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The Independence of International Arbitrators and Judges: Tampered With or Well Tempered?

Fabien Gélinas*

Since the 18th century, international law has recognized the ancient principle that one cannot be a judge in one's own cause.[1] Yet much of the scholarly attention and energy devoted to the independence and impartiality of adjudicators today continues to focus on guarantees relating to domestic courts, even as the number and importance of international tribunals keep on growing.[2] Increasingly, such tribunals decide disputes previously left to domestic legislative, executive or judicial authorities.[3] These range from international commercial disputes through investment disputes between states and private investors to trade disputes between states.[4] These tribunals have been the subject of a push toward "legalization," whereby features of domestic judicial processes and institutions are, consciously or not, exported to the international arena.[5] Against this backdrop, this article proposes a preliminary look at independence

1. *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 281 (George W. Keeton and Georg Schwarsenberger eds., Cambridge University Press 2006) (1953) (demonstrating that since the 18th century, public international law has recognized that a person cannot be their own judge).

2. *See* Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 272 (2003) (asserting that two major concerns are avoiding the appearance of bias and ensuring the independence of international courts from political organs); *see also* Cesare P. R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 710–23 (1999) (examining the proliferation of international tribunals). *See generally* JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE (Shimon Shetreet & Jules Deschenes eds., 1985) (explaining the international dialogue about judicial independence).

3. Any treaty that imposes substantive obligations on states and contains a grant of jurisdiction to an international tribunal potentially takes away from legislative, executive, and judicial authority at the national level. The important question of democratic legitimacy which this raises will not be addressed here. *See* Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VAND. J. TRANSNAT'L L. 1083, 1091 (2008) (stating that nations are becoming more like individuals in domestic systems and are increasingly sacrificing their sovereignty for membership in international organizations).

4. *See* John P. Bowman, *The Panama Convention and its Implementation Under the Federal Arbitration Act,* 11 AM. REV. INT'L ARB. 1, 13–14 (2000) (stating that in Latin America there is continuing suspicion toward international commercial arbitration).

5. *See* Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401 (2000) (stating that legalization is defined according to obligation, precision and delegation, which means that actors are bound to unambiguous rules implemented by third parties); *see also* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States,* 104 AM. J. INT'L L. 179, 189 (2010) (explaining that obligation refers to whether or not a rule is binding, precision refers to where the legal commitment falls and delegation refers to the granted authority to apply the law). *But see* Cesare P.R. Romano, *Can You Hear Me Now? The Case for Extending the International Judicial Network*, 10 CHI. J. INT'L L. 233, 256–57 (2009) (asserting that while there is increasing legalization of international law, many areas have not been judicialized, so justice is disproportionate geographically and in certain areas of human activity).

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and impartiality in the space beyond the state.[6] My modest aim is to put forth questions for further exploration into this largely uncharted territory.[7]

I. An Outline of Independence and Impartiality

Let me take as my starting point the question whether the notions of judicial independence and impartiality developed and refined in the domestic contexts of national legal systems can be exported to the international arena.[8] The existing literature and normative materials that cast independence and impartiality in a comparative perspective will allow me to outline the relevant requirements before taking stock of how they are reflected in the normative instruments that purport to provide guidance on this issue in the context of international adjudication.

A. Requirements Developed for Domestic Courts

The *Universal Declaration of Human Rights*[9] and the *International Covenant on Civil and Political Rights*[10] guarantee the right to an "independent and impartial tribunal," which is expected to be implemented in domestic legal systems.[11] Beyond this general consensus, there is no uniform terminological framework for independence and impartiality where they are con-

6. That space is admittedly vast, and my comments will, accordingly, focus on commonalities among a broad range of tribunals.

7. The main arguments of this paper were originally presented at a conference on judicial independence held at the Faculty of Law, University of Toronto, on November 29–30, 2007. An earlier version of this paper has appeared in ADAM DODEK & LORNE SOSSIN, JUDICIAL INDEPENDENCE IN CONTEXT (Adam Dodek & Lorne Sossin eds., Irwin Law 2010).

8. For an analysis of this question looking at public international law adjudication from a narrow economics perspective, *see* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals,* 93 CAL. L. REV. 1, 7 (2005) (asserting that independent tribunals are dangerous to international cooperation since they can issue decisions that conflict with state interests, which will cause states to be reluctant to use the tribunals).

9. *See* Universal Declaration of Human Rights, art. 10, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) (stating that all people are entitled to a fair and public hearing by an independent and impartial tribunal).

10. *See* International Covenant on Civil and Political Rights, art. 14, Dec. 19, 1966, 999 U.N.T.S. 171 (establishing a universal standard for the conduct of trials).

11. *See* Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331, 344 (2008) (stating that the text of the Universal Declaration of Human Rights enumerates specific rights, including a requirement of fair trials and impartial tribunals to protect equality before the law); *see also* Trevor C.W. Farrow, *Globalization, International Human Rights, and Civil Procedure,* 41 ALBERTA L. REV. 671, 679–80 (2003) (explaining that the International Covenant on Civil and Political Rights gave further meaning to the rights enumerated in the Universal Declaration of Human Rights); *see also* Andrea Vesa, *International and Regional Standards for Protecting Victims of Domestic Violence,* 12 AM. U. J. GENDER SOC. POL'Y & L. 309, 320–22 (2004) (indicating that the ICCPR encompasses fundamental rights including the right to effective legal protection, and it imposes affirmative obligations upon ratifying states to ensure that national law protects these rights).

sidered on a global plane.[12] But looking carefully at the available materials, one is able tentatively and schematically to define the relevant requirements.

Cast at a high level, the following requirements can be said to capture the principle of judicial independence as we know it in the domestic context: neutral appointment, security of tenure, financial independence and administrative autonomy.[13] To be sure, these requirements are not universally imposed in domestic legal systems, let alone guaranteed by written or unwritten constitutional norms,[14] and they probably do not fully obtain in any legal system.[15]

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12. *See* Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication,* 26 BERKELEY J. INT'L L. 111, 113–14 (2008) (asserting that academic commentary has recognized the problem of issue conflicts in international adjudication but has not provided a solution); *see also* Ilhyung Lee, *Practice and Predicament: The Nationality of the International Arbitrator (With Survey Results),* 31 FORDHAM INT'L L.J. 603, 605 (2008) (explaining that international organizations demand impartiality in their rules but fail to elaborate on what independence or impartiality entails); *see also* Theodor Meron, *Judicial Independence and Impartiality in International Criminal Tribunals,* 99 AM. J. INT'L L. 359, 359–60 (2005) (stating that international judicial independence requires judges to clarify laws, and the courts must have the power to review citizens' complaints and must be able to hold nations accountable).

13. A number of national reports on judicial independence were presented at the congress of the International Academy of Comparative Law in July 2006, but they have not been the object of a systematic publication. *See generally* INDEPENDENCE, ACCOUNTABILITY, AND THE JUDICIARY (Guy Canivet, Mads Andenas & Duncan Fairgrieve eds., British Institute of International and Comparative Law 2006) (describing accountability vis-à-vis independence); *see also* JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE (Shimon Shetreet & Jules Deschenes eds., 1985) (indicating that a modern view of judicial independence includes the collective independence of the judiciary as a whole, possibly including executive responsibility); *see also* Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171, 208–09 (2008) (stating that "all commentators agree that rules governing selection and tenure, financial and human resources, and perhaps even the trappings of the institution and the judicial role are relevant").

14. *See* Laurence Claus, *Constitutional Guarantees of the Judiciary: Jurisdiction, Tenure, and Beyond,* 54 AM. J. COMP. L. 459, 482 (2006) (indicating that the U.S. Constitution's guarantee of judicial independence comes from the structure of the government rather than the document's particular provisions); *see also* Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge,* 44 HARV. INT'L L.J. 271, 276 (2003) (explaining that the international community is concerned with the independence of the national judiciary, and several international documents set standards of the independence of judges).

15. *See* Vanessa A. Baird & Debra Javeline, *The Effects of National and Local Funding on Judicial Performance: Perceptions of Russia's Lawyers*, 44 L. & SOC'Y REV. 331, 4–5 (indicating that Russia's judiciary practices administrative freedom, tenure, and impartial appointment but fails to include financial independence because of "inadequate financing by the federal government," leading to funding by outside firms and local governments); *see also* Daniel Ryan Koslosky, *Toward an Interpretative Model of Judicial Independence: A Case Study of Eastern Europe*, 31 U. PA. J. INT'L L. 203, 211 (2009) (clarifying that the USSR, although specifically calling for judicial independence in its constitution, had adopted a system where the executive branch had complete control over the judiciary, even reviewing court decisions before they were given); *see also* Michael B. Wise, *Judicial Review and Its Politicization in Central America: Guatemala, Costa Rica, and Constitutional Limits on Presidential Candidates*, 7 SANTA CLARA J. INT'L L. 145, 153–54 (explaining that even though Guatemala's constitution calls for specific methods to achieve judicial independence, the system fails to implement these elements in order to achieve judicial freedom).

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Indeed, "[t]here are remarkable differences in the components or elements of judicial independence that liberal democracies find most important and in the arrangements they put in place for securing its various components."[16] However, the requirements I have outlined are all instantiated in some legal systems[17] and are all recognized to various degrees in the international soft law instruments that reflect the accumulated wisdom of domestic laws over the years and across borders.[18] The requirements are generally applied to individual adjudicators serving in a public capacity in what has been termed the "personal" dimension of independence.[19] There is also an "institutional" dimension to these requirements, such that, for example, security of tenure may refer not only to personal guarantees but also to protections against inappropriate tampering with the structure or jurisdiction of a court or tribunal;[20] and administrative

16. *See* PETER H. RUSSELL, *Toward a General Theory of Judicial Independence*, *in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY 2–3 (Peter H. Russell & David M. O'Brien eds., Charlottesville & London: University Press of Virginia 2001) (emphasizing the diversity in the many approaches to judicial independence, leaving open the question of whether there actually is a universal method to creating independence in a court system); *see also* Michal Bobek, *The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries*, 14 EUR. PUB. L. 1, 3 (2008) (indicating that there is "no universal recipe for standards of 'judicial independence'"); *see also* Lucius Caflisch, *Independence and Impartiality of Judges: The European Court of Human Rights*, 2 L. & PRAC. INT'L CTS. & TRIBUNALS 169, 169 (2003) (concluding that in finding conclusive methods for achieving judicial independence, the term "'independence' is a relative concept").

17. *See* Int'l Ctr. for Crim. Law Reform & Crim. Just. Pol'y, *The Rule of Law and the Independence of the Judiciary*, 9–10, 16 (1998) (prepared by Daniel C. Prefontaine & Joanne Lee) (stating that Canada's judicial structure includes security of tenure, financial security, and administrative independence, while the United States' federal judges enjoy neutral appointment); *see also* Keith S. Rosenn, *The Protection of Judicial Independence of Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1, 17–18 (finding that Argentina and Mexico, like the United States, guarantee life tenure for federal judges, pursuant to good behavior); *see also* JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE, *supra* note 13, at 647 (citing the United States as adopting a judiciary with financial autonomy).

18. *See* Second Arab Conference on Justice, Supporting and Promoting the Independence of Judiciary, Cairo, Egypt, February 21–24, 2003, *Cairo Declaration on Judicial Independence*; *see also* Recommendations of the First Arab Conference on Justice, The Judiciary in the Arab Region and the Challenges of the 21st Century, Beirut, Leb., June 14–16, 1999, *Beirut Declaration*; *see also* Parliamentary Supremacy and Judicial Independence . . . Towards a Commonwealth Model, U.K., June 15–19, 1998, *Latimer House Guidelines for the Commonwealth*; *see also* Status of Judges in Europe, Strasbourg, Fr., July 8–10, 1998, *European Charter on the Statute for Judges*; *see also* Sixth Conference of Supreme Justices from the Asia Pacific Region, Beijing, P.R.C., August 27, 1995, *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* (hereinafter *Beijing Statement*); *see also* the U.N. Office of High Commissioner for Human Rights (OHCHR), *Basic Principles on the Independence of the Judiciary* (1985); *see also* World Conference on the Independence of Justice, Montreal, Can., *Montreal Universal Declaration on the Independence of Justice* (1983); *see also* Law Ass'n of Asia & the Pacific (LAWASIA), Human Rights Standing Committee, *Tokyo Principles of the Independence of the Judiciary in the Lawasia Region* (1982); *see also* Int'l Bar Ass'n (IBA), Minimum Standards of Judicial Independence, New Delhi (1982); *see also* Int'l Ass'n of Penal Law (AIDP) and Int'l Comm'n of Jurists (ICJ), *Syracuse Draft Principles on the Independence of the Judiciary* (1981).

19. *See* Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217, 227 (1993) (emphasizing the importance of having individual judges enjoy judicial independence in order for the court system to remain fair and impartial); *see also* Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 L. & CONTEMP. PROBS. 59, 65 (1998) (identifying judicial independence as having the most significant effect on the personal freedom of judges); *see also* Ben Olbourne, *Independence and Impartiality: International Standards for National Judges and Courts*, 2 L. & PRAC. INT'L CTS. & TRIBUNALS 97, 117–18 (2003) (stating that "personal independence," which encompasses "terms and conditions of judicial service," must be guaranteed in order to prevent the executive power from having power over the judiciary).

20. *See* Eric Colvin, *The Executive and the Independence of the Judiciary*, 51 SASK. L. REV. 229, 234–35 (1987) (describing judicial independence, traditionally viewed as "personal," as an "institutional" aspect, which requires that the Judiciary have the freedom to control its courtroom environment, including the administration).

independence may refer not only to the power of judges to control the proceedings before them and to impose the necessary decorum in the hearing room, but also to the power of courts or tribunals to manage caseloads and control their staff.[21] This should not be confused with the distinction between independence and impartiality, which I shall take as a working assumption in this paper: independence refers to the external characteristics of an adjudicator or tribunal that work to ensure the ultimate goal of impartiality, which in turn refers to a state of mind.[22]

Let me briefly outline each requirement in both dimensions of independence. Neutral appointment in its personal dimension calls for a nomination and appointment process focused on competence and integrity that is detached from expectations as to particular adjudicative

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21. *See* Gilbert Guillaume, *Some Thoughts on the Independence of International Judges Vis-á-Vis States*, 2 L. & PRAC. INT'L CT & TRIBUNALS 163, 165 (2003) (indicating that judicial independence includes procedural methods and the status of judges, but also the organization and functions of the judicial system); *see also* Dinah Shelton, *Legal Norms to Promote the Independence and Accountability of International Tribunals*, 2 L. & PRAC. INT'L CT[S] & TRIBUNALS 27, 46–48 (2003) (finding that control of one's staff is essential for an independent tribunal). *See generally* Emilia Justyna Powell & Jeffrey K. Staton, *Domestic Judicial Institutions and Human Rights Treaty Violation*, 53 INT'L STUD. Q. 149, 154 (2009) (describing impartial courts as having more than just control over their decisions and proceedings).

