] Ehrenfeld argued that if the court was not sure whether

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31. 489 F.3d at 547.

32. *Id*. at 548.

33. Elec. Co. v. Rauland-Borg Corp., 20 N.Y.2d 377, 382, 229 N.E.2d 604, 283 N.Y.S.2d 34 (1967) (quoting Hanson v. Denckla, 357 U.S. 235 (1958)); *see also* CutCo Indus., Inc. v. Naughton, 806 F.2d 361, 365 (2d. Cir. 1986).

34. 489 F.3d at 548.

35. *See* PDK Labs, Inc., v. Friedlander, 103 F.3d 1105, 1109 (2d Cir. 1997) (quoting Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460, 467, 522 N.E.2d 40, 527 N.Y.S.2d 195 (1998)).

36. 489 F.3d at 548.

37. http://www.binmahfouz.info.

38. *Id*. at 549.

39. *Id*.

New York's statute was applicable in this case, then the question should be certified to the New York Court of Appeals.[40] Bin Mahfouz argued that the case involved only the application of settled law to the facts of the case.[41] However, because there was no controlling precedent, the matter was said to be one of first impression in New York.[42] Most important, because the present case involved matters of important public policy, that is, the jurisdictional reach of New York's long-arm statute, the state has a compelling interest in resolving the issue.[43] Additionally, the court reasoned that the question was especially important to authors, publishers, and those people like Bin Mahfouz who find themselves the subject of books and articles published on such a widespread level.[44] The implications of the present case extend not only to those defendants who successfully sue New York state residents abroad, but also, ultimately, to the First Amendment rights of citizens.[45] Subsequently, the New York Court of Appeals found that certification was proper on whether personal jurisdiction could be established under such circumstances.[46]

2. Personal Jurisdiction Under CPLR 302(a)(3)

Ehrenfeld also argued, in the alternative, that CPLR 302(a)(3) established an independent basis for personal jurisdiction.[47] Section 302(a)(3) requires a "tortious" act to have been committed by the defendant for personal jurisdiction to extend to him.[48] Ehrenfeld claimed that the defendant instituted a "scheme to chill her first amendment rights" by bringing a lawsuit in the British court, and that this act satisfies the statute.[49] The court disagreed, finding the argument too open-ended. The court held that for section 302(a)(3) to confer jurisdiction on the defendant, Ehrenfeld must allege a specific tort, actionable under either New York state law or that of another pertinent jurisdiction.[50] To have allowed Ehrenfeld to allege jurisdiction over the defendant based on some general notion of wrongfulness would allow jurisdiction to flow over any defendant in such a suit.[51]

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40. *Id*. at 549–50. New York Court of Appeals Rule 500.7 reads in part, "Where authorized by state law, this court may certify to the highest court of a state an unsettled and significant question of state law that will control the outcome of a case pending before this Court."
41. *Id*. at 549.
42. *Id*.
43. *Id*.
44. 489 F.3d at 549.
45. *Id*.
46. *See* Ehrenfeld v. Bin Mahfouz, 2007 N.Y. Slip Op. 5586; 2007 N.Y. LEXIS 1622 (June 28, 2007).
47. 489 F.3d at 550.
48. *Id*.
49. *Id*.
50. *Id*. at 551.
51. 489 F.3d at 551.

IV. Conclusion

Constitutional parameters of due process limit the court's ability to extend the reach of personal jurisdiction to include certain nonresidents. However, New York's long-arm statute, CPLR 301(a)(1), seeks to strike a balance[52] between those nonresidents who actively pursue business transactions in the state and those who are seeking only to settle legal claims in an area where they conduct no business. Even though a single transaction may suffice for the exercise of personal jurisdiction over the defendant, that transaction must have a "substantial" relation to the claim at issue.[53] In the present case, Bin Mahfouz sought to enforce the British judgment against Ehrenfeld while attempting to deal with the case that Ehrenfeld brought against him on her own soil. This should not automatically subject him to personal jurisdiction of the court when these contacts were immediately related only to enforcing and resolving the suit.

However, there is the additional matter of the Website that Bin Mahfouz operates. Personal jurisdiction has been established through Internet Websites when a site is "interactive"; that is, where business is being conducted and the site allows the user to obtain a product or goods.[54] But when the Website is "passive" and provides only information, the New York courts have held this as insufficient to establish personal jurisdiction.[55] Bin Mahfouz's Website disseminates information only; thus, it is "passive in nature."[56] Bin Mahfouz used this site to refute claims Ehrenfeld published in her book, to assert his arguments in the pending case, and to discuss other pending lawsuits.[57] Because this Website is an information-only Website, it is insufficient to establish jurisdiction over Bin Mahfouz under the standards set forth by the New York courts.

This case also discussed the issue of forum shopping. Ehrenfeld has argued that Bin Mahfouz purposely brought a defamation suit against her in the United Kingdom because the laws there were more favorable to his case.[58] The United Kingdom's defamation laws do not bestow the same protectionist standard for speech as provided in the United States by the First Amendment of the Constitution. Therefore, some defendants may engage in forum shopping,

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52. *See* Banco Ambrosiano, S.P.A. v. Artoc Bank & Trust Ltd, 62 N.Y.2d 65, 71 (1984) (asserting that New York's long-arm statute does not extend as far as is "constitutionally permissible"; thus, contacts may exist that satisfy due process, but the statute does not authorize personal jurisdiction over the defendant); *see also* McKee Elec. Co. v. Rauland-Borg. Corp., 20 N.Y.2d 377, 383 (1967) (holding that even though the court may assert jurisdiction through minimal contacts, this should be done only in the rarest of circumstances, and the preference should be to subject nondomiciliary defendants to the forum where they normally would be found).

53. *Id*. at 548.

54. Hammer v. Trendl, No. CV 02-2462(ADS), 2003 WL 21466686, at1, 5 (E.D.N.Y. Jan. 18, 2003) (holding that when the defendant conducts business through a Website, they are purposely engaging in business with residents of other forum states).

55. *Id*. (noting that something beyond the "mere posting of information on a passive web site" is needed to establish personal jurisdiction over the defendant).

56. http://www.binmahfouz.info.

57. *Id*.

58. *See* Rachel Ehrenfeld, *Libel Tourism*, N.Y. TIMES, October 21, 2007, at 74 (Book Review), http://www.nytimes.com/2007/10/21/books/review/Letters-t1.html?r=1&ref=review&oref=slogin (setting forth a brief overview of the case as written by Ehrenfeld to the NEW YORK TIMES book editor).

where they bring suit in a state where the laws will be more favorable to winning their case.[59] In the present case, Bin Mahfouz sought to prevent Ehrenfeld from publishing defamatory statements about him by enforcing a judgment that was rendered under more lenient standards than those that prevail in the United States. Although he would like the judgment of the British case to be enforced in New York, he does not feel that personal jurisdiction may reach him under New York's long-arm statute. Bin Mahfouz's competing interests are almost irreconcilable. Although it would be impractical to expect Bin Mahfouz to litigate his case in every forum where he would like the judgment enforced, the standard offered by the First Amendment protects authors like Ehrenfeld in such a way that the British standard does not. If Bin Mahfouz would like an enforceable judgment in New York, it may be that he will have to subject himself to the jurisdiction of the state to satisfy the higher standard of proof the state requires in defamation cases.

The court was sound in its judgment to grant certification to the New York Court of Appeals. As the world becomes smaller and smaller, increasingly interconnected by technology, the effect of peoples' actions, publications, and transactions easily extends further and further into the global community. Questions such as the quality and quantity of e-mail relating to service in suits will only increase. Also, the recognition of foreign judgments and claims of forum shopping are issues that will only increase as the world continues to become more of a global forum. Therefore, it is imperative that the courts deal with these issues as they arise, so that the reach of long-arm statutes in conjunction with foreign judgments can evolve to deal with the effect of litigation in the global community on the local level.