22. This assumption is broadly but not universally shared. *See generally* Leon E. Trakman, *The Impartiality and Independence of Arbitrators Reconsidered*, 10 INT'L ARB. L. REV. 999, at 6–9 (2007). The European Court of Human Rights has treated them together in order to avoid unnecessarily complicating the issue. *See* Langborger v. Sweden, 12 Eur. Ct. of H.R. 416, 425 (1989) (stating that "it appears difficult to dissociate the question of impartiality from that of independence"). The Court, however, has used the distinction between "subjective" and "objective" impartiality and the latter overlaps with the concept of institutional independence I use here. *See* Morel v. France, 33 Eur. Ct. H.R. 47, 1131 (2000). Also, "[i]ndependence can be considered a more objective characteristic and impartiality a more subjective one, but these attributes are closely connected." *See* ALI and Unidroit, ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE P-1A (2004). Even though independence essentially works to ensure impartiality, it is important to bear in mind that it is possible to be impartial without being independent, and vice versa. Indeed, this is an important issue for international adjudication because the question of the extent to which independence may be waived where impartiality is affirmed will arise in practice. The distinction was discussed at the San Francisco Conference with respect to the International Court of Justice, where the following conclusion carried the day: "[I]t is important that the judges of the court should be not only impartial but also independent of control by their own countries or the United Nations Organization." *See* Conference on International Organization, Seventh meeting of Committee IV/1, San Francisco, U.S., May 3-23, 1945, *Summary Report of Seventh Meeting of Committee IV/1*, p. 174, U.N. Doc. 309/IV/1/27; *see also* U.N. Econ. & Soc. Council (ECOSOC), Sub-Comm'n on Judicial Administrations, *The Administration of Justice and the Human Rights of Detainees: Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers*, ¶¶ 76–79, U.N. Doc. E/CN.4/Sub.2/1985/18 & Add. 1–6 (1985) (prepared by L. M. Singhvi).

outcomes.[23] The institutional dimension of the requirement calls for participation, or at least consultation, of judges in the nomination or the appointment process.[24] Security of tenure in its personal dimension demands a sufficiently long term of appointment,[25] as well as safeguards against the consideration of past or future adjudicative orientation in any renewal process.[26] The institutional dimension of this requirement refers to the institutional protection of established tribunals.[27] It calls for safeguards against inappropriate institutional tampering by the

23. *See* First Arab Conference on Justice, The Judiciary in the Arab Region and the Challenges of the 21st Century, Beirut, Leb., June 14–16, 1999, *Beirut Declaration*, ¶ 11 (proclaiming against any kind of improper discrimination in the appointment of judges and promoting the principle of equal opportunity among candidates); *see also* Status of Judges in Europe, Strasbourg, Fr., July 8–10, 1998, *European Charter on the Statute for Judges*, ¶ 2.1 (claiming that the selection of judges should be by an impartial, independent body, free from undue prejudice); *see also* Parliamentary Supremacy and Judicial Independence . . . Towards a Commonwealth Model, U.K., June 15–19, 1998, *Latimer House Guidelines for the Commonwealth*, ¶ II.1 (asserting that states, in selecting judges, should adopt an independent process and have a commission or a qualified officer to make the decision. The goal should be to select the most qualified and independent person for the permanent position, keeping in mind the present gender inequalities.); *see also Beijing Statement, supra* note 18, at ¶ 12 (finding that the method of judicial appointment must ensure the most qualified candidate is chosen, and that he must have "competence, integrity, and independence"); *see also* OHCHR, *supra* note 18, at ¶ 10 (stating that judicial appointment must be done honestly with appropriate intentions and must be free from discrimination).

24. *See* Status of Judges in Europe, Strasbourg, Fr., July 8–10, 1998, *European Charter on the Statute for Judges*, ¶ 1.3 (advocating a process where a body of legal scholars, independent of the executive and legislative branches, decides the selection or termination of a judge); *see also Beijing Statement*, *supra* note 18, at ¶ 15 (promoting the use of a judicial commission, consisting of high court judges who help in judicial nominations); *see also* IBA, Minimum Standards of Judicial Independence, New Delhi, ¶ 3(a) (1982) (asserting that the involvement of the legislative or executive branches in the judicial selection process is acceptable, as long as the decision-making body includes a majority of judges and those from the legal field).

25. *See Beijing Statement*, *supra* note 18, at ¶¶ 18, 21, 22 (sponsoring life tenure for judges, to be revoked only if incapacitated, convicted of a crime, or engaged in behavior unfit for a judge); *see also* OHCHR, *supra* note 18, at ¶¶ 12, 18 (calling for the life tenure of judges, subject only to mandatory age retirement and expiration of office, and suspension or removal only as a result of incapacity or improper behavior that would render the judge unfit for the position); *see also* IBA, *supra* note 18, at ¶ 22 (supporting judicial tenure, subject to retirement age and removal for cause).

26. *See* Int'l Comm'n of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors* 24, Practitioners Guide No. 1 (2007) (emphasizing that one important factor of judicial independence is that judges must be given the freedom to decide cases without "fear of reprisals of any kind"); *see also* Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 389 (2002) (stressing the importance for judges to feel secure in their positions in order to ensure enforcement of the law); *see also* Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 690 (1979) (stating that in order for judges to perform their duties as independent arbiters, they must feel secure that acting independently "will not lead to [their] own downfall").

27. *See Beijing Statement*, *supra* note 18, at ¶ 29 (advocating for reappointment of judges whose courts are abolished, or if no position is available, full compensation must be given); *see also* OHCHR, *supra* note 18, at ¶ 5 (providing that "[t]ribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals"); *see also* IBA, *supra* note 18, at ¶¶ 18(b) and 21 (protecting the court system from any interference by the Executive Branch, finding that citizens standing trial have the right to be heard in a regular court of law).

political branches.[28] Financial security means the assurance of a minimum salary for judges fixed at a level that is compatible with the dignity of their function and safeguards against salary determination exercises that take adjudicative orientation into account.[29] The requirement of financial security sometimes includes the institutional assurance of a depoliticized salary and benefits determination process with input from the judiciary.[30] Finally, administrative autonomy refers to control of the proceedings by the hearing judge, including matters of access and decorum.[31] At the institutional level,[32] it often calls for consultation or participation of the judiciary in the relevant processes of envelope and budget determination[33] and requires that the main responsibility for court administration, including the management of caseloads, communications, outreach and human resources, rest with judges.[34]

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28. Roosevelt's well-known court-packing plan of 1937, whereby he threatened to increase the number of Supreme Court judges to secure the majority he thought was needed to get his reform plan through constitutional review, is probably the best example of the kind of vulnerability that this addresses. *See* Henry J. Abraham, *The Pillars and Politics of Judicial Independence in the United States*, *in* PETER H. RUSSELL & DAVID M. O'BRIEN, JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY 25, 32–33 (2001) (relating the court-packing story and its consequences); *see also Beijing Statement*, *supra* note 18, at ¶¶ 38–40; *see also Beirut Declaration*, *supra* note 23, at ¶ 3; *see also* IBA, *supra* note 18, at ¶¶ 2, 16, 24 (providing that "[t]he number of the members of the highest court should be rigid and should not be subject to change except by legislation").

29. *See* Dep't of Int'l Econ. & Soc. Affairs*, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Aug. 26–Sept. 6, 1985, *Milan,* ¶ 11, U.N. A/CONF.121/22/Rev.1 (1986) (laying out conditions of judicial service and tenure); *see also* European Charter on the Statute for Judges, *Activities for the Development and Consolidation of Democratic Stability*, July 8–10, 1998, *Strasbourg*, ¶ 6.1, DAJ/DOC (98) 23 (requiring that judges be entitled to a fixed salary); *see also* Colloquium, The Latimer House Guidelines for the Commonwealth, *Parliamentary Supremacy Judicial Independence*, June 15–19, 1998, *United Kingdom*, art. 2 (hereinafter Latimer House Guidelines) (describing sufficient funding and salaries for the judiciary).

30. *See Beirut Declaration*, June 14–16, 1999, *Beirut*, art. 2 (guaranteeing an independent budget for the judiciary); *see also Beijing Statement*, Aug. 1997, *Manila,* art. 31 (requiring adequate compensation and conditions of service for judges); *see also* Latimer House Guidelines, *supra* note 29, at art. 2 (stating guidelines for funding and salaries).

31. *See* United States v. Brainer, 515 F. Supp. 627, 632–34 (D. Md. 1981) (recognizing judicial powers against threatened inefficiency); *see also* Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1322 (1993) (verifying the idea of judicial autonomy in practice and procedure).

32. The institutional dimension of administrative autonomy writ large is an evolving concept. A report commissioned by the Canadian Judicial Council defines administrative autonomy, based on case law, as a constitutional requirement. *See* Carl Baar, Karim Benyekhlef, Fabien Gélinas, Robert Hann & Lorne Sossin, *Alternative Models of Court Administration*, Ottawa: Canadian Judicial Council, Subcomm. on Alternative Models of Court Admin., *Alternative Models of Court Administration* 50 (2006) *available at* http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_Alternative_en.pdf (defining administrative autonomy as a constitutional requirement).

33. *See Beijing Statement*, *supra* note 30, at ¶ 37 (allowing the budget to be set for the courts by the courts); *see also* Todd D. Peterson, *Controlling the Federal Courts Through the Appropriations Process*, 1998 WIS. L. REV. 993, 997, 1023 (1998) (noting that Congress may not interfere in matters of judicial autonomy); *see also* J. Clifford Wallace, *An Essay on Independence from the Judiciary: Independence From What and Why,* 58 N.Y.U. ANN. SURV. AM. L. 241, 249 (2001) (arguing that the judiciary must have its own controls).

34. *See* Dep't of Int'l Econ. & Soc. Affairs*, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Aug. 26–Sept 6, 1985, *Milan,* ¶ 14, U.N. A/CONF.121/22/Rev.1 (1986) (stating that judges should control which cases they are assigned); *see also Beijing Statement*, *supra* note 30, at ¶¶ 35–36 (stating that judges should have control over cases and court personnel); *see also* Beirut Declaration, *supra* note 30, at art. 9 (demanding that lawsuits be distributed according to judicial regulation).

There is a good measure of general agreement with the statement made by Hersch Lauterpacht in 1933 that "as a matter of fundamental principle the problem of the impartiality of judges is in the international sphere the same as within the State."[35] However, as soon as one takes the requirements developed in relation to the judiciaries of domestic legal systems to the international arena, the lack of fit becomes apparent. International adjudication is replete with *ad hoc* tribunals with no institutional dimension to speak of[36] and is often composed of adjudicators appointed and remunerated by the parties or on their behalf for the purpose of a particular case.[37] This means that adjudicators may compete for appointments as fiercely as lawyers compete for clients. Indeed in many cases they are the same people, in or associated with the same law firms, one day sitting as adjudicators and the next acting as counsel.[38] Security of tenure is in many cases totally absent.[39] One can forget about security for a fixed term, a modest standard; in many configurations security of tenure does not last to the end of a single case.[40] International lawyers who act as arbitrators are now often "in the business" of getting cases,[41] which may reasonably be assumed to be the primary economic incentive that governs their behavior.[42] This means that one can cross out financial security, at least in the narrow sense that is relevant here, as a condition for independence that could generally be realized in the interna-

35. *See* HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 233, 235–36 (1933) (stating that impartiality of judges is the same issue internationally and domestically).

36. *See* David D. Caron, *Symposium: The Hague Peace Conferences: War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT'L L. 4, 12–13 (2000) (discussing ad hoc tribunals).

37. *See* Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 112 (2009) (noting that litigants may appoint their own adjudicators).

38. *See* Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication,* 26 BERKELEY J. INT'L L. 111, 135 (2008) (noting the many conflicting roles an international adjudicator may play); *see also* Address at John E. C. Brierley Memorial Lecture: International Arbitration Is Not Arbitration (May 28, 2008), *in* 2 STOCK. INT'L ARB. REV. 17 (2008) (noting that in France the people are skeptical about the intermingling of lawyers and arbitrators); *see also* Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct,* 41 STAN. J. INT'L L. 53, 84 (2005) (arguing that ethical lines become blurred when lawyers serve as arbitrators as well).

39. *See* James Crawford, *Current Development: The ILC Adopts a Statute for an International Criminal Court*, 89 AM. J. INT'L. L. 404, 416 (1995) (noting the importance of judicial security of tenure in criminal courts); *see also* Yuval Shany, *Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudications in International Legal Proceedings,* 30 LOY. LA INT'L & COMP. L. REV 473, 485 (2008) (explaining that tenure is inapplicable to ad hoc judges); *see also* Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure,* 137 U. PA. L. REV. 2131, 2133 (1989) (remarking that the adjunct judiciary lacks tenure).

40. In the context of arbitration, the parties are generally free to replace a member of the tribunal—or indeed the whole tribunal—if they agree to do so. *See* C.U.P.E. v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539, 2003 SCC 29 (Can.) (noting that ad hoc boards have no security or tenure past the arbitration itself); *see also* Matthew Lippman, *Towards an International Criminal Court*, 3 SAN DIEGO JUSTICE J. 1, 118 (1995) (arguing that prosecutors should serve for fixed terms); *see also* Patricia Wald, *Why I Support the International Criminal Court*, 21 WIS. INT'L L. J. 513, 515 (2003) (noting how cumbersome it is to set up a new tribunal each time one is needed).

41. *See* YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 37–38 (1998) (noting that firms now hire lawyers just to arbitrate); *see also* Sylvan Gotshal, *Arbitration and the Lawyer's Place in the Business Community*, 11 BUS. LAW 52, 53 (1955) (explaining how arbitration allows lawyers to expand their business).

42. *See* David E. Bloom et al., *An Analysis of the Selection of Arbitrators*, 76 AMER. ECON. REV 408, 411 (1986) (stating that arbitrators receive considerable income from arbitrating); *see also* Peter B. Rutledge, *Market Solutions to Market Problems: Re-Examining Arbitral Immunity as a Solution to Unfairness in Securities Arbitration*, 26 PACE L. REV. 113, 131 (2005) (describing the economic incentives provided to arbitrators via arbitral immunity).

tional context.[43] As for administrative autonomy, adjudicators are, on the whole, largely at the mercy of decisions made by the parties, who in many cases delegate significant powers to administering institutions such as standing arbitration bodies.[44] In view of the apparent lack of fit between the requirements of judicial independence and the realities of international adjudication, it would be legitimate to ask whether there is a fundamental, qualitative difference between domestic courts and international adjudication that would justify a different approach.[45]

It has been observed that, although many national laws historically permitted challenges to international arbitrators on the very grounds provided by law for the challenge of judges,[46] there seems to be a trend in favor of a separate legislative treatment of impartiality with respect to arbitration.[47] I would argue that such changes in the legislative basis for challenges are likely the result of the success of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Law)[48] rather than the result of any deliberate legislative decision to put the independence and impartiality of arbitrators on a separate conceptual plane. Be that as it may, current opinion appears to assume that there is no difference between domestic and international tribunals that would call for a

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43. *See* Yves Dezalay & Bryant Garth, *Fussing About the Forum: Categories and Definitions as Stakes in a Professional Competition*, 21 LAW SOC. INQUIRY 285, 296 (1996) (describing how young arbitrators competed with their older counterparts for business); *see also* Yves Dezalay & Bryant Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice From the Competition for Transactional Business Disputes,* 29 L. & SOC'Y REV. 27, 31 (1995) (describing the competitive, businesslike nature of international arbitration, specifically competition for representing parties).

44. *See* Peter B. Rutledge, *Medellin, Delegation, and Conflicts (of Law)*, 17 GEO. MASON L.R. 191, 213 (2009) (explaining that decisions delegated to arbitration bodies are often binding and immune from review in domestic courts); *see also* Jernej Sekolec, *The Need for Modern and Harmonized Regime for International Arbitration,* 1 CROAT. ARB. Y.B. 27, 38 (1994) (describing the autonomy of parties to delegate to arbitral bodies).

45. Although this paper focuses on international adjudication, it is worth noting that domestic arbitration displays many of the features described in the text that make the application of the requirements of impartiality and independence a challenge.

46. *See* MARY L. VOLCANSEK & JACQUELINE LUCIENNE LAFON, JUDICIAL SELECTION: THE CROSS-EVOLUTION OF FRENCH AND AMERICAN PRACTICES 59–60 (1988) (stating that historically, French arbitrators were considered to be judges); *see also* Christoph Liebscher, *Fair Trial and Challenge of Awards in International Arbitration*, 6 CROAT. ARB. Y.B. 83, 85 (1999) (stating that Austria applies the same rules to arbitral challenges as it does to challenge judicial decisions); *see also* Christopher R. Seppala, *French Domestic Arbitration Law*, 16 INT'L LAW. 749, 764 (1982) (stating that arbitrators assumed similar obligations as judges).

47. *See* Catherine A. Rogers, *The Ethics of International Arbitrators*, *in* LAWRENCE W. NEWMAN, THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 621, 632 (Lawrence W. Newman & Richard D. Hill eds., Juris Publishing 2d ed. 2008); *see also* Henry Gabriel & Anjanette H. Raymond, *Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards*, 5 WYO. L. REV. 453, 454 (2005) (highlighting that regard for impartiality and independence is different for arbitrators and judges).

48. The UNCITRAL rules require arbitrators to be impartial.

different treatment of independence and impartiality.[49] It is clear at the very least, that the most recent global codification initiatives in this area start with the general assumption that the requirements of independence and impartiality apply to international adjudicators and tribunals.[50]

B. Requirements Formulated for International Adjudicators

There are two recent global codification initiatives in this area.[51] The Burgh House Principles on the Independence of the International Judiciary (hereinafter the Burgh House Principles or the Principles)[52] have a public international law focus,[53] while the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (hereinafter the IBA Guidelines or the Guidelines[54]) have an eponymous international arbitration focus that spans private and mixed arbitration without excluding public adjudicative configurations.[55]

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49. *See* Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26 BERKELEY J. INT'L L. 111, 128 (2008) (noting that despite the differences between domestic and international arbitration, many states have adopted the impartiality standard required in international arbitration via UNCITRAL); *see also* Teresa Cheng, *Recent Developments in Dispute Resolution in Asia, Beyond Globalization: Issues and Opportunities*, 38 INT'L LAW. 616, 616 (2004) (highlighting Hong Kong's amendments to domestic law to reflect UNCITRAL's international impartiality requirement); *see also* Mark W. Friedman et al., *Developments in International Commercial Dispute Resolution in 2003*, 38 INT'L LAW. 265, 275 (2004) (stating that California now requires impartial arbitrators, a requirement formerly reserved for international arbitration).

50. *See* PIETER SANDERS, THE ART OF ARBITRATION 3 (Jan C. Schultsz & Albert Jan Van Den Berg eds., 1982) (stating that UNCITRAL requires all arbitrators to be impartial); *see also* Gabriel Bottini, *Should Arbitrators Live on Mars? Challenge of Arbitrators in Investment Arbitration*, 32 SUFFOLK TRANSNAT'L L. REV. 341, 345 (2009) (highlighting the importance of independence and impartiality in international arbitration); *see also* Gabriel & Raymond, *supra* note 47, at 457 (stating that independence and impartiality are required).

51. By "codification," of course, I do not mean the faithful reflection of fully developed practices but an intellectual effort to rationalize existing practices and formulate implicit understandings that involves a measure of normative choice.

52. *See* The Centre for International Courts & Tribunals, *The Burgh House Principles on the Independence of the International Judiciary, available at* http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf (reproducing the Burgh House Principles on the Independence of the International Judiciary).

53. *See* DANIEL TERRIS ET AL., THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES (Brandeis University Press 2007) (stating that the Burgh House Principles are a template for protecting the independence and integrity of international judges); *see also* Philippe Sands, Campbell McLachlan, & Ruth Mackenzie, *The Burgh House Principles on the Independence of the International Judiciary,* 4 LAW & PRAC. INT'L CTS. & TRIBUNALS 247, 247 (2005) (reiterating the Burgh House Principles).

54. *See* Council of the International Bar Association, *International Bar Association Guidelines on Conflicts of Interest in International Arbitration* (2004) (hereinafter IBA Guidelines), *available at* http://www.ldgiftsforeningen.dk/Files/Filer/Final_Text_of_Guidelines.pdf (stating the IBA Guidelines).

55. *See* Alexis Mourre, *Conflicts of Interest: Towards Greater Transparency and Uniform Standards of Disclosure?*, Kluwer Arbitration Blog, May 19, 2009, http://kluwerarbitration blog.com/blog/2009/05/19/conflicts-of-interest-towards-greater-transparency-and-uniform-standards-of-disclosure/ (stating that the guidelines may be adapted to the needs of international arbitration); *see also* Bottini, *supra* note 50, at 348 (noting that the guidelines were intended to guide arbitrators, parties, institutions and courts).

The Burgh House Principles were drafted by the International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals in association with the Project on International Courts and Tribunals.[56] The multi-national study group and its group of advisers, composed of professors, practitioners and judges, included some of the "most highly qualified publicists" and conducted its work on independence over a period of three years.[57] The draft principles were presented to the Berlin Congress of the International Law Association in 2004 for a last round of comments and were released shortly thereafter.[58] The Burgh House Principles consider the requirements of independence and impartiality to be principles of international law of general application and propose detailed rules to govern the international judiciary.[59] The Principles are wide-ranging and touch upon most of the require-

56. The Project on International Courts and Tribunals is a joint initiative of London University and New York University. *See About PICT*, Project on International Courts and Tribunals, http://www.pict-pcti.org/about/management.html (last visited Oct. 1, 2010) (describing the history and functions of the Project on International Courts and Tribunals and its component organizations); *see also International Law Association/Project on International Courts and Tribunals Study Group on the Practice and Procedure of International Courts and Tribunals,* The Centre for International Courts and Tribunals, http://www.ucl.ac.uk/laws/cict/docs/burgh_280604.pdf, at art. 3 (hereinafter Project on International Courts) (indicating that the Burgh House Principles were drafted by the International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals in association with the Project on International Courts and Tribunals); *see also* Sands, *supra* note 53, at 247 (stating that the Burgh House Principles are the final product of the joint effort of the International Law Association Study Group on the Practice and Procedure of International Tribunals and the Project on International Courts and Tribunals and UCL's Centre on International Courts and Tribunals).

57. *See* Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat 1055 (describing teachings of the most highly qualified publicists as supplemental law); *see also* Project on International Courts, *supra* note 56, at art. 1 (listing the dates upon which the study group met spanning from February 2002 to April 2004); *see also* Activities of the International Law Association Study Group, http://www.pict-pcti.org /activities/ILA_study_grp.html, (last visited Sept. 30, 2010) (noting that the study group is made up of academics and practitioners).

58. The Principles were released under the authority of the co-chairs (Professor Philippe Sands, University College London, and Professor Campbell McLachlan, School of Law, Victoria University of Wellington) and the members of the study group. *See generally* Project on International Courts, *supra* note 56, at art. 1.

59. *See* Project on International Courts, *supra* note 56, at pmbl. (asserting independence and impartiality to be of general application); *see also* Mads Andenas, *A European Perspective on Judicial Independence and Accountability*, 41 INT'L LAW. 1, 14 (2007) (recognizing the Burgh House Principles to be focused on the problems on independence of international courts and tribunals and noting their goal to be of general application); *see also* Yuval Shany, *Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings*, 30 LOY. L.A. INT'L & COMP. L. REV. 473, 485–86 (2008) (applying rules set out in the Burgh House Principles to party-appointed adjudicators).

ments outlined above in the context of domestic safeguards: appointments,[60] tenure,[61] financial security[62] and administrative autonomy.[63] The Principles acknowledge that the requirements must vary in their detail given the number and variety of international courts and tribunals, noting in the preamble "that each court or tribunal has its own characteristics and functions and that in certain instances judges serve on a part-time basis or as *ad hoc* or *ad litem* judges."[64] The scope of application of the Principles is then defined in more detail but in a manner that leaves much to be determined:

> [The Principles] shall apply to standing international courts and tribunals (hereafter "courts") and to full-time judges. The Principles should also be applied as appropriate to judges *ad hoc*, judges *ad litem* and part-time judges, having regard to their particular functions and circumstances, and to international arbitration proceedings taking place under the 1982 UN Convention on the Law of the Sea, the International Centre for the Settlement of Investment Disputes and similar international institutions.[65]

Several questions immediately come to mind. What is meant by "as appropriate"? Do judges ad hoc or ad litem have distinct functions by virtue of their method of appointment?

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60. *See* Project on International Courts, *supra* note 56, at art. 2, 10–12 (providing guidelines for the appointment of judges which serve to ensure independence and impartiality); *see also* Sands, *supra* note 55, at 249 (outlining the issues addressed in the Burgh House Principles, including the independence and impartiality of procedures for the appointment of international judges); *see also* Shany, *supra* note 59, at 486 (referring to the Burgh House Principles' suggestion that there be a three-year period in which judges do not work for parties since appointment is often based on prior acquaintances).

61. *See* Project on International Courts, *supra* note 56, at art. 3 (declaring that judges should have security of tenure to ensure their ability to act independently); *see also* Sands, *supra* note 53, at 249 (outlining the issues addressed in the Burgh House Principles, including the independence and impartiality of procedures involving the tenure of international judges); *see also* Shany, *supra* note 59, at 485 (recognizing security of tenure as a hallmark of judicial independence).

62. *See* Project on International Courts, *supra* note 56, at art. 4 (establishing that judges are entitled to adequate wage and pension arrangements which cannot be modified during their terms of office); *see also* Shimon Shetreet, *The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges*, 10 CHI. J. INT'L L. 275, 285 (2009) (identifying adequate remuneration and pensions to be a characteristic of judicial independence).

63. *See* Project on International Courts, *supra* note 56, at art. 1, 6 (proclaiming that judges should be free from outside interference and shall accordingly be provided with adequate budgetary resources); *see also* Thordis Ingadottir, *Financial Challenges and Their Possible Effects on Proceedings*, 4 J. INT'L CRIM. JUST. 294, 298 (2006) (asserting that sufficient funding is a cornerstone of the independence of the judiciary); *see also* Suzannah Linton, *Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers*, 4 J. INT'L CRIM. JUST. 327, 335 (2006) (recognizing a guarantee of financial autonomy to be essential to proper and autonomous performance of judicial duties).

64. This passage is in the last paragraph of the preamble. *See* Project on International Courts, *supra* note 56, at pmbl. (outlining the goals of the Principles).

65. *See id.* (suggesting what circumstances the Burgh House Principles should be applied to); *see also* THOMAS A. MENSAH ET AL., LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES 125 (Tafsir Malick Ndiaye & Rudiger Wolfrum eds., Martinus Nijhoff Publishers 2007) (recognizing the importance of considering not only standing courts but ad hoc courts and arbitral tribunals as well in examining the independence of international judiciary).

Are the Principles[66] intended to apply to international proceedings taking place under the UNCITRAL Arbitration Rules[67]? Do "similar international institutions" include permanent arbitral institutions that focus on, but are not limited to, the resolution of commercial disputes? If so, do the principles apply only when a state is a party to the proceedings, or when rules o public international law are applicable? The sweeping range of these questions draws attention to the fact that in the overwhelming majority of international cases, disputes are not decided by the full-time members of standing international courts who were clearly taken as the ideal type of an international adjudicator by the Study Group.[68]

Even a broader public international law perspective, one that better recognized the multiple forms of public international law adjudication, could provide only a partial account of international adjudication, as defined here, for the purpose of assessing independence and impartiality.[69] Any perspective limited to adjudication under public international law ignores the fact that the bulk of international adjudication today is actually conducted in the private environment of international contract law.[70] Every year, international disputes are arbitrated by the hundreds under the aegis of standing arbitration institutions such as the International Centre for Dispute Resolution, the International Court of Arbitration of the International Cham-

66. *See International Law Association/Project on International Courts and Tribunals Study Group on the Practice and Procedure of International Courts and Tribunals,* The Centre for International Courts and Tribunals, http://www.ucl.ac.uk/laws/cict/docs/ burgh_280604.pdf, at art. 3 (creating guidelines of general application to ensure the independence and impartiality international courts and tribunals).

67. *See* UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL ARBITRATION RULES (1976), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf (providing comprehensive procedural rules to guide the conduct of arbitral proceedings).

68. *See* About the International Centre for Dispute Resolution, American Arbitration Association, http://www.adr.org/about_icdr (last visited Oct. 4, 2010) (describing the roles of the International Centre for Dispute Resolution, which handles several hundred multinational cases each year); *see also* International Court of Arbitration, International Chamber of Commerce, http://www.iccwbo.org/court/arbitration/id4584/index.html (last visited Oct. 4, 2010) (noting that the ICC International Court of Arbitration handled more than 16,000 cases since its founding).

69. *See* Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26 BERKELEY J. INT'L L. 111, 148 (2008) (claiming that the ICTY's jurisprudence is imperfect, and other courts should amend their own impartiality standards to regulate conflicts).

70. *See* John D. Blum, *The Role of Law in Global E-Health: A Tool for Development and Equity in a Digitally Divided World*, 46 ST. LOUIS L.J. 85, 85 (2002) (asserting that emerging international law principles affecting private contractual arrangements illustrate the fact that public and private international law are interchangeable); *see also* Michelle Flores*, A Practical Approach to Allocating Environmental Liability and Stabilizing Foreign Investment in the Energy Sectors of Developing Countries*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 141, 160 (2001) (stating that the use of contractual mechanisms moves enforcement of the agreement away from the realm of public international law to one based primarily on commercial contract law); *see also* Thomas W. Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT'L L.J. 216, 219 (1996) (claiming that the issue of contractual practice has so far been viewed exclusively as a problem of public international law, when it has increasingly and predominantly become a problem of transnational commercial contract law).

ber of Commerce, and the London Court of International Arbitration.[71] Typically these organizations perform the function of an appointing authority where required, including in some cases the resolution of challenges of arbitrators for lack of independence or impartiality, as well as a host of supporting and administrative functions.[72] Hundreds of disputes are also arbitrated every year under the UNCITRAL Arbitration Rules, which provide a popular instrument for the conduct of international cases,[73] or under the rules made available by national arbitration laws governing international cases.