Sara Cross

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59. *See* Eric J, MacCarth, Comment, *Networking in Cyberspace: Electronic Defamation and the Potential for International Forum Shopping*, 16 U. PA. J. INT'L BUS. L. 527, 552–55 (1995) (stating that the strict liability standard in British defamation law is a much easier standard to meet for the plaintiff, because there is a presumption that the defamatory statements are false and damaging, leaving the defendants to prove otherwise).

Fed'n Internationale de Football Assoc. v. Eatery Ltd.

[2007] H.K.E.C. 1478 (C.F.I.)

The Court of the First Instance of the High Court of Hong Kong affirmed that Hong Kong's Copyright Ordinance contains a procedural shortcut easing requirements for a copyright owner or exclusive licensee to prove the existence and ownership of a copyright.

I. Holding

In *Fed'n Internationale de Football Association*,[1] the Hong Kong Court of First Instance dismissed the defendant Eatery Ltd.'s appeal of the dismissal of three summonses to produce documents and for further and better particulars. The court held that, pursuant to § 112 of the Copyright Ordinance of Hong Kong (the "Copyright Ordinance"),[2] the exclusive licensee of a copyright is entitled to the same rights and remedies as the owner of that copyright, including § 121 of the same ordinance, which provides a streamlined procedure for proof of the owner's rights.[3]

II. Facts and Procedural History

Plaintiff Federation Internationale de Football Association ("FIFA"), the owner of the copyright in the broadcast of the 2006 FIFA World Cup ("Broadcast"),[4] filed an action for copyright infringement against the defendant Eatery Ltd. ("Eatery") for showing the Broadcast in several bars and eateries in Wanchai, Hong Kong, without securing a license to do so[5] and with Eatery being fully aware of FIFA's ownership of the copyright.[6] This action is one of five commenced by plaintiff FIFA against different defendants in cases involving similar facts and legal issues.[7]

FIFA granted the exclusive right to broadcast the 2006 FIFA World Cup in certain territories, including Hong Kong, to Sporis Holding AG ("Sporis"), a Swiss company.[8] Infront WM GmbH ("Infront"), also a Swiss company, acquired those rights from Sporis and later

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1. Fed'n Internationale de Football Assoc. v. Eatery Ltd. [2007] H.K.E.C. 1478 (C.F.I.).
2. Copyright Ordinance of Hong Kong, (1997) § 112 Cap.528 (H.K.).
3. [2007] H.K.E.C. 1478 (C.F.I.) at ¶ 29; *see also* Copyright Ordinance of Hong Kong, (1997) § 121 Cap.528 (H.K.).
4. *Id*. at ¶ 3.
5. *Id.* Plaintiffs allege that defendant intercepted the Broadcast by the South African company MultiChoice Africa Ltd. using "unauthorized devices." *Id*. at ¶ 3, 9.
6. *Id*. at ¶ 10.
7. *Id*. at ¶ 2. The summonses issued in this action are being treated by the parties as "test cases" for the four similar actions.
8. *Id*. at ¶ 6. The original answer referenced an agreement between FIFA and InFront WM AG, but the amended answer replaced InFront WM AG with Sporis Holding AG. *Id.* at ¶ 6, 12.

transferred the Hong Kong broadcast rights to the second plaintiff (Second Plaintiff).[9] At the date of the Broadcast, Second Plaintiff was the exclusive licensee of the Broadcast in Hong Kong.[10]

After the commencement of the suit, defendant issued several summonses,[11] all made pursuant to the Hong Kong Rules of the High Court,[12] resulting in the lower court's ordering the plaintiffs to provide further and better particulars of the plaintiffs' Statement of the Case.[13] Unsatisfied with the plaintiffs' subsequent answer, the defendant issued three additional summonses, which are at issue in the case. These summonses are as follows: (1) that unless the plaintiffs answer the defendant's request for further and better particulars concerning Infront's acquisition of the Broadcast rights from Sporis,[14] the plaintiff's action be "struck out" (Unless Order Summons);[15] (2) plaintiffs must provide an unredacted copy of the exclusive license for the broadcast of the 2006 FIFA World Cup entered between Infront WM GmbH and Second Plaintiff in the territory of Hong Kong (Production Summons);[16] and (3) plaintiffs must provide further and better particulars of paragraph 2 of the Amended Statement of Claim (Second FBP Summons).[17]

The parties subsequently exchanged affidavits in which the plaintiffs provided both an affirmation made by David Murray, a representative of the plaintiffs, confirming the ownership of its rights to the broadcast and explaining the chain of license holders, and a redacted copy of the agreement between Infront and Second Plaintiff.[18] The redacted agreement confirmed the Second Plaintiff as the exclusive license holder in Hong Kong for the Broadcast.

Challenges to the three summonses were heard by the master on May 31, 2007, and were promptly dismissed. Defendant appealed the dismissal of the summonses.[19] Plaintiffs asserted that pursuant to § 121 of the Copyright Ordinance,[20] available to the plaintiffs by virtue of § 112 of the same ordinance,[21] the defendant's requests for further and better particulars had been properly answered by the affirmation by David Murray, and the production of

9. *Id.* at ¶ 7.

10. *Id.*

11. *Id.* at ¶ 12, 13. These summonses included the request to inspect the agreement between the Plaintiff and Sporis and the Request for Further and Better Particulars of the Plaintiff's Statement of the Case.

12. HKCP RHC.

13. *Id.* at ¶ 15–16.

14. [2007] H.K.E.C. 1478 (C.F.I.) at ¶ 32.

15. *Id.* at ¶ 1, 18.

16. *Id.* at ¶ 1, 19.

17. *Id.* at ¶ 1, 20. Paragraph 2 of the Amended Statement of Claim alleged that FIFA granted the exclusive right to broadcast the 2006 FIFA World Cup in certain non-European territories, including Hong Kong, to Sporis; and that Infront WM GmbH acquired that right from Sporis. *Id.* at ¶ 6.

18. *Id.* at ¶ 16.

19. *Id.* at ¶ 17.

20. Copyright Ordinance of Hong Kong, (1997) § 121 Cap.528 (H.K.).

21. *Id.*

the unredacted copy of the license agreement would be irrelevant and unnecessary.[22] It was defendant's contention that § 121 of the Copyright Ordinance is inapplicable to exclusive licensees, by virtue of § 112 or otherwise, and therefore plaintiffs' answers to the summonses were insufficient.[23]

III. The Court's Decision

A. Statutory Construction of the Copyright Ordinance Sections

Given the preceding facts, the court was left to determine not how § 121 of the Copyright Ordinance operates, but whether the procedural convenience it provides to the copyright owner is equally available to an exclusive licensee through application of § 112, and, in light of that answer, whether the dismissal of the defendant's summonses was appropriate.

Section 121 of the Copyright Ordinance[24] concerns the use of affidavit evidence in a lawsuit and provides a shortcut to the copyright owner in proving ownership of the copyright.[25] It states that an affidavit claiming ownership in a copyright that has been made by or on behalf of a copyright owner, such as FIFA, shall be admitted and is presumed to be true as long as it states several things, including both that "copyright subsists in the work," and that the "copy of the work exhibited to the affidavit is a true copy of the work."[26] This allows a copyright owner

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22. [2007] H.K.E.C. 1478 (C.F.I.) at ¶ 18–20.

23. *Id*. at ¶ 22.

24. Copyright Ordinance of Hong Kong, (1997) § 121 Cap.528 (H.K.).

The Copyright Ordinance provides:

(1) For the purpose of facilitating the proof of subsistence and ownership of copyright, . . . an affidavit which purports to have been made by or on behalf of the copyright owner of a copyright work and which states—

(a) the date and place that the work was made or first published;

(b) the name of the author of the work; (Replaced 15 of 2007 s. 36) . . .