The IBA Guidelines do contemplate private international arbitration proceedings. Indeed, they take the matter from that end of the spectrum, starting from international commercial arbitration and extending to mixed—typically investor-state—international arbitration and beyond.[74] The scope of the Guidelines thus overlaps significantly with the Burgh House Principles, particularly at the point (which one reaches quickly) where the ambit and substance of the latter become hazy.[75] The Guidelines were prepared by a working group of the Committee on

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71. *See* International Centre for Dispute Resolution, http://www.adr.org/about_icdr (stating that the ICDR was created to provide alternate dispute resolution services to individuals around the world); *see also* International Court of Arbitration of the International Chamber of Commerce, http://www.iccwbo.org/court/ (noting that the International Court of Arbitration of the International Chamber of Commerce has an outstanding track record for resolving cross-border disputes); *see also* London Court of International Arbitration, http://www.lcia-arbitration.com/ (asserting that the LCIA is universally recognized as one of the world's leading arbitral institutions).

72. *See* William W. Park, *Income Tax Treaty Arbitration*, 10 GEO. MASON L. REV. 803, 814 (2002) (claiming that if agreement proves impossible, selection is made by an appointing authority such as the World Bank (ICSID), the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA)).

73. *See* John D. Franchini, *International Arbitration Under the UNCITRAL Arbitration Rules: A Contractual Provision for Improvement*, 62 FORDHAM L. REV. 2223, 2223 (1994) (asserting that currently, many international privatization contracts provide that future disputes will be resolved through binding arbitration under UNCITRAL); *see also* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1541 (2005) (claiming that parties have an option to arbitrate before various international institutions, such as the International Chamber of Commerce, the Stockholm Chamber of Commerce, or before an ad hoc arbitral body organized under the UNCITRAL Arbitration Rules); *see also Arbitration Centre Adopts UNCITRAL Arbitration Rules (as Revised in 2010)*, States News Service (Vienna) (stating that UNCITRAL is recognized as one of the most successful international instruments of a contractual nature in the field of arbitration and has been used for the settlement of a broad range of disputes).

74. *See* Gomez-Palacio, *International Commercial Arbitration: Two Cultures in a State of Courtship and Potential Marriage of Convenience*, 20 AM. REV. INT'L ARB. 235, 253 (2009) (stating that the IBA Rules are intended to govern, among other things, international commercial arbitration).

75. *See* Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26 BERKELEY J. INT'L L. 111, 128 (2008) (stating that the Burgh House Principles provide little guidance on the problem of issue conflicts. Also noting that two provisions of the IBA Guidelines touch upon issue conflicts); *see also* Yuval Shany, *Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings*, 30 LOY. L.A. INT'L & COMP. L. REV. 473, 485 (2008) (noting the vagueness of the Burgh House Principles and their apparent incompatibility with a number of the features characterizing the status of a party-appointed adjudicator); *see also* Shimon Shetreet, *The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges*, 10 CHI. J. INT'L L. 275, 277 (2009) (discussing the similarities between the Burgh House Principles and the IBA).

Arbitration and ADR of the International Bar Association.[76] The Working Group was composed of 19 experts from 14 countries.[77] Although dominated by international commercial arbitration experts, the Group included a significant number of arbitrators and counsel with vast experience of mixed arbitration.[78] The IBA Guidelines were approved by the Council of the International Bar Association in 2004.[79]

Steering clear of the institutional dimension of independence and impartiality, which is not easily conceptualized in the arbitration context, the Guidelines nevertheless declare the "general standard"[80] that "every arbitrator shall be impartial and independent of the parties"[81] "during the entire arbitration proceedings"[82] to be a "fundamental"[83] "general principle."[84] Arbitrators who have any doubts about their independence or impartiality are to decline or resign the relevant appointments.[85] Beneath the level of general principle, however, the Guidelines focus more heavily on the question of conflicts of interest and the attendant disclosure requirements, which in the practice of commercial arbitration have been described as "the real

76. *See* Gabriel Bottini, *Should Arbitrators Live on Mars? Challenge of Arbitrators in Investment Arbitration*, 32 SUFFOLK TRANSNAT'L L. REV. 341, 346 (2009) (noting that the IBA Guidelines were drafted by a working group); *see also* William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 687 (2009) (stating that the working group had debates about what to include in the IBA Guidelines); *see also* Ana Stanic, *Challenging Arbitrators and the Importance of Disclosure: Recent Cases and Reflections*, 16 CROAT. ARB. Y.B. 205, 226 (2009) (discussing the explanatory notes by the working group which developed the IBA Guidelines).

77. *See* Leon E. Trakman, *The Impartiality and Independence of Arbitrators Reconsidered*, INT'L ARB. L. REV. 1, 1 (2010) (stating that the working group consisted of nineteen of the most brilliant arbitrators).

78. *See* Bottini, *supra* note 76, at 346 (noting that the IBA Guidelines should equally apply to other types of arbitration, such as investment arbitrations); *see also* Trakman, *supra* note 77, at 1 (stating that the working group consisted of brilliant arbitrators).

79. *See* Bottini, *supra* note 76, at 346 (stating that on May 22, 2004, the Council of the International Bar Association (IBA) approved the IBA Guidelines on Conflicts of Interest in International Arbitration); *see also* John M. Townsend, *Clash and Convergence on Ethical Issues in International Arbitration*, 36 U. MIAMI INTER-AM. L. REV. 1, 3 (2004) (asserting that the final version of the IBA Guidelines was not approved by the Council of the International Bar Association until May 22, 2004).

80. *See* IBA Guidelines at 7 (May 22, 2004), http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (follow IBA Guidelines on Conflicts of Interest in International Arbitration (English) hyperlink) (stating that every arbitrator shall be impartial and independent of the parties at the time of accepting appointment and will remain so until the final award has been rendered or the proceeding has otherwise been terminated).

81. *See id.* (quoting General Principle 1 regarding impmartiality and independence of arbitrators).

82. *See id.*

83. *See id.*

84. *See id.*

85. *See id.* (quoting IBA General Standard 2 regarding conflicts of interest); *see also* William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 676 (2009) (declaring that an arbitrator, according to the IBA Guidelines, should decline appointment if he or she doubts his or her ability to remain impartial). *See generally* Townsend, *supra* note 79, at 18 (opining that an arbitrator that makes disclosures can be considered impartial because otherwise the arbitrator would have declined appointment).

question."[86] While many of the adjudicators and tribunals contemplated by the Burgh House Principles fall under the ambit of the Guidelines, the latter are silent on anything that has to do with tenure, financial security and administrative autonomy.[87] This should not be surprising given that the focus of the Burgh House Principles is on standing tribunals while that of the IBA Guidelines is on ad hoc arrangements.[88] As we shall see, the independence requirements developed in the domestic context are in some respects a function of the institutional position of the judiciary upon which the separation of powers principle has been brought to bear.[89]

My review of the initiatives aimed at codifying independence and impartiality for international adjudication shows how underconceptualized this area remains. The Burgh House Principles take full members of standing tribunals as their focus and remain ambiguous as to their applicability to other international adjudicators.[90] The IBA Guidelines focus on conflicts of interest and the related duty of disclosure[91] while keeping silent on all other aspects of indepen-

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86. *See* Jean-Denis Bredin, *La révélation*, *in* ÉTUDES DE PROCÉDURE ET D'ARBITRAGE EN L'HONNEUR DE JEAN-FRANÇOIS POUDRET 349, 349 (Jacques Haldy, Jean-Marc Rapp & Phidias Ferrari eds., 1999); *see also* Thomas Clay, *L'indépendance et l'impartialité de l'arbitre et les règles du procès équitable*, *in* L'IMPARTIALITÉ DU JUGE ET DE L'ARBITRE 199, 216 (Jacques van Compernolle & Giuseppe Tarzia eds., 2006). *See generally* Gabriel Bottini, *Should Arbitrators Live on Mars? Challenge of Arbitrators in Investment Arbitration*, 32 SUFFOLK TRANSNAT'L L. REV. 341, 347 (2009) (describing the disclosure regime laid out in the International Bar Association Guidelines).

87. *See generally* Burgh House Principles, at 1–3 (June 2004), www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf (discussing tenure, remuneration and various administrative autonomies). *See generally* Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26 BERKELEY J. INT'L L. 111, 114 (2008) (discussing the shortcomings of the Burgh House Principles); *see generally* Yuval Shany, *Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings*, 30 LOY. L.A. INT'L & COMP. L. REV. 473, 485–86 (2008) (providing key points on the Burgh House Principles and their general features).

88. *See* Shany, *supra* note 87, at 485 (stating that the Burgh House Principles would "apply to ad hoc judges and arbitrators only 'as appropriate'").

89. *See generally* Allan Rosas, *Separation of Powers in the European Union*, 41 INT'L LAW. 1033, 1043 (Winter 2007) (noting that judicial independence is central to many jurisdictions, but specific requirements vary based on location).

90. *See generally* Mads Andenas, *A European Perspective on Judicial Independence and Accountability*, 41 INT'L LAW. 1, 14 & n.57 (2007) (noting that the Burgh House Principles specifically mention its applicability to international tribunals in the preamble). *See generally* William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 637 n.15 (2009) (recommending the Burgh House Principles as a reference on impartiality standards for international tribunals). *But see* Brubaker, *supra* note 87, at 152 n.20 (acknowledging that the Principles were designed for international judges, but "should be applied as appropriate to judges ad hoc" and in other international settings).

91. See John M. Townsend, *Clash and Convergence on Ethical Issues in International Arbitration*, 36 U. Miami Inter-Am. L. Rev. 1, 15 (2004) (stating that the "IBA Guidelines focus on the problem of disclosure"). *See generally* Emmanuela Truli, *Liability v. Quasi-Judicial Immunity of the Arbitrator: The Case Against Absolute Arbitral Immunity*, 17 Am. Rev. Int'l Arb. 383, 391 (2006) (giving broad overview of the IBA Guidelines, in particular Section 1); *see generally* Otto L O de Witt Winjen et al., *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5 Bus. L. Int'l. 433, 433–34 (2004) (explaining that the IBA's Arbitration and ADR Committee decided to formally address the problems of conflicts of interest through the IBA Guidelines).

dence and impartiality.[92] Neither acknowledges the glaring lack of fit between the principles as they were developed for the purposes of domestic judiciaries and much of the practice of international adjudication.[93] Both declare the requirement of independence and impartiality to be a principle that is applicable to the international adjudicators to whom they are addressed.[94]

Beyond the codification initiatives reviewed above, no progress can be made unless the hypothesis of a fundamental difference between domestic and international adjudication—one that may explain the application to international adjudicators of standards that are different from those set for domestic judges—is further tested. To this end, it would, of course, be useful to take a good look at the historical development of international adjudication so as to be in a better position to situate current international practices vis-à-vis those surrounding domestic courts.[95] Against such historical backdrop, it would also be useful to look more closely at current practices with a view to determining if international adjudication is really adjudication as we know it in the domestic environment.[96] This is not the place to undertake such historical and theoretical enquiries. What I will do here is look briefly at one obvious difference between domestic and international adjudication in order to determine whether it may possibly justify a different approach to independence and impartiality.

At a high level, party control seems to be the most obvious difference. Party control is the flip side of legalization: the more legalized a dispute resolution process becomes, the more con-

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92. *See generally* IBA Guidelines, General Principle, at 17–19 (May 22, 2004), http://www.ibanet.org /Publications/publications_IBA_guides_and_free_materials.aspx (follow IBA Guidelines on Conflicts of Interest in International Arbitration (English) hyperlink) (stating that the document seeks to provide the user with specific guidance as to which conflicts of interest to disclose and which conflicts of interest not to disclose); *see generally* Ana Stanic, *Challenging Arbitrators and the Importance of Disclosure: Recent Cases and Reflections*, 16 CROAT. ARB. Y.B. 205, 222–23 (outlining the conflict of interest and disclosure hierarchy designed by the IBA Guidelines); *see generally* Judith Levine, *Dealing With Arbitrator "Issue Conflicts" in International Arbitration*, DISP. RESOLUTION J. (Feb.-Apr. 2006), *available at* http://www.allbusiness.com/legal/4083500-1.html (noting that the IBA's guidance documents do not deal with an "arbitrator's relationship with the subject matter of the dispute").

93. *See generally* Burgh House Principles, *supra* note 87 (stating that independence of the international judiciary involves freedom from undue influence, freedom from the parties as well as freedom from other conflicts of interest).

94. *See id.* at 1, 4 (stating need for judges to be independent from parties to the cases which they adjudicate); *see also* IBA Guidelines at 20, http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (requiring that there be no relationship between an arbitrator and a party).

95. The fact that scholars and practitioners of international law often overlook the rich arbitral practices of the 19th century was highlighted by James Crawford in his MIDS Inaugural Lecture entitled "Continuity and Change in International Dispute Settlement," delivered in Geneva on October 1, 2008. *See* James Crawford, lecture at the Geneva inauguration of the Master in International Dispute Settlement (MIDS) program (Oct. 1, 2008), *in* 1 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 3 (2010) at 4–5 (asserting that international arbitration originated in the 19th century despite lack of scholarship on the subject).

96. This is what I attempt in an unpublished paper provisionally entitled *Is International Adjudication Adjudication?,* which looks at the nature of the adjudicative function defined through the mode of participation of the parties and the rational basis of the arguments and decisions. *See* Laurence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 284–87 (1997) (comparing varying levels of success enforcing judgments in international tribunals and domestic courts); *see also* David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 IOWA L. REV. 769, 776–78 (1994) (anticipating difficulties in enforcing international environmental law when multiple countries use domestic legal models as basis for adjudication).

trol is taken away from the parties to that process.[97] Looking more closely at party control is helpful to get a better sense of adjudication in the international context because it highlights its basis in the agreement of the parties.

II. Party Control and Party Appointment

In most international configurations, the parties are in full control of the process of adjudication in the important sense that jurisdiction must find its source in their agreement, whether it is formed before or after the dispute arises.[98] "The authority to decide whether or not to submit a dispute to international arbitration is an incident of party autonomy and, in the case of inter-state disputes, of state sovereignty."[99] The control of the procedure by the parties is intimately linked to the power they enjoy, in most international configurations, to withhold or transfer their consent to jurisdiction.[100] The international tribunal "is not entitled to do anything not authorized by the parties."[101] "It has its origins in, and depends for its existence and continuity on, the parties' agreement."[102] In many arbitral configurations, the parties are free to define the rules governing the appointment of the tribunal, including those govern-

97. *See* Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457, 458 (2000) (putting forward delegation or independence, the power to decide on general legal principle, access, whether the process can be triggered without state consent, and embeddedness, whether state action and therefore state consent is required for implementation, as the main characteristics of legalization for international tribunals). These can all be summed up in terms of party control. *See also* Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 17, 27 (2000) (citing various levels of legal obligation between nations and parties' ability to breach obligations).

98. *See* Laurence R. Helfer and Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. REV. 899, 945–47 (2005) (finding several reasons why countries use international tribunals, including ability to control through drafting agreements).

99. *See* M.C.W. Pinto, *Structure, Process, Outcome: Thoughts on the "Essence" of International Arbitration*, 6 LEIDEN J. INT'L L. 241, 260 (1993), *reprinted in* Sam Muller & Wim Mijs, THE FLAME REKINDLED: NEW HOPES FOR INTERNATIONAL ARBITRATION 43, 62 (Kluwer Academic Publishers 1994).

100. *See* Rene Guilherme S. Medrado, *Renegotiating Remedies in the WTO: A Multilateral Approach*, 22 WIS. INT'L L.J. 323, 328–30 (2004) (discussing primary and secondary rules of international adjudication and lack of centralized system of sanctions to address nations who refuse to appear before tribunals); *see also* David Palmeter, *The WTO as a Legal System*, 24 FORDHAM INT'L L.J. 444, 458–60 (2000) (analyzing parties' ability to delay consensus at each step of dispute resolution through refusal of consent). *But see* Cesare P. R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 NY.U. J. INT'L L. & POL'Y 791, 816–21 (2007) (arguing that international courts are moving away from traditional model of consent to compulsory acceptance of jurisdiction).

101. *See* Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43, 49–51 (2001) (outlining use of arbitration among NAFTA members whose consent is implicit in agreement); *see also* Peggy Rodgers Kalas and Alexia Herwig, *Dispute Resolution Under the Kyoto Protocol*, 27 ECOLOGY L.Q. 53, 65 (2000) (suggesting that arbitration and conciliation are likely to be accepted by parties due to ability to select judges); *see also* W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 745 (1990) (asserting that arbitration is advantageous to parties because arbitrator must have parties' consent before taking action).

102. *See* JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 76 (2003) (describing the "contractual theory" of international arbitration); *see also* Vitek Danilowicz, *The Choice of Applicable Law in International Arbitration*, 9 HASTINGS INT'L & COMP. L. REV. 235, 250–51 (1986) (agreeing that international arbitration is based upon contractual theory where sovereigns are allowed to choose applicable law during dispute resolution); *see also* Melanie Ries and Bryant Woo, *International Arbitration in Japan and China*, 61 DISP. RESOL. J. 63, 64 (2006) (discussing growing popularity of arbitration in Japan through adoption of new JCAA's new commercial arbitration rules).

ing the qualifications required of arbitrators.[103] The parties generally reserve to themselves the right to appoint an adjudicator,[104] and they retain a high degree of control even after a tribunal has been constituted and jurisdiction has been established.[105] Under standard arbitration practice, the parties acting together are almost fully in control of the rules of procedure.[106] This state of affairs obtains not only positively, as it were, but also negatively, in the sense that a failure by one party to object timely when faced with a known procedural irregularity will generally be taken as a valid waiver of the procedural right at issue, no matter how fundamental.[107] Parties acting together are generally able to put an end to the process and to start afresh with a new tribunal, under a different set of rules or, as the case may be, under the aegis of another institution.[108]

Party control does distinguish domestic courts from international tribunals, therefore, in a way that appears conceptually significant: even the most legalized international tribunals remain, in tangible ways, the creature of agreements between identifiable parties as opposed to

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103. *See* Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53, 56–57 (2005) (identifying parties' ability to choose arbitrators who are likely to rule in their favor).

104. *See* Jennifer Amundsen, Note, *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, 386 (2003) (identifying preference for arbitration over litigation due to parties' ability to choose fora, arbitrators); *see also* Christopher Shen, Note, *International Arbitration and Enforcement in China: Historical Perspectives and Current Trends*, 14 WTR-CURRENTS INT'L TRADE L.J. 69, 70 (2004) (positing that arbitration is becoming increasingly popular because parties may protect their interests by choosing arbitrators).

105. *See* Patrick Borchers, *Categorical Exceptions to Party Autonomy in Private International Law*, 82 TUL. L. REV. 1645, 1650–51 (2008) (comparing European and American approaches to exceptions to party autonomy in international disputes).

106. *See* Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211, 222–23 (2004) (showing that disputants' conception of fairness of procedure is correlated with their level of control); *see also* Donna Shestowsky & Jeanne Brett, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63, 69 (2008) (analyzing disputants' satisfaction with choice of procedure following dispute resolution).

107. *See* William H. Knull III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, 11 AM. REV. INT'L ARB. 531, 551 (2000) (acknowledging that failure to object to procedural irregularities during arbitration may effect an implied waiver of recourse under some arbitral legal systems); *see also* Alec Emmerson & Sapna Jhangiani, *DIAC Announced New Set of Arbitration Rules*, CLYDE&CO (2007), http://www.clydeco.com/knowledge/articles/diac-announces-new-set-of-arbitration-rules.cfm (noting that some rules incorporating waiver provisions, as found in the ICC rules, state that any party failing to object to procedural rules waives its objection right). *See generally* Loïc Cadiet, *La Renonciation à se prévaloir des irrégularités de la procédure arbitrale*, 3 REVUE DE L'ARBITRAGE 28 (2006).

108. *See* Jiaqi Liang, *The Enforcement of Mediation Settlement Agreements in China*, 19 AM. REV. INT'L ARB. 489, 491–92 (2008) (asserting that a settlement agreement can put an end to the arbitration); *see also* Francis Russell, Esquire to the Right Hon. Lord Brougham & Vaux (Oct. 20, 1853), *reprinted in A Letter of 1853 From Francis Russell Esq. MA of the Inner Temple, Barrister-at-Law, to the Rt. Hon. Lord Brougham & Vaux on the Improvement and Consolidation of the Law of Arbitration*, 13 ARB. INT'L 253, 254 (1997) (citing to old common law to show that both parties could have, at any time before the award was made, revoked their submission to arbitration and put an end to the arbitrator's authority).

a judiciary responsible for the general application of a system of law.[109] Even the International Court of Justice lacks general, compulsory jurisdiction and allows ad hoc appointments in most cases.[110] In these important respects, the nature of the Court's intervention remains essentially

109. *See* Henry P. de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 74 (1982) (explaining that international arbitration is based on contract rather than on legal norms and laws established by states). *See generally* Donald F. Donovan, *International Commercial Arbitration and Public Policy*, 27 N.Y.U. J. INT'L L. & POL. 645, 646–47 (1995) (indicating that parties exercise "party autonomy" by specifying arbitral procedures and governing law).

110. *See* Statute of the International Court of Justice, art. 31(2)–(3), June 26, 1945 (permitting state parties before the ICJ to appoint ad hoc judges where one of their own nationals is not already in the court); *see also* Aman M. McHugh, *Resolving International Boundary Disputes in Africa: A Case for the International Court of Justice*, 49 HOW. L. J. 209, 233 (2005) (noting that while states are restricted to the 15 judges on the International Court of Justice, they are still able to appoint ad hoc judges in certain instances); *see also* Eric A. Posner & Miguel De Figueiredo, *Is the International Court of Justice Biased?*, 6, 29–30 (U. CHI. JOHN M. OLIN L. & ECON. WORKING PAPER SERIES, Working Paper No. 234, 2004), *available at* http://www.law.uchicago.edu/Lawecon/wp201-250 (noting that on many occasions, one or both of the parties used an ad hoc judge in an ICJ proceeding).

arbitral.[111] Does this make international adjudication so different as to impact the requirements of independence and impartiality? A brief look at the most glaring manifestation of party control should help us get a sense of how different international adjudication really is.

A. Whence Party Appointment?

Questions concerning independence and impartiality will often arise when the role of the parties in the appointment of adjudicators is considered.[112] This is an issue which cuts across the whole spectrum of international adjudication and is probably its most obvious point of

111. This is precisely what had been contemplated in the penultimate draft of the Covenant of the League of Nations ("Hurst-Miller Draft," version of February 14, 1919) with respect to the Permanent Court of International Justice. *See* League of Nations Covenant art. 14 & art. 15 (Draft Version 1919), http://www.world courts.com/pcij/eng/documents/1919.08.28_covenant _art14_15.htm (requiring that "the Executive Council formulate plans for the establishment of a Permanent Court of International Justice and that the Court shall, when established, be competent to hear and determine any matter which the parties recognize as suitable for submission to it for arbitration under the foregoing Article"); *see also* John C. Guilds III, *"If It Quacks Like A Duck:" Comparing the ICJ Chambers to International Arbitration for a Mechanism of Enforcement*, 16 MD. J. INT'L L. & TRADE 43, 43 (1992) (concluding that the ICJ Chambers possess many, if not all, of the characteristics common to international arbitration). *See generally* Karl-Heinz Bockstiegel, *The Role of Arbitration Within Today's Challenges to the World Community and to International Law*, 22 J. LONDON COURT INT'L ARB. 165, 171 (2006) (illustrating that creating the chambers of the ICJ with judges selected by the parties is similar to arbitration).

112. The flexibility to get subject-matter or industry experts as judges is also a common feature of international adjudication that may have an indirect impact on the approach to independence and impartiality (where independence is seen as a function of the duty to decide on the basis of legal principle). This flexibility is often claimed as an advantage in commercial arbitration, but it is one of which parties rarely avail outside certain close-knit industries that have their own arbitration systems. The only cases where one regularly sees a non-lawyer appointed as arbitrator in mainstream commercial arbitration seem to involve construction disputes, with consulting engineers as arbitrators. Otherwise, in the overwhelming majority of commercial cases, parties and institutions rely instead on arbitration law experts. This element of control also seems to have fallen into desuetude in the context of mixed arbitration, where virtually all arbitrators are trained lawyers. With respect to state-to-state public international law disputes, the Statute of the International Court of Justice requires that judges possess the qualifications for appointment to the highest judicial office in their country of nationality or that they be jurists of recognized competence in international law. *See* I.C.J. STATUTE, Art. 2. The practice of calling upon experts in fields other than law for the purposes of dispute resolution was relatively widespread in trade law but is also in the process of disappearing due to the legalization of dispute settlement in this area brought about by the World Trade Organization (WTO) in 1995. *See* Jennifer Keefe, *Canadian Federalism and International Trade Agreements: Evaluating Three Policy Options for Mitigating Federal-Provincial Conflict* (Jan. 25, 2008) (unpublished M.A. thesis, Simon Fraser University, on file at Simon Fraser University). In 1997, the Appellate Body of the WTO decided to allow representation of states by law firms, which had not been the practice under the previous GATT system. The last Appellate Body Member who was not a trained lawyer was Arumugamangalam Venkatachalam Ganesan, a distinguished retired civil servant who had represented India at the various stages of the Uruguay Round of Multilateral Trade Negotiations. *See* World Trade Organization Current Appellate Body Members, http://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm. *See* David J. McLean & Sean-Patrick Wilson, *Is Three a Crowd? Neutrality, Partiality and Partisanship in the Context of Tripartite Arbitrations*, 9 PEPP. DISP. RESOL. L. J. 167, 169–70 (2008) (commenting that despite its widespread usage, there has been confusion and concern about the proper role of neutrality in the tripartite structure). *See generally* Marybeth Wilkinson & Elizabeth Koehn, *International Arbitrators: Impartial and Independent?* 541, 543–44 (PLI Ethics Program, N.Y. Practice Skills Course Handbook Series No. 24134, 2010) (pointing out that the international arbitration community lacks uniformity in applying the seemingly similar standards for independence and impartiality).

demarcation with the model of domestic courts.[113] It is not entirely clear how this feature of international arbitration has evolved over time between ancient commercial practices and the evolution of rule-based diplomacy.[114] However, since international tribunals are always based on consent,[115] the parties are necessarily involved, directly or indirectly, in their constitution.[116] My focus here is the insistence upon the right of a party to be "represented" on a tribunal, which is seen across the spectrum of international adjudication. In all forms of international arbitration, it is standard practice to have each of the parties appoint an arbitrator

113. What is emphasized here is a distinction relating to domestic courts, not domestic arbitration. On the distinction between domestic and international arbitration, *see* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 875 (2nd ed. 2001) (comparing the international arbitration system with the domestic arbitration system of the United States whereby party-nominated arbitrators are understood to have a measure of partiality toward the party that appointed them); *see also* Tony Cole, *Authority and Contemporary International Arbitration*, 70 LA. L. REV. 801, 854 (2010) (distinguishing the difference in views between international arbitration where all arbitrators should be both independent and impartial and the traditional rule in domestic arbitration where party-appointed arbitrators are regarded as "advocates"); *see also* William S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 357, 369–70 (2000) (declaring that domestic tribunals may not be sufficiently impartial as opposed to international arbitrations).

114. *See* Adam M. Smith, *"Judicial Nationalism" in International Law: National Identity and Judicial Autonomy at the ICJ*, 40 TEX. INT'L L. J. 197, 202–3 (2005) (suggesting that arbitration moved from commercial practices to the formal resolution of disputes between states in the 18th century, and brought with it the tradition of openly partial judges). *See generally* Frank D. Emerson, *History of Arbitration Practice and Law*, 19 CLEV. ST. L. REV. 155, 156–64 (1970) (giving a historical account of arbitration); *see generally* JACKSON H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 151–93 (1929) (chronicling the evolution of arbitration).

115. *See* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 2 (2008) (asserting that the parties' consent provides the underpinning for the power of the arbitrators to decide the dispute); *see also* Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 79 (addressing the consensual nature of the international arbitration process). *See generally* Aboul Enein, *Arbitration Under the Auspices of the Cairo Regional Center for Commercial Arbitration*, 4 INT'L TAX & BUS. LAW. 256, 260–61 (1986) (showing that parties consent to every step of the arbitration process and specifically the choice of arbitrators).

116. *See* JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION (2003) (attributing all of the procedural and substantive factors of an international arbitration directly to party autonomy); *see also* Catherine Kessedjian, *Sir Kenneth Bailey Memorial Lecture: Dispute Resolution in a Complex International Society*, 29 MELB. U. L. REV. 765, 782 (2005) (emphasizing that many arbitral tribunals derive their powers only from the parties' will and therefore the parties control the arbitral proceedings). *See generally* Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 33–34 (Bocconi Univ. Inst. of Comparative Law Legal Studies Research Paper Series Research Paper No. 06-04, 2004) (implying that since parties have a lot of control over the choice of the arbitrators, they can ultimately directly or indirectly influence the outcome).

to the tribunal, which is then chaired by a third arbitrator.[117] The chair normally does not share the nationality of any of the parties[118] and is chosen by the party-appointed arbitrators in consultation with the parties.[119] The practice of party appointments was adopted early in state-to-state arbitration.[120] It later found its way into the Code of International Arbitration, adopted by the Peace Congress at Antwerp in 1894,[121] and thence into the Convention for the Pacific Settlement of International Disputes of 1899, which established the Permanent Court of Arbi-

117. *See* Richard M. Mosk, *The Role of Party-Appointed Arbitrators in International Arbitration: The Experience of the Iran-United States Claims Tribunal*, 1 TRANSNAT'L LAW. 253, 253 (1988) (suggesting that oftentimes each party will appoint an arbitrator and those arbitrators will choose the presiding arbitrator); *see also* Claudia T. Salomon, *Selecting an International Arbitrator: Five Factors to Consider*, 17 MEALEY'S INT'L ARB. REP. 1 (2002) (explaining that when an arbitration is to be decided by three arbitrators, each side typically selects an arbitrator and the two party-appointed arbitrators select the chairman); *see also* Olga K. Byrne, Note, *A New Code of Ethics for Commercial Arbitrators: The Neutrality of Party-Appointed Arbitrators on a Tripartite Panel*, 30 FORDHAM URB. L. J. 1815, 1818 (2002) (stating that a common arrangement of an arbitration tribunal is a panel of three wherein each party appoints one arbitrator and the two party-appointed arbitrators agree on a third).