(bb) where the author of the work is a body corporate—

(i) the place of incorporation of the author; or

(ii) the principal place of business of the author; (Added 15 of 2007 s. 36)

(c) the name of the copyright owner; (Amended 15 of 2007 s. 36)

(d) that copyright subsists in the work; and

(e) that a copy of the work exhibited to the affidavit is a true copy of the work,

shall, subject to the conditions contained in subsection (4), be admitted without further proof in any proceedings under this Ordinance . . .

(3) The court before whom an affidavit which complies with the conditions in subsection (4) is produced under subsection (1), (2), (2A), (2B), (2C) or * [(2D)] shall presume, in the absence of evidence to the contrary—(Amended 15 of 2007 s. 36)

(a) that the statements made in the affidavit are true; and

(b) that it was made and authenticated in accordance with subsection (4).

25. *Id*.

26. *Id*.

to prove its ownership in the copyright without having to having to show how it created or acquired ownership.[27] It is by virtue of this section that the plaintiffs claimed their answer to the summonses, including David Murray's affirmation and the submission of the redacted license agreement, which complied with the requirements of § 121, was sufficient.

Section 112 of the Copyright Ordinance states that an exclusive licensee has "the same rights and remedies . . . as if the licence had been an assignment."[28] Additionally, it provides that those rights and remedies are "concurrent with those of the copyright owner" and that "references in relevant provisions of this Part to the copyright owner shall be construed accordingly."[29] Although § 121 on its face affords its procedural shortcut only to copyright owners, § 112 purports to expand this. Through § 112, an exclusive licensee is put in the same position as if it were an assignee from the owner.[30] According to the court,

> [a]s against a third party, there is no distinction between original ownership and ownership by assignment. If section 121 permits an owner to prove ownership and subsistence by affidavit without having to prove how he created or acquired ownership, including production of the assignment if it was acquired by assignment, there is no reason why the exclusive licensee should be required to produce his licence.[31]

In this appeal, defendant argues that the § 112 grant of rights and remedies relates only to those in the first limb of the statute (§§ 107 to 111), making § 121 inapplicable to exclusive licensees such as Second Plaintiff,[32] but the broad language of the statute precludes this from being the case. Section 112 explicitly grants rights and remedies existing in relevant provisions of "this Part" of the ordinance; §§ 112 and 121 are both situated in Part II of the Copyright Ordinance.[33] Furthermore, both sections are situated in Division VI of the ordinance, entitled "Remedies for Infringement."[34] The court held that the statutory construction, granting "relevant provisions of this Part," instead of stricter language such as "sections 107 to 111" or "relevant provisions of this sub-Division" precluded defendant's view and granted an exclusive licensee the rights and remedies available to the copyright owner in *all* relevant provisions of that Part, including those in § 121.[35]

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27. [2007] H.K.E.C. 1478 (C.F.I.) at ¶ 28.

28. HKO Cap.528 s.112.

29. *Id*.

30. [2007] H.K.E.C. 1478 (C.F.I.) at ¶ 28.

31. *Id.* The court stated, "Furthermore, if the exclusive assignee has to prove his status as an exclusive licensee, he would have to produce not only the written licence and copyright subsistence, but also proof of copyright ownership in the licensor and all intermediate licensors/licensees whose co-operation may not always be readily available. This is one of the difficulties which section 121 seeks to avoid."

32. *Id.* at ¶ 25.

33. HKO Cap.528.

34. *Id*.

35. [2007] H.K.E.C. 1478 (C.F.I.) at ¶ 29. The court reasoned that "[a] statute must be construed as a whole. Section 112(1) gives an exclusive licensee the same rights and remedies as if the licence had been an assignment. Thus, the subsection effectively puts an exclusive licensee into the shoes of the copyright owner." *Id.* at ¶ 27.

B. The Issues: Review of the Three Summonses

1. The Unless Order Summons

The court next addressed the issue of the defendant's summons requesting further and better particulars regarding the grant of the exclusive license of the Broadcast from Sporis to Infront. As a general rule, the court stated that although the plaintiffs may be assisted by § 121 of the Copyright Ordinance, they bear the legal burden of proof in proving their ownership and subsequent licensing of the Broadcast.[36] Once the requisite facts are pleaded, § 121 creates a presumption of validity, which may then be rebutted by the defendant.[37] In their answer, the plaintiffs informed the defendant that they were relying on David Murray's affirmation[38] as evidence of the facts that FIFA is the copyright owner, that the exclusive licensing rights passed from FIFA to Sporis to Infront and lastly to Second Plaintiff, and that this made Second Plaintiff the exclusive licensee in Hong Kong, giving it the same rights and remedies that were available to FIFA.[39] In light of this view, the court held that the answer given by the plaintiffs was "to the point and sufficient."[40]

It had been defendant's belief that because of the principles laid out in the Hong Kong Rules of Civil Procedure 2007, which provided that the pleadings had to contain all material facts that were to be relied upon at trial,[41] not having access to the particulars of the license agreement would impair their case, leading to possible surprises at trial.[42] The court held that although the plaintiffs' answer did not address all of defendant's questions specifically, it gave more than sufficient information regarding the ownership and licensing of the Broadcast for the defendant to prepare a defense.[43] Additionally, it stated that it was up to the plaintiffs to decide their method of pleading the case and proving it at trial; if the plaintiffs determined that their pleadings were particularized enough to serve their ends, the defendant could not force upon them a duty to prove irrelevant facts.[44] The court upheld the master's decision and dis-

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36. *Id*. at ¶ 35.

37. *Id*.

38. *Id*. at ¶ 32. The affirmation stated in part that:

> 4. The author of the Broadcasts is Host Broadcasting Services AG ("HBS"), a company incorporated under the laws of Switzerland . . .
>
> 5. Copyright has subsisted in the Broadcasts from the dates they were created to the date herein and at all material times, FIFA is and was the copyright owner of the Broadcasts. . . .
>
> 6. FIFA granted the exclusive right to broadcast the Broadcasts in certain non-European territories including Hong Kong by any form of radio or television signals, live or deferred, for private or public viewing to Sporis Holding AG of Markstrasse 10, CH-6060 Samen, Switzerland. Infront WM GmbH acquired such right from Sporis Holding AG.

39. *Id*. at ¶ 38.

40. *Id*. at ¶ 44.

41. HKCP at ¶ 18/7/7.

42. [2007] H.K.E.C. 1478 (C.F.I.) at ¶ 36.

43. *Id*.

44. *Id*.

missed the appeal, holding that the Unless Order Summons was inappropriate, and the plaintiffs' answer had been sufficient.[45]

2. The Production Summons

In the face of the production of a redacted copy of the exclusive license of the Broadcast between Infront WM GmbH and Second Plaintiff in the territory of Hong Kong and an affirmation by the plaintiffs' general counsel that the redacted parts of the license were irrelevant, the defendant requested the production of an unredacted copy of the agreement.[46] The defendant claimed that once an agreement is deemed relevant, it must be available in its entirety to both parties to a case—a party should not be faced with a document in court without having access to it in its entirety, and it is up to the refusing party to prove why this should not be the case.[47] The court made it clear, however, that pursuant to the English case *GE Capital Corporate Finance Group Ltd v. Bankers Trust Co.*,[48] a party does not have to disclose parts of a document that are irrelevant.[49]

Additionally, the court stated the affirmation of the plaintiffs' general counsel, confirming the irrelevancy of the redacted portion of the license, was prima facie conclusive unless the court decided that his affirmation did not truly state the position.[50] In this case, the court decided that the redacted agreement fully supported the Second Plaintiff's claim to an exclusive right to the Broadcast in Hong Kong and that there was nothing in the pleadings, affirmations, exhibits, or disclosed documents to suggest otherwise.[51] The court held the affirmation of the plaintiffs' counsel was conclusive, and the redacted agreement contained all relevant provisions; and it dismissed the defendant's appeal with respect to this summons.[52]

3. The Second FBP Summons

The second summons for further and better particulars, this time in respect to the license between FIFA and Sporis Holding AG, was decided by the court without further analysis because of its similarity to the first summons.[53] The issues and facts surrounding both summonses are identical and so consequently was the court's holding.[54] The court dismissed the

45. *Id.* at ¶ 45.

46. *Id.* at ¶ 46.

47. *Id.*

48. [1995] 1 WLR 172. The *GE Capital* court stated, "It has long been the practice that a party is entitled to seal up or cover up parts of a document which he claims to be irrelevant."

49. [2007] H.K.E.C. 1478 (C.F.I.) at ¶ 48.

50. *Id.* (quoting Jones v. Andrews (1888) 58 LT 601, 604). In *Jones,* the court stated that the affirmation of the party giving discovery is conclusive, "unless the court can be satisfied—not on a conflict of affidavits, but either from the documents produced or from anything in the affidavit made by the defendant, or by any admission by him in the pleadings, or necessarily from the circumstances of the case—that the affidavit does not truly state that which it ought to state."

51. *Id.* at ¶ 53.

52. *Id.*

53. *Id.* at ¶ 55.

54. *Id.*

defendant's appeal in respect to this summons, holding that the plaintiffs' affidavit containing the David Murray affirmation was sufficient, and that the affidavit in conjunction with § 121 of the Copyright Ordinance created a presumption of validity in favor of the plaintiffs.[55]

IV. Conclusion

The Court of the First Instance held § 112 gives the exclusive licensee of a copyright the same rights and remedies as the copyright owner, including the defenses available in § 121. Although the burden remained on the plaintiffs to prove copyright ownership and the existence of the exclusive licenses, § 121 provided a shortcut to that burden, allowing them to conceal substantial portions of the licenses.

The wide scope of § 121 has been interpreted by various Hong Kong courts in recent years, and these courts have taken a very liberal view of its interpretation. In *HKSAR v. Ho Hon Chun*,[56] against the defendant's arguments that a § 121 affirmation had to include the basis of the statement that the party was the owner of the copyright in a work and that copyright existed in that work,[57] the court held that only the statement of copyright ownership and existence in the work was required in the affirmation and nothing beyond that.[58] The court held that, according to the Interpretation and General Clauses Ordinance, "[a]n Ordinance shall . . . receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit";[59] because the intent of § 121 was to provide a shortcut in proving copyright ownership, the court held that it would interpret the Ordinance liberally in order to fulfill that purpose.[60]

Additionally, Hong Kong courts have recently gone even further in widening the scope of the statute, holding that the deponent of the affirmation's personal knowledge of the copyright or its ownership is not required for a valid affirmation; this effectively validated the use of hearsay evidence in § 121 affirmations. In *Tse Mui Chun v. HKSAR*,[61] several deponents for the plaintiff made affirmations concerning the ownership of the copyright at issue, admitting that they had no personal knowledge of the copyright ownership and only were repeating what the plaintiff had told them.[62] Nonetheless, through a literal reading of the Copyright Ordinance, the court held that this hearsay evidence was admissible.[63] To justify this decision, the court stated that if true disputes of copyright ownership were to arise, additional evidence could be introduced, but in the absence of evidence otherwise, the plaintiff's affirmation of ownership stands.[64] The purpose of § 121 was to provide a shortcut to copyright owners in proving their

55. *Id.*

56. [2002] H.K.E.C. 230 (C.A.).

57. *Id.* at ¶ 18.

58. *Id.* at ¶ 21.

59. HKO Cap.1 s.19.

60. HKSAR v. Ho Hon Chun [2002] H.K.E.C. 230 (C.A.) at ¶ 20.

61. Tse Mui Chun v. HKSAR [2003] H.K.E.C. 1504 (C.F.A.).

62. *Id.* at ¶ 21.

63. *Id.* at ¶ 21–22.

64. *Id.*

ownership (because, in the majority of Hong Kong cases, ownership has not been an issue).[65] If the defendant met the burden and introduced evidence that the ownership of the copyright lay elsewhere, then it would be up to the court to determine the true copyright owner.

Given the wide scope of the § 121 shortcut, the current court's ruling has given the exclusive licensees of a copyright substantial leeway in proving their exclusive license and the owner's ownership in the copyright. In a recent case in the Hong Kong Court of the First Instance, the court differentiated an exclusive licensee and a nonexclusive licensee, making it clear that the benefits of § 121 are conferred, through virtue of section § 112, upon only the former.[66] In matters of contract law, it is important that exclusive licensees have been given some of the same rights and remedies as copyright owners, because in their territory, they have the exclusive rights, and they will likely be the parties bringing suit for copyright infringement in those territories. Allowing copyright owners and exclusive licensees this shortcut avoids delaying tactics, as in the present case, when there was no real dispute as to the copyright ownership, and the defendant was likely attempting to delay the court's ruling. The § 121 affirmation allows parties to bypass the lengthy process of proving copyright ownership in cases where it is not a legitimate issue, and this court correctly extended that power to exclusive licensees by the use of § 112.

Peter Bienkowski

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65. *Id*. at ¶ 17.

66. Liao Fu Pin v. Ad-Magnetics Co. Ltd. [2007] H.K.E.C. 779 (C.F.I) (holding the plaintiff's section 121 affirmation inadmissible because, although the plaintiff was a valid licensee, it was not an exclusive licensee to the exclusion of other parties).

Häupl v. Lidl Stiftung & Co. KG

Case C-246/05, 2007 E.C.R. 0000 (June 14, 2007)

In an action to cancel an internationally registered trademark for non-use, the Court of Justice for European Communities interpreted the First Council Directive 89/104/EEC, to allow EEC member states to set their own procedures for trademark registration and define "proper reason for non-use."

I. Holding

In *Häupl v. Lidl Stiftung & Co. KG*,[1] the Court of Justice of the European Communities interpreted Council Directive 89/104/EEC, dated December 21, 1988 (the "Directive")[2] to approximate the laws of the member states relating to trademarks. It held: (1) Article 10(1) of the Directive is to be interpreted according to the procedural rules on registration that each member state sets forth, and (2) "proper reasons for non-use" under Article 12(1) is to be interpreted to include only those obstacles that have a direct relationship with a trademark that would make its use impossible or unreasonable and that are independent of the will of the proprietor of the mark.

II. Facts and Procedural Posture

A. Facts and Key Issues

Lidl Stiftung & Co. KG ("Lidl"), a German supermarket chain, registered the word and figurative mark of "Le Chef DE CUISINE" in Germany on July 8, 1998. The mark also was registered in Austria, where it was considered protected from October 12, 1993.[3] On December 2, 1993, the International Bureau of the World Intellectual Property Organization published the mark and notified the designated contracting states.[4] Lidl used the mark on a line of ready-made meals sold in its German supermarkets.[5] Likewise, Lidl planned a similar use for the mark once it expanded its supermarket chain into Austria.[6]

On October 13, 1998, Häupl filed a petition with *Nichtigkeitsabteilung des Patentamtes* ("Cancellation Division of the Austrian Patent Office") (hereinafter the "Cancellation Divi-

1. Case C-246/05; Häupl v. Stiftung & Co. KG, 2007 E.C.R. 0000 (Jun. 14, 2007) (hereinafter, "*Häupl*").
2. 1989 O.J. (L 40) 1.
3. *Häupl* at ¶ 10.
4. The International Bureau notifies the relevant offices concerned upon receipt of the international registration. Additionally, marks registered in the International Register are published in a periodical gazette issued by the International Bureau on the basis of the particulars contained in the international application. Madrid Agreement Concerning International Registration of Marks, art. 3(4), Jun. 27, 1989, 583 U.N.T.S. 3 ("Madrid Agreement")
5. *Häupl* at ¶ 11.
6. *Id*.

sion") to have Lidl's mark canceled in the Republic of Austria[7] for non-use under Paragraph 33 of *Markenschutzgesetz*,[8] which declares a mark invalid in Austria if it has not been used within five years of the beginning of the protection period.