118. *See* LONDON COURT OF INTERNATIONAL ARBITRATION art. 6.1 (establishing that either party shall name two persons, identifying one of them as the arbitrator who shall not have the same nationality as nor be a national of either party); *see also* ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 202–3 (2nd ed. 2004) (1986) (claiming that the usual practice in international arbitration is to appoint a sole arbitrator of a different nationality from that of the parties to the dispute); *see also* Hans Smit, *Mandatory Law in Arbitration*, 18 AM. REV. INT'L ARB. 155, 158 (2007) (recognizing that international arbitrators typically do not possess the nationality of either of the parties).

119. *See* World Intellectual Property Organization, WORLDWIDE FORUM ON THE ARB. OF INTELL. PROP. DISP. 219 (1994) (maintaining that it is proper procedure for party-appointed arbitrators to consult with the party which appointed them with respect to the selection of the chairman); *see also* Dana H. Freyer & Irene T. Cate, *Selecting the Right Arbitrator*, 349, 354 (PLI Litig. & Admin. Practice, Course Handbook Series No. 23211, 2010) (clarifying that each party's input is assured in the panel selection process because party-appointed arbitrators consult the parties on which person to appoint as chairman arbitrator); *see also* Lauren D. Rachlin, *A Guide to Effective International Arbitration: Practical Considerations in International Arbitration Proceedings*, 10 INT'L L. PRACTICUM 29, 31–32 (1997) (noting that under the AAA, UNCITRAL and ICC rules, a party-appointed arbitrator may discuss with the parties such issues as the qualifications, names and general qualities of potential chairmen).

120. An early example can be found in the dispute resolution provisions of the so-called Jay Treaty of 1794 between the United States and Great Britain. *See* Treaty of Amity, Commerce and Navigation, U.K.-U.S., art. V, Nov. 19, 1794, 8 U.S.T. 116. Art. V provides that "One Commissioner shall be named by His Majesty, and one by the President of the United States . . . and the said two Commissioners shall agree on the choice of a third." *See id.* The Alabama Claims Convention of 1869 (signed but not ratified by the United States, the Senate having denied ratification on April 13, 1869) had established a mechanism with party-appointed "commissioners" for the resolution of certain claims made by the British subjects against the Government of the United States. *See* CHARLES C. BEAMAN, JR., THE NATIONAL AND PRIVATE "ALABAMA CLAIMS" AND THEIR "FINAL AND AMICABLE SETTLEMENT," 298–99 (1871) (showing that each party appointed two of the four commissioners for their arbitration). Party appointment was also contemplated in the Treaty of Ghent of 1814 (Treaty of Peace and Amity between great Britain and the United States of America, December 24, 1814). *See* Treaty of Peace and Amity, U.K.-U.S., art. IV, Dec. 24, 1814, 8 U.S.T. 218. But in the latter two cases, the procedure was a two-stage "umpire" procedure whereby the persons appointed by the parties first attempted to find a mutually acceptable solution and then called upon the umpire only to the extent that they disagreed. The umpire then decided alone. *See* WILLIAM E. DARBY, INTERNATIONAL TRIBUNALS 271, 277, 306 (4th ed. 1904) (analyzing the procedural process of choosing international arbitrators).

121. *See* Convention for the Code of International Arbitration art. 10, 41 (1894) (stating that "[t]he arbitrators shall be at least three in number; one to be chosen by each of the disputant nations: these two arbitrators shall choose the umpire" and that "the umpire is one of the three arbitrators, who make the decisions together by absolute majority"); *see also* Michael Clinton, *Frederic Passy: Patriotic Pacifist*, J. OF HIST. BIOGRAPHY 33, 43–44 (2007) (explaining that international arbitration became popular in the midst of the creation of peace societies).

tration at The Hague.[122] At the Peace Conference of 1907, which reviewed the 1899 Convention, the freedom to appoint adjudicators had come to be viewed as the "very essence" of international arbitration.[123]

This is the backdrop to the judge ad hoc, the institution of which is part and parcel of the compromise that made the creation of standing international courts possible.[124] As had been the case with the Permanent Court of International Justice, parties to a dispute before the International Court of Justice are allowed to appoint additional judges if they are not already "represented" on the bench.[125] This provision was widely carried over to other public international law standing tribunals.[126] The initial introduction of the ad hoc judge into the Statute of the Permanent Court of International Justice did not go unnoticed or without objection. Bernard Loder, who was to become the first president of that Court, had observed in the course of the debates of the Advisory Committee of Jurists that ad hoc judges "would give the proceed-

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122. *See* Convention for the Pacific Settlement of International Disputes art. 24, 28, 45, July 29, 1899, 32 Stat. 1779 (describing rules of arbitration, providing a default appointment procedure, a tribunal of five where an umpire is the chair of the tribunal making decisions by majority, and this was revised in 1907, restricting the appointment of nationals to one per party); *see also* U.N. Conference on Trade & Dev., *The Course on Dispute Settlement in International Trade Investment and Intellectual Property*, ¶ 2.2, 2.3, U.N. Doc UNCTAD/EDM/MISC.232/Add. 26 (June 24, 2003) (prepared by H.M. Holtzman and B.E. Shifman) (describing that a majority of the states were reluctant to establish an overly autonomous bureau for arbitration purposes pursuant to their desire to preserve their own sovereignty); *see also* Turki Al Saud, A Comparison Between the Dispute Settlement Procedures in the International Court of Justice and the World Trade Organization (December 2009) (unpublished M.Phil. thesis, Brunel University) (on file with author) (describing the conventions' party appointment in the establishment of international peace and mediation).

123. *See* JAMES BROWN SCOTT, THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1907: TRANSLATION OF THE OFFICIAL TEXTS (Oxford University Press 1921) at 2, 14, 144–45, 147 (discussing the profound significance of party appointment in international arbitration).

124. *See* Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271, 274 (2003) (describing the emergence of ad hoc judges in dealing with particular disputes in international tribunals); *see also* OLE SPIERMANN, INTERNATIONAL LEGAL ARGUMENT IN THE PERMANENT COURT OF INTERNATIONAL JUSTICE: THE RISE OF THE INTERNATIONAL JUDICIARY 8 (Cambridge University Press 2005) (declaring that judges ad hoc will play a novel and yet to be determined, if unequivocally positive, role in international arbitration owing to their previous legal experience); *see also* Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication,* 26 BERKELEY J. INT'L L. 111, 112 (2008) (recognizing preference in the establishment of ad hoc adjudicators because of their practical experience and knowledge in adjudication matters).

125. *See* Statute of the International Court of Justice art. 31, Jun. 26, 1945, 59 Stat. 1031 (stating that a "national judge" is a standing member who is of the representative party's nationality); *see also* Christian Tomuschat, *National Representation of Judges and Legitimacy of International Jurisdictions: Lessons from ICJ to ECJ?*, *in* THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE, 183, 186 (commenting that if a dispute arises in which a State does not have a Judge of its nationality on the bench, an ad hoc judge may be appointed to safeguard the party's interests); *see also* Stephen M. Schwebel, Note, *National Judges and Judges Ad Hoc of the International Court of Justice,* 48 INT'L & COMP. L. Q., 889, 891 (1999) (describing the eminent role of ad hoc judges in international arbitration).

126. *See, e.g.,* European Convention on Human Rights and Fundamental Freedoms art. 27, Nov. 4, 1950, 213 U.N.T.S. 221 (describing the Court's procedural and numerical requirements for Committees, Chambers, and Grand Chamber); *see also* Organization of American States, Statute of the Inter-American Court of Human Rights art. 10, 1 Oct. 1979, 18 I.L.M 1189 (stating the logistical requirements as well as a State Party's responsibility to the hearing and appointment of ad hoc judges); *see also* U.N. Convention of the Law of the Sea art. 17, Dec. 10, 1982, 1833 U.N.T.S 397 (describing the nationality of members of an international tribunal).

ings a characteristic essentially belonging to arbitration."[127] And indeed, the formula that won the day was fairly close in the result to the tribunal composition devised for state-to-state arbitration under the revised Convention of 1907: a formation made up of a majority of non-nationals, and a national "representing" each of the parties.[128] In spite of the objections that this

> was too reminiscent of the way in which arbitral tribunals are composed, a powerful argument in favour of it turned out to be that a rule giving both parties the right to have a judge of its nationality on the bench could be instrumental in overcoming the traditional mistrust of states towards a permanent judicial body.[129]

It would have been theoretically possible simply to prevent a judge of the nationality of any of the parties to a dispute to participate in the proceedings. However, it was thought that if the "representation" of states on the Court could not be assured, it would "prove impossible to obtain their assent."[130] This might have been seen as a political compromise, but substantive merit was also found in the participation of "national representatives" of both parties. Substantive merit is where the arguments converge in favour of party appointments across the spectrum of international adjudication. Confidence in the process is repeatedly touted as the basis for this aspect of party control.[131] But, as Andreas Lowenfeld once observed, if "one of the principal functions of [party appointments] is to give confidence in the process . . . , some basis for that confidence needs to be established."[132]

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127. *See* PERMANENT COURT OF INTERNATIONAL JUSTICE: ADVISORY COMMITTEE OF JURISTS, PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE COMMITTEE: JUNE 16TH-JULY 24TH 531 (The Lawbook Exchange 2006) (1920).

128. *See* Convention for the Pacific Settlement of International Disputes art. 4, 5, 31, 45, July 29, 1899, 32 Stat. 1779 (discussing party appointments to one party); *see also* JOHN Q. BARRETT, THE PATH FROM THE 1907 HAGUE CONFERENCE TO NUREMBERG AND FORWARD, AMERICAN SOCIETY OF INTERNATIONAL LAW STUDIES IN TRANSNATIONAL LEGAL POLICY (Elizabeth Anderson & David M. Crane eds., 2008) (2008) (recognizing that the 1907 convention created an embryonic court in the face of international arbitration).

129. *See* PETER H. KOOIJMANS, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 497 (Andreas Zimmerman, Christian Tomuschat & Karim Oellers-Frahm eds., Oxford Univ. Press 2006) (emphasizing the significance of State Parties' consent).

130. *See* Permanent Court of International Justice, *supra* note 127, at 531 (reporting the meetings in the Peace Palace in The Hague to draft the statute for the Permanent Court of International Justice of the League of Nations); *see also* Bingbin Lu, *Reform of the International Court of Justice—A Jurisdictional Perspective*, 5 PERSPECTIVES 2 (2004) (stating that only States can gain access to the Court, and upon doing so, must accept the Court's jurisdiction and undertake to comply the Court's determinations in good faith).

131. *See* Schwebel, *supra* note 125, at 892 (emphasizing the substantial and renowned role of ad hoc judges in international arbitration proceedings); *see also* Yuval Shany, *Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings*, 30 LOY. L.A. INT'L & COMP. L. REV. 473, 474 (2008) (reasoning that increased party control would inevitably be at the expense of judicial independence and impartiality but would result in a subsequent increase in the party's dependence upon international adjudication).

132. *See* Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT'L L.J. 59, 62 (1995) (acknowledging that party-appointed adjudicators are apt to contribute promising, party-neutral, well-considered, and reasonable determinations in international arbitration matters).

B. Why Party Appointment?

The objective of the party-appointment system needs to be established in order for it to be weighed against the principles of independence and impartiality. At first glance, of course, "a system whereby each of the parties chooses an arbitrator is hardly likely to result in a court which is totally indifferent to the parties and their concerns."[133] Thus, "the mirage of absolute judicial impartiality becomes more distorted when it is superimposed onto the arbitrator." A well-known arbitrator once reported having sought, when acting as counsel in a commercial case, an arbitrator with "the maximum predisposition" toward his client and "the minimum appearance of bias." In the same context, another such arbitrator described the party-appointed arbitrator as "a friend, who must be independent enough to award against the party who appointed him should the merits of the case warrant it." Such characterizations hardly amount to rational grounds for the practice; nor does the unconditional support of law firms in whose interest it may well be to maintain it. One needs some measure of clarity: What is the "role," and what is the "use," of party-appointed adjudicators?[134]

There are essentially two points. The first is that the party-appointed adjudicator "will ensure that all the arguments of his party get a thorough and fair hearing." Lowenfeld expressed it as follows:

> At least one of the persons who will decide the case will listen carefully—even sympathetically—to the presentation, and if the arbitrator is well chosen, will study the documents with care. That fact alone is likely to spur the other arbitrators to study the documents as well, whether or not they would have done so in any case. Thus the presence of a well-chosen party-appointed arbitrator goes a long way toward promising (if not assuring) a fair hearing and a considered decision.[135]

This description, which was offered for international arbitration, also tracks the general understanding of the role of the judge ad hoc at the International Court of Justice, who "will usually take care that during the deliberations and in the judgment the views and position of the party which has appointed him or her will be duly reflected."[136]

The second point is that a party-appointed adjudicator will serve as an "interpreter" of language, of legal culture, and of law for the benefit of fellow adjudicators. Lowenfeld, again, explains it as follows:

> [A] party-appointed arbitrator serves as a translator. I do not mean just of language, though occasionally that is required as well, as even persons highly

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133. *See* Ibrahim Fadlallah, "L'ordre public dans les sentences arbitrales" (1994) 249 *Recueil des cours* (Hague Academy of International Law) 369, 378–79 (translation of quotation from Dominique Hascher, *A Comparison between the Independence of State Justice and the Independence of Arbitration*, *in* Emmanuel Jolivet (ed.), *Independence of Arbitrators* (ICC Publishing 2008) 77, 85).

134. *See* Lowenfeld, *supra* note 132, at 65.

135. *See id.*

136. *See* Kooijmans, *supra* note 129, at 498 (commenting on the role of the judge ad hoc).