The first issue is to determine the date on which protection of Lidl's mark began in Austria. The Directive states that a trademark can be subject to sanctions if not put to genuine use within five years of the "date of completion of the registration procedure."[9] Lidl and Häupl disagreed with one another regarding the "date of completion." In Häupl's view, Lidl's mark would no longer be protected in Austria; whereas, in Lidl's view, it had used the mark within the proscribed time, and there was no inaction to be sanctioned.[10]

The second issue arose in response to an additional argument that Lidl asserted based on Article 12(1) of the Directive, which creates a carve-out that makes a trademark's non-use excusable.[11] Thus, the second issue the Court examined was whether or not Article 12(1) of the Directive was to be interpreted to mean that non-use based upon bureaucratic obstacles to the implementation of a business plan wherein the protected mark would be used constituted a proper reason for non-use.[12]

The Cancellation Division found in favor of Häupl and declared the mark was no longer protected in Austria as of October 12, 1998.[13] Lidl appealed to the *Oberster Patent-und Markensenat* ("Supreme Patent and Trademark Adjudication Tribunal") (hereinafter, the "Patent Tribunal"), which certified two questions to the Court of Justice of the European Communities ("Court of Justice"). The questions referred were (1) whether, under Article 10(1) of the Directive, "the date of the completion of the registration procedure" should be interpreted to refer to the start of the period of protection under Austrian law, or the date on which the examination procedure before the office responsible for that procedure is completed; and (2) what constitutes a "proper reason for non-use" under Article 12(1) of the Directive.[14]

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7. *Id*. at ¶ 12.

8. *Id*. at ¶ 8 quoting ¶ 33a(1) of *Markenschutzgesetz,* the Austrian national law on trademark protection, which states:

> Anyone may apply for the cancellation of a mark that has been registered in Austria for at least five years or that enjoys the protection in Austria pursuant to Paragraph 2(2), if that mark has not been put to genuine use in Austria in respect of the goods or services in respect of which it was registered (Paragraph 10a) either by the proprietor of the mark or, with his permission, by a third party within the five years preceding the day on which the application for cancellation was lodged, unless the proprietor of the mark can justify the non-use. BGBl.260/1970.

9. *Id*. at ¶ 3. *See also infra* note 21 for full text of Article 10(1) of the Directive.

10. *Id*. *See also* Part III.A for a more detailed discussion of the factual issues being contended in this case.

11. *Id*.

12. *Häupl* at ¶ 14(2).

13. *Id*. at ¶ 13.

14. *Id*. at ¶ 14.

B. Framework of Multinational Treaties and State Law

There are three main sources of multinational law governing this dispute: Directive 89/104,[15] the Madrid Agreement,[16] and the TRIPS Agreement.[17] Additionally, there will be limited discussion of *Markenschutzgesetz*, the Austrian Law regulating the protection of trademarks. *Markenschutzgesetz* provides that a trademark right arises on the day it is entered in the register of trademarks, and under Austrian law, that protection lasts for ten years after the month of registration.[18] Although the law at issue in this case is the European Economic Community ("EEC") law known as the Directive, this case requires an inquiry into the scope of the Directive and how the Directive interacts with, or is affected by, other multinational agreements as well as the law of Austria, the sovereign nation in which this dispute arose.

Directives of the EEC are acts undertaken to set forth the juridical bases and broad objectives for its members to achieve cooperative development.[19] Although Directive 89/104 became effective for its existing members on December 12, 1988, it did not become binding on Austria until Austria became a member in 1995.[20] The operation of Article 10(1)[21] and

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15. 1989 O.J. (L 40) 1–7.

16. Madrid Agreement Concerning the International Registration of Marks, art. 3(4), adopted on April 14, 1891, as amended on October 2, 1979, 828 U.N.T.S. 389; *see also* 2003/793/EC: Council Decision of October 27, 2003 (approving the accession of the European Community to the Protocol relating to the Madrid Agreement concerning the international registration of marks, adopted at Madrid on 27 June 1989).

17. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 19(1), Sept. 27, 1994, 1869 U.N.T.S. 299, Annex 1C (the "TRIPS Agreement").

18. *Häupl* at ¶ 7 quoting ¶ 19(1) of *Markenschutzgesetz*.

19. *See generally* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, Vol. 30, DEVELOPMENT CO-OPERATION REVIEW SERIES: EUROPEAN COMMUNITY 21 (1998).

20. 1989 O.J. (L 40) 1.

21. *Id*. at Article 10(1), 1989 O.J. (L 40) 1, which states in its entirety:

> 1. If, within a period of five years following the date of the completion of the registration procedure, the proprietor has not put the trade mark to genuine use in the Member State in connection with the goods or services in respect of which it is registered, or if such use has been suspended during an uninterrupted period of five years, the trade mark shall be subject to the sanctions provided for in this Directive, unless there are proper reasons for non-use.

Article 12(1)[22] of the Directive, which are the specific provisions being challenged by Häupl and Lidl, are called into question by Article 3(4) of the Madrid Agreement[23] which also binds many of the EEC member states, including Austria.[24] The texts of these two agreements seem to provide overlapping but dissimilar guidance on the issue at hand. The Madrid Agreement provides a more definitive date upon which a mark that is internationally registered is considered protected[25] whereas Article 10(1) of the Directive merely refers to the "date of completion of the registration" without defining the moment of time at which a registration is deemed "complete."

The TRIPS Agreement establishes standards for the protection of intellectual property and the enforcement of intellectual property rights in the World Trade Organization (WTO) member countries.[26] It requires that each WTO member country apply the substantive obligations of the world's various intellectual property agreements, such as the Madrid Agreement and the Directive, by supplementing those multinational agreements with substantial domestic protection to ensure that proper enforcement procedures will be available in each member country to protect intellectual property rights.[27] This case specifically addresses Article 19 of

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22. *Id*. at Article 12(1), 1989 O.J. (L 40) 1, which states in its entirety:

> 1. A trade mark shall be liable to revocation if, within a continuous period of five years, it has not been put to genuine use in the Member State in connection with the goods or services in respect of which it is registered, and there are no proper reasons for non-use; however, no person may claim that the proprietor's rights in a trade mark should be revoked where, during the interval between expiry of the five-year period and filing of the application for revocation, genuine use of the trade mark has been started or resumed; the commencement or resumption of use within a period of three months preceding the filing of the application for revocation which began at the earliest on expiry of the continuous period of five years of non-use, shall, however, be disregarded where preparations for the commencement or resumption occur only after the proprietor becomes aware that the application for revocation may be filed.

23. Madrid Agreement, art. 3(4) states:

> (4) The International Bureau shall register immediately the marks filed in accordance with Article 2. The international registration shall bear the date on which the international application was received in the Office of origin, provided that the international application has been received by the International Bureau within a period of two months from that date. If the international application has not been received within that period, the international registration shall bear the date on which the said international application was received by the International Bureau. The International Bureau shall notify the international registration without delay to the Offices concerned. Marks registered in the International Register shall be published in a periodical gazette issued by the International Bureau, on the basis of the particulars contained in the international application.

24. The date until which Lidl claims its protection extends, December 2, 1998, was based on the text of Article 3(4) of the Madrid Agreement, because December 2, 1993, was the date on which the International Bureau, created by the Madrid Agreement, notified the trademark offices of the other member states of the existence of Lidl's trademark. *See* note 23 for the full text of the relevant article of the Madrid Agreement.

25. The Madrid Agreement defines the date of international registration as the date upon which the application was received in the office of origin, provided that the International Bureau received the application within two months from that date. Alternatively, if the application was not received at the International Bureau within two months of receipt in the office of origin, then the date of international registration would be the date on which the application was actually received by the International Bureau. Madrid Agreement, art. 3(4).

26. TRIPS Agreement, art. 19(1).

27. *Id*.

the TRIPS Agreement and provides some insight for this Court into what constitutes "non-use."[28]

Markenschutzgesetz is applicable to this case only in that it defines the date of registration as the date of its entry into Austria's register of trademarks.[29] Under its own terms, *Markenschutzgesetz* was to apply analogously to internationally registered marks in Austria on the basis of international agreements.[30]

III. Discussion

A. Interpretation of Article 10(1): Date of Registration to Initiate the Period of Protection

The first question addressed by the Court of Justice was which date the registration could be considered completed under Article 10(1) of the Directive. Häupl contended that the date when protection began was on October 12, 1993 because that was the first day that Lidl's mark was considered protected and registered in Austria.[31] In contrast, Lidl contended that the period of protection actually began on December 2, 1993, the date on which the International Bureau published the mark and notified the contracting states, pursuant to the Madrid Agreement.[32] Lidl argued that because it was displaying the mark on goods for sale in its first Austrian supermarket as of December 2, 1998, his mark could not be canceled in Austria under Article 10(1) of the Directive for non-use.[33]

In determining how Article 10(1) of the Directive was to be interpreted, the Court noted that the provisions of both the Madrid Agreement, which sets forth the terms upon which marks can be registered with the International Bureau, and the community law, particularly the Directive, must apply.[34] Additionally, in interpreting Article 10(1), the Court gave a great deal of weight to the stated purpose of the Directive—particularly that the Directive was not meant to encompass the full extent of trademark law in its member states, and that member

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28. *Id*. Article 19 provides that an internationally registered mark may be canceled only after three years of non-use unless that nonuse is justified by the mark holder. Article 19 provides examples of valid reasons for non-use of an internationally registered trademark, including when import restrictions on or other government requirements for goods or services are protected by the trademark. Use of a trademark by another person is recognized as use of the trademark for the purpose of maintaining a registration, if such use is controlled by the trademark owner. *Id.*

29. *Häupl* at ¶ 7. Paragraph 19 of *Markenschutzgesetz* provides that, under Austrian law, trademark rights arise on the day the mark is entered in the register of trademarks.

30. *Id*. at ¶ 8.

31. *Id*. at ¶ 12. *See also supra* note 8 for the *Markenschutzgesetz* rule on non-use.

32. *Id*. *See also supra* note 24 for the full text of the Article of the Madrid Agreement relevant in this case. Additionally, it should be noted the Court points out that, according to the Commission of the European Communities, the words "date of completion of the registration procedure" refer to the date on which the examination procedure before the office responsible for that procedure is complete, not the date on which protection begins. *Häupl* at ¶ 24.

33. *Id.*

34. The Court also takes great care to point out that the Directive applies to every trade mark that is the subject of international registration given effect in a member state. *Häupl* at ¶ 25.

states remained free to set forth the procedural aspects of trademark registration.[35] The other factor the Court took into consideration was that Article 10(1) of the Directive did not define "date of the completion of the registration procedure" in unambiguous terms.[36]

Therefore, the Court found neither Häupl's argument based solely on *Markenschutzgesetz* nor Lidl's arguments based solely on the Madrid Agreement to be compelling.[37] One reason for the Court's rejection of Lidl's argument was its recognition that where there was "an international registration procedure under the Madrid Agreement, that procedure cannot be completed before the period within which the national authorities may make a provisional refusal of protection has expired or the protection has been confirmed once and for all by those authorities," thereby making international registration contingent upon the completion of local registration.[38] Thus, the Court concluded that because the Directive did not set forth procedural rules for international registration of trademarks, the proper way to determine when a mark was considered "registered" was to look to each member state's procedural rules and when the registration procedure was deemed complete in that particular member state.[39] On remand, the Court of Justice advised that the determination of the date referred to in Article 10(1) was varied and was to be determined on the basis of each member state's national trademark registration procedure.[40]

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35. 1989 O.J. (L 40) 1 at ¶ 5 in the preamble specifically states:

> Whereas Member States also remain free to fix the provisions of procedure concerning the registration, the revocation and the invalidity of trade marks acquired by registration; whereas they can, for example, determine the form of trade mark registration and invalidity procedures, decide whether earlier rights should be invoked either in the registration procedure or in the invalidity procedure or in both and, if they allow earlier rights to be invoked in the registration procedure, have an opposition procedure or an ex officio examination procedure or both; whereas Member States remain free to determine the effects of revocation or invalidity of trade marks. . . .

36. Notably, the Court pointed out that the beginning of the five-year period of protection was defined in terms of the procedural process of "registration," which by the terms of the Directive itself was left to each individual member state. *Häupl* at ¶ 27.

37. The errors in Häupl's and Lidl's arguments lie in the source of law that each follows. Häupl relies solely on Austrian law, which, in theory, is correct, but the paragraph of *Markenschutzgesetz* he relies on refers to the date from which trademarks rights arise—not the date on which Austrian law deems the registration of a trademark to be complete, which is the issue at hand. Under Austrian law, the date from which trademark rights arise and the date on which registration of a mark is deemed complete may or may not be the same, but the Court of Justice is not provided enough information about *Markenschutzgesetz* to draw this conclusion. Similarly, Lidl relies solely on the Madrid Agreement, which speaks only to when a trademark's registration is deemed completed for purposes of the International Bureau. This is certainly distinguishable from an international mark duly registered in the Republic of Austria. Because neither Paragraph 19 of *Markenschutzgesetz* nor Article 3(4) of the Madrid Agreement specifically states the date upon which the registration procedure is deemed completed in a member state, neither law can be used to determine the meaning of "date of completion of the registration procedure" as it is used in Article 10(1).

38. *Häupl* at ¶ 24.

39. *Id*. at ¶ 28–29.

40. *Id*. at ¶ 30–31.

B. Interpretation of Article 12(1): Proper Reasons for Nonuse of a Mark

Lidl made an alternate argument based on Article 12(1) that the trademark's non-use was excusable because of bureaucratic obstacles in obtaining operating licenses, or its non-use was excused by the terms of the Directive.[41] The opposing interpretation of Article 12(1), advanced by Häupl, was that Lidl was required to change his business plan in order to make proper use of his trademark before the five years was over, because a corporate strategy could never constitute proper grounds for excuse.[42]

On this issue, the Court had to consider a myriad of differing opinions as to what constituted proper non-use for the purposes of Article 12(1) of the Directive. The Austrian government took the view a proper reason for non-use existed when there was a delay in the implementation of a corporate strategy being pursued and that delay was caused by reasons, particularly legal or economic, outside the control of the trademark proprietor.[43] The Commission of European Communities took the view that there was no proper reason for non-use where the implementation of a corporation strategy, which was fully within a trademark holder's control, was delayed for reasons outside the trademark holder's control, but the trademark holder failed to undertake that corporate strategy in good time.[44] The French government took a narrower view by suggesting that the only proper reason for non-use is if the non-use arose independently of the will of the trademark proprietor, such as in cases of government restrictions or cases of force majeure.[45]

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41. *See supra* note 22 and accompanying text.
42. *Häupl* at ¶ 37.
43. *Id*. at ¶ 40.
44. *Id*. at ¶ 39.
45. *Id*. at ¶ 41.