> skilled in the language of arbitration may be confused by so-called *faux amis* (false friends)—words that look the same but have different meanings in different languages. I mean rather the translation of legal culture, and not infrequently of the law itself, when matters that are self-evident to lawyers from one country are puzzling to lawyers from another.[137]

This is what Lord Phillimore expressed in his capacity as a member of the Advisory Committee of Jurists tasked with drafting the Statute of the Permanent Court of International Justice, when he spoke in favour of "party representation." Having a national "representing" each of the parties was "not only to protect their interests, but to enable the Court to understand certain questions which require highly specialised knowledge and relate to the differences between the various legal systems."[138]

Presented in this way, the system of party appointments does seem to meet a confidence-building need that is peculiar to international proceedings. The adjudicator appointed by a party brings something to the process "through a shared or similar economic, political, social, cultural, national or legal background," even if this comes at the cost of "initially" harbouring "a general sympathy or predisposition in favour of the appointing party or some aspect of its case."[139] By any measure, the cost is not insignificant. Claiming that the independence of a party-appointed arbitrator can be equated to that of a domestic judge, or that of a presiding arbitrator, has been called "hypocrisy,"[140] an "ideological façade,"[141] a "fiction,"[142] a "mythology,"[143] and a "triumph of rhetoric"[144] for the "naïve."[145] In terms of independence and impar-

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137. *See* Lowenfeld, *supra* note 132, at 65 (describing an arbitrator's contribution to an arbitration through the translation of terms, concepts and assumptions that may resolve critical misunderstandings).

138. *See* JÖRG KAMMERHOFER, PERMANENT COURT OF INTERNATIONAL JUSTICE, ADVISORY COMMITTEE OF JURISTS, PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE COMMITTEE JUNE 16TH–JULY 24TH, 1920 528–29 (The Lawbook Exchange 2006).

139. *See* Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT'L 395, 404–5 (1998). *See generally* Amalia D. Kessler, *Enforcing Virtue: Social Norms and Self-Interest in an Eighteenth-Century Merchant Court*, 22 L. HIST. REV. 71, 84 (2004) (indicating that party-appointed arbitrators have a personal connection to the litigants that encourages trust and eventually furthers efforts toward reconciliation).

140. *See* Pierre Bellet, *Des arbitres neutres et non neutres*, *in* ETUDES DE DROIT INTERNATIONAL EN L'HONNEUR DE PIERRE LALIVE 339, 407 (Helbing & Lichtenhahn 1993).

141. *See* Peter F. Schlosser, *L'impartialité et l'indépendance en droit allemand*, *in* L'IMPARTIALITÉ DU JUGE ET DE L'ARBITRE 299, 305 (Jacques Van Compernolle & Giuseppe Tarzia eds., Bruylant 2006).

142. *See* Robert Coulson, *An American Critique of the IBA's Ethics for International Arbitrators*, 4 J. INT'L ARB. 103, 107 (1984).

143. *See* Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 508 (1997).

144. *See* Catherine A. Rogers, *The Ethics of International Arbitrators*, *in* THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 621, 635 (Lawrence W. Newman & Richard D. Hill eds., 2d ed. 2008).

145. *See* Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?,* 18 OHIO ST. J. ON DISP. RESOL. 505, 515 (2003) (describing some of the criticisms of party-appointed arbitration where the arbitrator makes decisions based on partiality); *see also* Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT'L L.J. 59, 69 (1995) (concluding that a party-appointed arbitration system allows the arbitrator to act impartially); *see also* Schlosser, *supra* note 141, at 307.

tiality, therefore, party-appointed adjudicators cannot "be equated" to judges.[146] Yet it is taken for granted that they are governed by the requirements of independence and impartiality, and the "same test,"[147] or one deemed "no less stringent,"[148] is often purportedly applied to them.[149] How can the legal framework surrounding party-appointed adjudicators explain this contradiction?

There seems to be little point in burying one's head in the sand about party-appointed international adjudicators. The party appointment system has emerged out of long-established and widely shared practices across the whole spectrum of adjudicative configurations.[150] What is more, it is supported by reasons. One may find those reasons more or less persuasive,[151] but they undeniably give a measure of normative force to the practice: this is no blind usage supported merely by repetition. For those in search of authority, the party-appointment system is endorsed in a plethora of important normative instruments, both domestically and internationally. These include arbitration statutes in most jurisdictions, whether or not they follow the

146. *See* KATHERINE LYNCH, THE FORCE OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION 72 (Kluwer Law International 2003) (indicating the possibility of abuse and unfairness in a system where parties utilize party-appointed arbitrators rather than courts); *see also* Hans Smit, *Delinquent Arbitrators and Arbitration Counsel*, 20 AM. REV. INT'L ARB. 43, 57 (2009) (asserting that judges, unlike arbitrators, represent the public rather than the parties); *see also* Emmanuela Truli, *Liability v. Quasi-Judicial Immunity of the Arbitrator: The Case Against Absolute Arbitral Immunity*, 17 AM. REV. INT'L ARB. 383, 392, 404 (2006) (highlighting the differences between judges and arbitrators in their performances and concluding that an arbitrator's duty of impartiality and independence is not required).

147. *See* R v. Gough (1993) A.C. 646, 670 (H.L.).

148. *See* Fali S. Nariman, *Standards of Behaviour of Arbitrators* 4 ARB. INT'L 311, 311 (1988).

149. *See* IBA Guidelines on Conflicts of Interest in International Arbitration § 1 (May 22, 2004), *available at* http://www.int-bar.org/images/downloads/guidelines%20text.pdf (asserting that all arbitrators must remain impartial and independent to the parties throughout the entire course of the arbitration); *see also* The Study Group of the International Law Association on the Practice and Procedure of the International Court and Tribunals, The Burgh House Principles on the Independence of the International Judiciary § 1.1 (Nov. 25, 2004), *available at* http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf (defining the standard that international judges act independently of the parties before them). "This concept of a 'predisposed but ultimately impartial' party-appointed arbitrator does not require formally different standards for party-appointed and presiding arbitrators in international arbitration rules." *See also* Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT'L 395, 405 (1998); *see also* John M. Townsend, *Clash and Convergence of Ethical Issues in International Arbitration*, 36 U. MIAMI INTER-AM. L. REV. 1, 1 (2004) (stating the ethical duty for international party-appointed arbitrators to act independently and impartially).

150. Elvia Arcelia Quintana Adriano, *14th Biennial Meeting of the International Academy of Commercial and Consumer Law: Bramberg, Germany July 30 through August 3, 2008: Commercial Arbitration: Its Harmonization in International Treaties, Regional Treaties and Internal Law*, 27 PENN. ST. INT'L L. REV. 817, 841 (2009) (citing that the long history of the evolving international arbitration system began in the late 18th century); *see also* David J. Branson, *American Party-Appointed Arbitrators—Not the Three Monkeys*, 30 U. DAYTON L. REV. 1, 6–7 (2004) (stating that the party-appointed arbitration system in America dates back to the 19th century, where an arbitrator picked by each party sat on a panel and acted in a quasi-judicial manner); *see also* Henry P. de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 43 (1982) (describing arbitration's long history within the judicial system).

151. The responsibility to ensure a fair hearing can be said ultimately to fall on the chair of the tribunal, who should require no prompting to perform this task, and the responsibility to ensure that the position of a party, in all of its cultural subtleties, fully comes across to all members of the tribunal, can be said to fall squarely on the relevant counsel. *See* HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 233, 235–36 (Clarendon 1933).

UNCITRAL Model Law in other respects;[152] dozens of sets of international arbitration rules referred to in tens of thousands of business contracts;[153] and thousands of bilateral and multilateral treaties, including the *Charter of the United Nations*, of which the *Statute of the International Court of Justice*[154] is part.[155] One may, of course, argue quite legitimately that the reasons supporting party appointment are steadily losing ground with the increasing circulation of information and movement of persons.[156] At least, the sharing of a "similar economic, political, social, cultural, national or legal background'[157] may well become less significant or meaningful with globalization.[158] But the proxy for most of these, nationality, not only is entrenched in a daunting array of domestic and international legal instruments,[159] it very likely has continued

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152. *See* UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration*, G.A. Res. 61/33, art 1, U.N. DOC. A/RES/61/33 (Dec. 4, 2006), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

153. *See* de Vries, *supra* note 150, at 79 (1982) (stating that parties to international contracts are bound to its terms because of contract provisions regarding rules of law); *see also* Iur. Oliver Dillenz, *Drafting International Commercial Arbitration Clauses,* 21 SUFFOLK TRANSNAT'L L. REV. 221, 224 (1998) (concluding that when parties draft arbitration clauses, they often include UNCITRAL or some other rules in the agreement); *see also* Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration* 33 VAND. J. TRANSNAT'L L. 79, 117 (2000) (explaining that parties use international arbitration rules by incorporating them into the language of their contracts).

154. *See* U.N. Statute of the International Court of Justice, Jun. 26, 1945, 59 Stat. 1031.

155. *See* U.N. Charter art. 92 (explaining the role of the International Court of Justice as the principal legal tool of the United Nations); *see also* MOHAMED SAMEH M. AMR, THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AS THE PRINCIPAL JUDICIAL ORGAN OF THE UNITED NATIONS 20, 22–23 (Kluwer Law International) (2003) (describing how the International Court of Justice fits into the framework of the United Nations); *see also* Kathleen Renee Cronin-Furman, Note, *The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship*, 106 COLUM. L. REV. 435, 437 (2006) (affirming the prominence of the International Court of Justice within the Charter of the United Nations).

156. *See* Seth A. Lieberman, *Something's Rotten In the State of Party-Appointed Arbitration: Healing ADR's Black Eye That Is "Nonneutral Neutrals,"* CARDOZO J. CON. RES. 216, 225 (2004) (describing the conflicting interests faced by the party-appointed arbitrator); *see also* Yuval Shany, *Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings*, 30 LOY. L.A. INT'L. & COMP. L. REV. 473, 473–74 (2008) (questioning the impartiality of party-appointed mediators and how this could erode the reasons for their appointment). *See generally* Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26 BERKLEY J. INT'L. L. 111, 116 (2008) (explaining the International Court of Justice's standards of impartiality).

157. *See* Bishop & Reed, *supra* note 149, at 404–5.

158. *See* David J. McLean, *Anniversary Contributions: International Litigation and Arbitration: Toward a New International Dispute Resolution Paradigm: Assessing the Congruent Evolution of Globalization and International Arbitration*, 30 U. PA. J. INT'L. L. 1087, 1094 (2009) (assessing the problems arising from the growth of international arbitration).

159. *See* Ilhyung Lee, *Essay: Practice and Predicament: The Nationality of the International Arbitrator*, 31 FORDHAM INT'L L. J. 603, 610 (2008) (describing the rules on arbitrator nationality in LCIA, ICC, WIPO, UNCITRAL, and CIETAC).

significance in the minds of those involved in the constitution of tribunals today. Party-appointed adjudicators may well not be around forever, but they will certainly be with us long enough to justify the effort of devising a legally coherent treatment of their independence and impartiality.[160]

III. Considerations for Differentiated Approaches

In regard to impartiality, it has been argued that "[t]he absence of attempts to codify the "delicate" position of party-appointed arbitrators in international arbitration rules presumably reflects a general sense of satisfaction with the prevailing practice."[161] But this seems rather like wishful thinking. Either a prevailing practice can be identified that elicits a general sense of satisfaction, in which case it can be codified at least in general terms; or it cannot be identified, in which case there is no recognizable practice to be satisfied with. The argument must be that the practice is hazy, unsure of its bearings and still evolving, and that it may well be unwise to rush in from on high with the valiant intention of producing a detailed codification. I would agree with this argument.

Although my focus has been on party-appointed adjudicators, I should mention here that the position of arbitrators appointed in some other way, usually to chair a tribunal, can also be described as delicate, or at least somewhat unsettled. To illustrate this, it should be enough to point to *Amco Asia Corp. v. Republic of Indonesia*,[162] a famous ICSID case where a formation of two arbitrators rejected a challenge to the third member of the tribunal, stressing that "absolute impartiality of the sole arbitrator or, as the case may be, of all the members of an arbitral tribunal, is required, and it is right to say that no distinction can and should be made, as to the standard of impartiality, between members of an arbitral tribunal, whatever the method of their appointment."[163] This may have been taken to raise the standard for party-appointed arbitrators. However, the arbitrators went on to say that a system of party appointments implies the existence of some acquaintance between the party and the arbitrator, which "leads necessarily to the consequence" that a challenge cannot succeed against an arbitrator "for the only reason

160. *See also* Gabriel Bottini, *Should Arbitrators Live on Mars? Challenge of Arbitrators in Investment Arbitration*, 32 SUFFOLK TRANSNAT'L. L. REV. 341, 347 (2009) (asserting the need for in-depth rules regarding arbitrator conduct); *see also* Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L. L. 341, 356–57 (2002) (discussing the difficulty of balancing the ethical guidelines of different national jurisdictions and the need for international arbitration regulation).

161. *See* Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration* 14 ARB. INT'L 395, 406 (1998); *see also* David J. McLean & Sean-Patrick Wilson, *Is Three a Crowd? Neutrality, Partiality and Partisanship in the Context of Tripartite Arbitrations*, 9 PEPP. DISP. RESOL. L. J. 167, 170–71 (2008) (exploring the contractual rights of parties to choose arbitrators without restriction).

162. *See* Amco Asia Corp. v. Rep. of Indonesia, ICSID Case No. ARB/81/1 (1988).

163. *See id.*; *see also* W. Michael Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 INT'L & COMP. L.Q. 26, 45 (1989) (discussing the case, with excerpts).

that some relationship existed between that person and a party, whatever the character—even professional—or the extent of said relations."[164] This passage nicely captures the persisting uncertainty of the position, especially when contrasted with the somewhat different view that Berthold Goldman had expressed at a symposium in 1970. Responding to the suggestion that there may be several ways of being impartial, he had said: "I do not think . . . that an arbitrator can be impartial in several ways: there is only one way, which is that of the judge."[165] Goldman was of course the respected arbitrator who chaired the Amco tribunal.[166]

The wisdom needed to help advance and clarify the position will likely appear to us, in this context as in many others, from the experience of real cases scrutinized in light of principles seen merely as the tentative rationalizations of existing solutions and positions. As it happens, more and more such cases are being brought as international adjudicators and their decisions are being challenged seemingly more freely than ever before for an alleged lack of independence and impartiality. Working from real cases generally helps avoid the making of premature generalizations and the creation of a gap between theory and practice.[167]

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164. *See* Amco Asia Corp. v. Rep. of Indonesia, ICSID Case No. ARB/81/1 (1988).

165. "*je ne pense pas . . . qu'un arbitre puisse être impartial de plusieurs manières: il n'y en a qu'une celle du juge*" (my translation): *See* Berthold Goldman, *Symposium of Nov. 20, 1970*, REVUE DE L'ARBITRAGE 217, 229.

166. *See* Amco Asia Corp. v. Republic of Indonesia, No. ARB/81/1 (Goldman, Foighel & Rubin, arbs., Nov. 20, 1984), 24 ILM 1022 (1985) (stating that Berthold Goldman's role was chair of the *Amco* tribunal); *see also* Philip Alston, *A Note to Our Readers: Le droit des relations economiques internationales: Etudes offertes a Berthold Goldman*, 80 A.J.I.L. 241, 241 (1982) (honoring Berthold Goldman's work in the area of international law and arbitration); *see also* Walid John Kassir, *Current Development: The Potential of Lebanon as a Neutral Place for International Arbitration*, 14 AM. REV. INT'L ARB. 545, 547 (2003) (discussing Berthold Goldman's theory that international arbitrators are the judges of the international community).