The Court read certain sections of the preamble[46] to imply that because the major objective of the Directive and of the Council as Community legislator in enacting the Directive was to have uniform trademark rights within the EEC, the Court could supply uniform interpretation of terms of art used within the Directive. Some of these interpretations may be "non-use" and "genuine use" of trademarks in order to protect against varying levels of protection within the member states. The Court takes care to note also that Article 12(1) does not itself contain any indication of what may constitute a proper reason for non-use.[47] Thus, the Court looked to other multinational agreements to which Austria was a signatory to provide some guidance on what the EEC might have meant by a proper reason for non-use. Under Article 19(1) of the TRIPS Agreement, discussed above, circumstances that arise independently of the will of the owner of the trademark and constitute an obstacle to the use of the trademark are to be recognized as proper reasons for non-use.[48] To then define what is considered an "obstacle" under the Directive, the Court looked at the eighth recital in the preamble[49] and reasoned that because the Directive was attempting to reduce the number of total trademarks registered in the EEC by requiring that registered marks actually be used, a broad conception of "proper reasons for non-use of a mark" would be contrary to the scheme of Article 12(1).[50]

Therefore, the Court laid out the general standard to be used by all member states bound by the Directive and said that a proper reason for non-use under Article 12(1) was an obstacle having a direct relationship with a trademark that makes its use impossible or unreasonable and is independent of the will of the proprietor of the mark. The Court of Justice further advised that an obstacle that makes the use of the mark impossible would not necessarily need to have a "direct relationship" with the trademark, but the obstacle may be considered a hindrance when it makes the use of the mark unreasonable. As an example, the Court surmised that a valid rea-

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46. 1989 O.J. (L 40) 1 at ¶ 6,7, and 8 in the preamble, which state generally:

> (6) Whereas attainment of the objectives at which this approximation of laws is aiming requires that the conditions for obtaining and continuing to hold a registered trade mark are, in general, identical in all Member States; to that end, it is necessary to list examples of signs that constitute a trade make and such signs are to be listed in an exhaustive manner; whereas the Member States shall be able to introduce such measures into their own legislation and also introduce grounds of refusal or invalidity and conditions for obtaining and continuing to hold trade mark;
>
> (7) Whereas it is necessary to require that registered marks must actually be used or, if not used, subject to revocation in order to reduce the total number of trade marks registered and protected in the Community and, consequently, the number of conflicts which arise between them; whereas in all these cases it is up to the Member States to establish the applicable rules of procedure so long as Member States agree to abide by the principle that a trade mark may not be invalidated on the basis of the existence of a non-used earlier trademark ;
>
> (8) Whereas it is fundamental, in order to facilitate the free circulation of goods and services, to ensure that henceforth registered trade marks enjoy the same protection under the legal systems of all the Member States; whereas this should however not prevent the Member States from granting at their option extensive protection to those trade marks which have a reputation;

47. *Häupl* at ¶ 47.

48. *Id*. at ¶ 49.

49. *See supra* note 45 ¶ 2.

50. *Häupl* at ¶ 51.

son for non-use existed where the obstacle at issue would jeopardize the appropriate use of a trademark—such as requiring the holder of a registered mark to sell its goods in the retail stores of its competitors.[51] Therefore, the Court of Justice remanded the case to the Austrian national court for consideration of the facts presented in light of its answers to the certified questions and advised that future questions of non-use be evaluated on a case-by-case basis in light of the general standard announced by this Court.

IV. Conclusion

The holding of the Court of Justice in this case shows how multinational agreements that are entered into for the sake of creating uniform rights and uniform enforcement of those rights can lead to the exact opposite of uniformity: inconsistency. The effect of the Court's holding with regard to the interpretation of Article 10(1) makes the "date of completion of registration" different from one member state to the next, depending upon each member state's specific registration procedure. Thus, a single mark registered in all 25 member states of the Directive may have up to 25 different overlapping periods of protection in each state in which it is registered. It is certainly not the role of the Court to set forth a uniform date across all the member states upon which registration of a trademark is considered complete. However, if the objective of Directive 89/104[52] is to provide uniform protections for intellectual property across all the EEC member states, that objective may be better served if the EEC amended the Directive to set a uniform date upon which registration would be considered complete.

The Court's interpretation of Article 12(1) in the second question, while purporting to create a single standard across all member states for evaluating what constitutes a valid reason for non-use, leaves it to the discretion of the national court of each member state to analyze the facts related to a trademark that the particular national court believes are independent of the will of the proprietor of that mark. Although it would be a waste of judicial resources to suggest that the Court of Justice adjudicate all cases that arise in any of the numerous member states regarding obstacles that constitute valid reasons for non-use under Directive 89/104, the national courts could achieve more consistent results with more guidance. It seems that greater consistency in adjudication and uniformity of trademark rights could be achieved if the Court of Justice provided a list of factors for each national court to consider in such cases.

Shirley T. Cheng

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51. *Id*. at ¶ 53. In such cases, the Court suggested that requiring a proprietor of a trademark to change its corporate strategy in order to make use of that trademark possible was not reasonable.

52. 1989 O.J. (L 40) 1.

Řízení Letevého Provozu ČR, s.p. v. Bundesamt für Finanzen

Case C-335/05, Řízení Letevého Provozu ČR, s.p. v. Bundesamt für Finanzen, 2007 E.C.R. 00000 (June 7, 2007)

The Court of Justice of the European Communities interpreted Article 2(2) of the Thirteenth Council Directive 86/560/ECC to deny Řízení Letevého Provozu ČR its German VAT tax refund and allow, but not require, European Union members to give a third state a comparable advantage regarding turnover taxes.

I. Holding

In *Řízení Letevého Provozu ČR, s.p. v. Bundesamt für Finanzen*,[1] the Court of Justice of the European Communities was asked to make a preliminary ruling by a German national court (the Finanzgericht Köln) on the interpretation of secondary community and national legislation with respect to international agreements.[2] It ruled that Article 2(2) of the Thirteenth Council Directive 86/560/ECC of November 17, 1986,[3] must be interpreted as meaning that (1) the term "Third States"[4] means all third states and not just those who cannot invoke the most-favored-nations clause, and (2) that, regardless of this provision, member states are required to comply with their obligations under international agreements, such as the General Agreement on Trade in Services ("GATS").[5]

II. Facts and Procedure

Řízení Letevého Provozu ČR, s.p. ("LP"), a Czech corporation specializing in the flight security sector,[6] brought suit against the Bundesamt für Finanzen ("Federal Financial Office") before the Finanzgericht Köln (Financial Court at Cologne).[7] LP claimed that the Federal

1. Case C-335/05, Řízení Letevého Provozu ČR, s.p. v. Bundesamt für Finanzen, 2007 E.C.R. 00000 (June 7, 2007) ("*LP*").

2. *Id*. at ¶ 1.

3. Thirteenth Council Directive of November 17, 1986, on the harmonization of the laws of the member states relating to turnover taxes: arrangements for the refund of value-added tax to taxable persons not established in Community territory (86/560/EEC) 1986 O.J. (L 326) 40-41.

4. *See* Rita Heimes, *Internet Privacy Law, Policy, and Practice: State, Federal, and International Perspectives*, 54 ME. L. REV. 95, 101 (2002) (defining that, generally, other countries that are nonmembers of the European Union are called third states with respect to European Union case law and agreements).

5. *LP* at ¶ 21. *See* 1994 O.J. (L 336) 191. GATS is an international agreement that was signed at the Uruguay Round of Multilateral Trade Negotiations by the European Union in December 1994. LP ¶ 3. *See generally* Gary Hufbauer & Sherry Stephenson, *Services Trade: Past Liberalization and Future Challenges*, 10 J. INT'L ECON. L. 605, 612–15 (2007) (discussing the application of GATS in international trade).

6. *LP* at ¶ 8 (indicating that according to the record, LP's activities were restricted to the Czech Republic).

7. *Id*. at ¶ 10. LP had to bring the action as a third state because the Czech Republic was not a member of the European Union at the time. *Czech Republic—The Official Website*, http://www.czech.cz/en/czech-republic/history/the-czech-republics-accession-to-the-european-union/, at ¶ 4. The Czech Republic became an EU member May 1, 2004. *Id*.

Financial Office wrongfully rejected its value-added tax ("VAT")[8] refund application and its objection to that same rejection under paragraph 18(9)[9] of the Umsatzsteuergesetz of 1999 ("UStG").[10]

The Federal Financial Office rejected LP's application for a VAT refund on the basis that the statutory conditions for a tax credit were not met.[11] These conditions that enable a person not established in Community territory to receive a VAT refund based on § 18(9) UStG require the person to show either (1) no turnover tax or similar tax in the country in which the person has a place of business; or (2) if the tax is levied, that the input tax is credited to undertakings established in German territory ("the reciprocity requirement").[12]

LP, according to the Federal Financial Office, was not entitled to the VAT refund applying either prong of the test.[13] First, and more particularly, the Czech Republic levied a turnover tax[14] but did not provide for the deduction of input tax[15] paid or for the refund of an input tax for foreign traders.[16] Second, because LP's actions were restricted to the Czech Republic, it could not claim that its undertakings were established in German territory.[17] LP objected to the denial of the tax credit but the objection was also denied by the Federal Financial Office.[18]

LP appealed the action to the Financial Court at Cologne on the ground that Article II(1) of GATS[19] is exclusively applicable to this scenario, and, therefore, on that basis it should be granted the VAT refund.[20] The Financial Court then referred the case to the European Court

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8. *See* BLACK'S LAW DICTIONARY 704 (8th ed. 2004) (defining VAT as a tax that is assessed at each step of the production process based on the value added to these steps, a value that is determined by subtracting the production cost of the commodity from the selling price. Because European countries often trade with each other, the VAT is required by the European Union); *see generally* Mark F. Kightlinger, *A Solution to the Yahoo! Problem? The EC E-Commerce Directive as a Model for International Cooperation of Internet Choice Law*, 24 MICH. J. INT'L L. 719, 725 (2003) (noting that e-commerce services based in the EU are required to charge a VAT on all transactions).

9. Case C-335/05, Řízení Letevého Provozu ČR, s.p. v. Bundesamt füur Finanzen, 2007 E.C.R. at 2.

10. *Id*.

11. *Id*. at ¶ 9.

12. *Id*. at ¶ 7.

13. *Id*. at ¶ 9.

14. *See* 2 *Eckstrom's Licensing* in FOR. & DOM. OPS. § 10:9 ¶ 8 (2007) (defining a turnover tax as a noncreditable tax that is generally similar to a VAT but sometimes is cascading).

15. *See European Commission, Taxation and Custom Unions*, http://ec.europa.eu/taxation_customs/taxation/vat/traders/e-commerce/article_1610_en.htm#18recoverinput (defining input taxes as taxes on the supply that a business receives); *see also Czech Republic Chapter 22 Value-added tax*, http://e-fpo.fpo.go.th/e-fiscal/PWGuides/individualguides/DOCS/wcd00012/wcd01288.htm (defining an input tax as a VAT incurred upon the acquisition of supplies that are used for business purposes).

16. *Id*. at ¶¶ 10–11.

17. *LP* at ¶ 8. The Federal Financial Office ruled that LP did not satisfy this requirement even though the recipients of its activities included Germans and it had a flight simulator in Germany and other training courses in Germany. *Id*. Germany imposed a VAT on the services provided above. *Id*.

18. *Id*. at ¶ 10.

19. See *id*. at ¶ 12 (describing Article II(1) of GATS as the "most-favored-nations clause").

20. *LP* at ¶ 10.

of Justice for preliminary rulings on the interpretation of Article 2(2) of the Thirteenth Directive and whether Article 2(2) trumps § 18(9) UStG.[21]

III. The Court's Discussion

A. Relevant International Agreement, Community Legislation, and National Legislation

The Court first analyzed the legal framework of the decision, which consists of international agreements such as GATS; secondary community legislation such as Article 2(2) of the Thirteenth Directive; and national legislation of the member states.[22]

Article II(1) of GATS provides that "each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country."[23] This international agreement establishes that European Union member states must provide service suppliers of other GATS member states the same benefit of any negotiating concessions as they provide to any other state. According to the Court, this provision forms a vital part of the Community legal order, and secondary Community law must be interpreted, insofar as possible, in conformity to it.[24] The most-favored-nation clause, therefore, must be taken into account when analyzing the compatibility of Article 2(2) of the Thirteenth Directive with the UStG.[25]

Article 2(2) of the Thirteenth Directive provides that "Member States may make the [VAT] refunds . . . conditional upon the granting by third States of comparable advantages regarding the turnover taxes"[26] and is the secondary community legislation applicable to European Union members. The Court analyzed this with respect to § 18(9) UStG, a German law that provides a two-prong standard for allowing a trader of a nonmember state to receive a refund for an imposed VAT.[27]

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21. *Id*. at ¶ 13.

22. *Id*. at ¶¶ 3–7.

23. *Id*. at ¶ 4. *See* 1994 O.J. (L 336) 191 (indicating that it is the Council decision by which the EU itself became a party to the GATS).

24. *LP* at ¶ 16.

25. *Id*. *See* Case C-311/04, Algemene Scheeps Agentuur Dordrecht BV v. Inspecteur der Belastingdienst, 2006 E.C.R. I 609, ¶ 25 (indicating that the Community concludes that the primacy of international agreements over secondary Community legislation requires the latter to be interpreted in accord with the former); *see also* Case C-286/02, Bellio F.lli Srl v. Prefettura di Treviso, 2004 E.C.R. I-3465 ¶ 33 (reiterating that the court has held that the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements).

26. *LP* at ¶ 14; *see* 1986 O.J. (L 326) 40.

27. *See LP* at ¶ 7. The two-part standard is the test applied by the Federal Financial Office. This test considered that a trader not established in the territory of the Community will be credited with input tax (1) only if no turnover tax or similar tax is levied in the country in which the trader has his place of business; or (2) if the taxes are levied, only if the taxes are credited to undertakings established in German territory. *Id*.

B. The Question of Preliminary Ruling

The Court then turned to the interpretation of Article 2(2) of the Thirteenth Directive.[28] It noted that the consistent meaning of "third States" throughout the directive is all third states without any distinction, as opposed to just those third states who may not invoke the most-favored-nation clause.[29] Although there is an obligation to read secondary Community law in light of Article II(1), there is no requirement that "third States" be interpreted restrictively.[30]

The Court found it sufficient to note, however, that Article 2(2) of the Thirteenth Directive merely makes it an option, as opposed to an obligation, to give a third state a comparable advantage regarding turnover taxes.[31] It allows member states the freedom to decide whether it would be proper or not to impose a condition of reciprocity.[32] According to the Court, Article 2(2) allows member states discretionary leniency when entering into agreements with certain third states and to adapt the legislation accordingly.[33]

The Court did limit this discretion:[34] the member states have a responsibility "to comply with their obligations under international agreements such as GATS."[35]

IV. Conclusion

The Court ruled that "third States," as used in Article 2(2) of the Thirteenth Directive, means all third states, not just those who may not invoke the most-favored-nation clause, and that member states must still comply with their commitments under international agreements.[36] This ruling effectively denies LP its VAT refund. Had the Court ruled that the phrase "third States" meant just those states who may not invoke the most-favored-nation clause, LP might have recovered its refund.

Moreover, this decision affects many more traders than merely LP. [37] This seeming limitation upon the most-favored-nation clause may allow for discrimination on the grounds of nationality.[38] It is inevitable that "violations of the equal treatment principles generate tax obstacles to cross-border economic activity in the Internal Market."[39]

Kristopher Olin

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28. *Id*. at ¶ 13
29. *LP* at ¶ 15.
30. *Id*. at ¶ 19.
31. *Id*. at ¶ 17.
32. *Id*. at ¶ 18.
33. *Id*. at ¶ 18.
34. *Id*. at ¶ 19.
35. *LP* at ¶ 20.
36. *Id*. at ¶ 21.
37. *See generally* Marie Konečná, *Time to Update EU's Rules for VAT*, CZECH BUSINESS WEEKLY, Jan. 22, 2007, http://www.cbw.cz/phprs/2007012208.html.
38. *See* Georg W. Kofler, *Most-Favoured-Nation Treatment in Direct Taxation: Does EC Law Provide for Community MFN in Bilateral Double Taxation Treaties?*, 5 HOUS. BUS. & TAX. L.J. 1, 20–22 (2005) (describing how discrimination arises though the application of the same rule in different situations).
39. *Id*. at 20.

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