167. *See* Klaus Peter Berger, *Lex Mercatoria Online The CENTRAL Transnational Law Database At WWW.TLDB.DE*, 17–4 MEALEY'S INTL. ARB. REP. 18 (2002) (highlighting the Transnational Law Database as a tool to bridge the gap between the theory behind international commercial law and international legal practice); *see also* Daniel H. Joyner, Jus Ad Bellum *in the Age of WMD Proliferation*, 40 GEO. WASH. INT'L L. REV. 233, 247 (2008) (referencing the classic gap between lawmakers' perceptions and reality).

One difficulty is that in many of the configurations of international adjudication, cases may be brought before any and all of the courts of law sitting in review of international arbitral awards, which has the unwanted effect of nationalizing the treatment of the issues. In commercial and mixed arbitration settings, such reviewing courts will generally include those at the seat of arbitration, which the parties are free to decide upon; they will also include the courts of law in any jurisdiction where enforcement of the award may be sought. There are configurations where the arbitrators or sitting judges of a tribunal will hear the challenge of one of their members, but I think it is fair to say that these instances are not conducive to a productive legal debate.[168] Cases are also considered, at least on a provisional basis, by international institutions acting as appointing authority in arbitral proceedings.[169] However, since those institutions often do not provide reasons for decisions on the challenge of adjudicators,[170] much of the available legal wisdom on the fundamental rules of process, including the standards of independence and impartiality as applied to international adjudicators, will be found in the decisions of domestic courts. These courts may well strive for harmony in the application of the relevant rules and standards, which can be found in international instruments such as the UNCITRAL

168. This is the case before the International Court of Justice. One of the most notorious allegations of bias, made by the United States in the Nicaragua case, was made in a statement following the withdrawal of the case: "We will not risk US [*sic*] national security by presenting . . . material . . . before a Court that includes two judges from Warsaw Pact nations. This problem only confirms the reality that such issues are not suited for the International Court of Justice." *See* Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, 24 I.L.M. 246, 248 (1985). The allegation is not mentioned in the letter of withdrawal sent to the registrar on January 18, 1985 (see the correspondence file made available by the Court on its website: http://www.icj-cij.org/docket/files/70/9635.pdf). More recently, an allegation of bias was made by Israel against Egyptian judge Nabil Elaraby, who formed part of the ICJ panel giving an advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.* Israel alleged that in his previous role as an Egyptian diplomat, Judge Elaraby had been "actively engaged in opposition to Israel including on matters which go directly to aspects of the question now before the Court." The ICJ denied Israel's request for the exclusion of Judge Elaraby. The full text of the Order is available on the ICJ website: http://www.icj-cij.org/docket/files/131/1533.pdf. Another configuration where allegations of bias of an adjudicator are brought before the tribunal on which the challenged adjudicator sits is when arbitration proceedings take place under the UNCITRAL Model Law. The decision of the tribunal may then be reviewed by a Court at the place of arbitration under Art. 13(2). In the ICSID context, a challenge is first brought before the unchallenged arbitrators, if that is possible; i.e., where one member of a tribunal of three is challenged under Rule 9 of the Arbitration Rules. There may then be a review in the context of annulment proceedings.

169. *See* William K. Slate II et al., *United Nations Commission on International Trade Law (UNCITRAL): Its Workings in International Arbitration and a New Model Conciliation Law*, 6 CARDOZO J. CONFLICT RESOL. 73, 79 (2004) (citing examples of institutions that are limited to serving as appointing authorities).

170. *See*, e.g., the Rules of Arbitration of the International Chamber of Commerce, Art. 7(5) (stating that the ICC Court does not communicate reasons for its decisions). For more information on ICC practice, *see* Jason Fry & Simon Greenberg, *The Arbitral Tribunal: Applications of Articles 7–12 of the ICC Rules in Recent Cases*, 20:2 ICC ARB. BULL. 12 (2009); *see also* Anne Marie Whitesell, *Independence in ICC Arbitration: ICC Court Practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, ICC ARB. BULL. (Special Supplement) 7 (2007). Art. 29(1) of the LCIA Rules of Arbitration is similar, but the LCIA now publishes summaries of challenge cases and decisions.

Model Law and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[171] But very often, these issues will come to them or will be taken up by them as a question of "international" public policy: was there a violation of a rule, standard or conception that their legal system considers important enough to be imposed beyond domestic cases?[172] In such a context, the identification of some of the considerations that may help give substance to independence and impartiality as international standards is a far cry from what may be termed a premature attempt at codification. Let me now finally turn to two sets of such considerations.

A. Judiciaries and Roaming Adjudicators

The first set of considerations I would like to address has to do with the specific environment in which the requirements of independence and impartiality have evolved. As I suggested, the domestic legal wisdom pertaining to independence and impartiality is liberally being tapped by the practice and theory of international adjudication. But as Posner and Yoo pointed out, "the conventional wisdom overlooks the profound differences between the settings in which domestic and international courts operate."

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171. See Shahla F. Ali, *Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and the West*, 28 REV. LITIG. 791, 826 (2009) (citing Korea as an example of a country that modeled its arbitration rules on the UNCITRAL Model Law); *see also United Nations Commission on International Trade Law—Convention on the Recognition and Enforcement of Foreign Arbitral Awards—the "New York" Convention*, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (supplying documents and information relevant to the "New York" Convention); *see also United Nations Commission on International Trade Law—UNCITRAL Model Law on International Commercial Arbitration*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (last visited Oct. 3, 2010) (providing an overview of the UNCITRAL Model Law, its text, and its amendments).

172. This refers to the notion of "international public policy," which is commonly found in conflict of laws systems across traditions and jurisdictions. "Public policy," which is a ground of annulment and refusal of enforcement under the UNCITRAL Model Law and a ground of refusal of enforcement under the New York Convention, has been broadly interpreted as referring to "international public policy." This is not to be confused with "transnational" or "genuinely international public policy," which may be described as the common core of the international public policy, which legal systems broadly share. This narrower set of norms is enforced directly by arbitrators and bears a striking resemblance to *ius cogens*. *See* Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 4, 13 (June 27) (discussing Nicaragua's request that the International Court of Justice consider principles of international law with respect to alleged violations of the law by the United States of America); *see also* Donald Francis Donovan, *The Relevance (or Lack Thereof) of the Notion of "Mandatory Rules of Law" to Investment Treaty Arbitration*, 18 AM. REV. INT'L ARB. 205, 211 (2007) (quoting Pierre Lalive's report at the International Council for Commercial Arbitration, which highlighted the arbitrator's role in questions of international public policy); *see also* Christopher S. Gibson, *Building the Civilization of Arbitration: Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law*, 113 PENN ST. L. REV. 1227, 1260 (2009) (setting forth the recommended components of international public policy).

Domestic courts operate in a particular institutional setting which features a powerful executive wielding the sword and a powerful legislature with vast rule-making powers and, generally, significant control over the public purse.[173] The role and position of judiciaries can be fully understood only by thinking back to the despotic potential—all too well demonstrated by history as well as current affairs—of both political branches and the way in which a refinement of institutional design involving a powerful judicial branch has helped contain it. This is the reason why the promotion of the Rule of Law understood as "a government of laws and not of men" was accompanied in both American and French revolutionary thinking by the separation of powers principle.[174] Power would check power through a balance between branches. In order for this to work, a strict separation of functions has never been necessary; most of all, as James Madison had succinctly put it, each of the branches must have "a will of its own."[175]

This requirement of the separation of powers, I would argue, is among the underlying reasons why several of the independence requirements have been developed. The judiciary being without power over purse or sword, its continued effectiveness as a branch capable of checking other branches has depended on the development of guarantees which it seemed logical to link to the core of an older tradition of adjudicative independence intended merely to achieve impartiality. This may well have been justified in a context—one which now prevails in the many jurisdictions with a judicial model of constitutionalism—where the political branches are regularly involved as parties to court cases. In order to be impartial when deciding cases involv-

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173. *See* Wojciech Sadurski, *Partnering With Strasbourg: Constitutionalization of the European Court of Human Rights*, 9 HUM. RTS. L. REV. 397, 438 (2009) (portraying the power of financially strong executives and legislatures). *See generally* JAMES W. HURST, THE GROWTH OF AMERICAN LAW: LAW MAKERS, 90–91 (The Lawbook Exchange 2007) (demonstrating the power of the judiciary in relation to the other branches); *see generally* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1344 (1988) (explaining the origin of the legislature's power over finances).

174. The Constitution of Massachusetts of 1780, art. XXX, provides the best example:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men.

The separation of powers principle was also spelled out in art. 16 of the French Declaration of Rights of 1789 (*Déclaration universelle des droits de l'homme et du citoyen*): "Any society in which rights are not guaranteed or the separation of powers established is without a Constitution" (my translation; the French original is as follows: "*Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs determinée, n'a point de Constitution*"). *See* MA. CONST OF 1780, ART XXX; *see also* IUTISTONE SALEVAO, RULE OF LAW, LEGITIMATE GOVERNANCE & DEVELOPMENT IN THE PACIFIC, 44 (Asia Pacific Press 2005) (demonstrating the historical perspective of the rule of law); *see generally* Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L, 331, 334 (2008) (establishing the history of the rule of law that is given).

175. *See* VINCENT OSTROM, THE PRACTICE OF CONSTITUTIONAL DEVELOPMENT 48 (Lexington Books 2009) (providing the quote); *see also* D. Brooks Smith, *Because Men Are Not Angels, Separation of Powers in the United States*, 47 DUQ. L. REV. 687, 689 (2009) (explaining the historical perspective).

ing the political branches, the judiciary requires special institutional protections that the separation of powers also demands in order to keep this least dangerous branch in a position to check the power of the other branches.[176] This is the reason why in the domestic sphere, separation of powers and judicial independence have been entangled. This entanglement confuses the issues for international adjudicators.[177]

If one takes a good look at the institutional dimension of the requirements I outlined at the beginning of this paper, for example, one will find that they mostly have to do with the strengthening of the judiciary as one of the three branches of government in the institutional setting of the contemporary constitutional state. Thence come the "neutral appointments" requirement that judges participate in the nomination of judges,[178] the "security of tenure" requirement that established tribunals benefit from institutional protection,[179] the "financial security" requirement that the process of salary determination be depoliticized,[180] and the "administrative autonomy" requirement that judges be involved in processes of envelope and budget determination and be broadly responsible for court administration.[181] Much of the institutional dimension of judicial independence has to do with the requirement of a strong judiciary with "a will of its own," as much as with the need for impartiality. It has to do with the assurance of a judiciary that is capable of not only rendering justice in ordinary adjudica-

176. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 1 (Yale University Press 1986) (asserting that the judicial branch is the least threatening of the three branches because of the many safeguards against overuse of power in place); *see also* Shirley Abrahamson, *Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 3, 10 (2003) (enumerating the safeguards in place to protect the judicial branch); *see also* John Ferejohn, *Independent Judges, Dependent Judiciary*, 72 S. CAL. L. REV 353, 353–54 (1999) (providing further examples of the protections in place for the judicial branch).

177. *See* Jose Alvarez, *The Normalizing of Adjudication in Complex International Governance Regimes: Patterns, Possibilities, and Problems*, 41 N.Y.U. J. INT'L. L. & POL. 991, 1003 (2009) (exemplifying international judges' possible lack of knowledge of the separation of powers); *see also* Curtis Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 SUP. CT. REV. 59, 97 (2006) (contrasting the international model of government that focuses less on the separation of power against the U.S. system that focuses more on separation of power).

178. *See* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals,* 93 CAL. L. REV. 1, 7 (2005) (providing and example of a neutral appointment of judges and arbitrators).

179. *See generally* John Merryman, *How Others Do It: The French and German Judiciaries*, 61 S. CAL. L. REV 1865, 1866 (1988) (discussing how judges should have security of tenure to promote judicial impartiality).

180. *See* JOHN KANE, DISPERSED DEMOCRATIC LEADERSHIP: ORIGINS, DYNAMICS AND IMPLICATIONS, 151–52, (Oxford University Press 2009) (correlating an independent judiciary with a depoliticized salary).

181. *See generally* ROBIN CREYKE, TRIBUNALS IN THE COMMON LAW WORLD 81 (Federation Press 2008) (discussing judicial independence from political administration).

tion but also keeping the political branches in check while remaining impartial when deciding cases in which they are involved.[182]

My point should be clear. Many of the requirements of independence developed for domestic courts appear simply irrelevant for the bulk of international adjudication and its population of roaming adjudicators. And this extends beyond the institutional dimension of independence. The Supreme Court of Canada's position on labour arbitrators may be evidence of an emerging sensitivity to the limits of the requirements elaborated with the judiciary in mind. The Court had already stated in the narrow context of criminal proceedings that "[t]he standard of judicial independence . . . cannot be a standard of uniform provisions."[183] It now remarked, in regard to a legislative labour arbitration scheme:

> An *ad hoc* tribunal is by definition constituted on a case-by-case basis. Security of tenure does not survive the termination of the arbitration, and financial security is similarly circumscribed. Administrative independence has little formal protection. Professional labour arbitrators . . . function successfully in such a structure even though there may be no guarantee of continuing work from any particular employer or union.[184]

The Court, finally, endorsed the following statement from an expert report filed in the case: "The independence and impartiality of arbitrators is guaranteed not by their remoteness, security of tenure, financial security or administrative security, but by training, experience and mutual acceptability."[185]

This is not to say that impartiality is not required, or that the objective requirements of independence should be ignored entirely. It means that they have to be looked at in context. It

182. *See* CHARLES GEYH, WHEN COURTS AND CONGRESS COLLIDE 9 (University of Michigan Press 2008) (explaining that the judiciary is independent while still helping to maintain checks and balances); *see also* MARK GIBNEY, JUDICIAL PROTECTION OF HUMAN RIGHTS: MYTH OR REALITY? 6 (Greenwood Publishing Group 1999) (suggesting that the judiciary is an effective check only if it is on other branches of the government); *see also* W. Bradley Wendel, *Impartiality in Judicial Ethics: A Jurisprudential Analysis*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 305, 309 (2008) (describing the judicial branch's role within the governmental structure and the way it contributes to the checks and balances of other branches).

183. *See* R. v. Valente, [1985] 2 S.C.R. 673, ¶ 26 (Can.).

184. *See* C.U.P.E v. Ontario, [2003] 1 S.C.R. 539, ¶ 190 (Can.).

185. *See id.* at ¶ 179.

may well be the case that the permanent members of a standing public international law tribunal should enjoy protections that would be inappropriate for the party-appointed members of a tribunal constituted to adjudicate a discrete commercial dispute.[186] In turn, this does not mean that in private configurations one can freely do away with all institutional considerations about independence, and focus exclusively on a case-by-case, subjective analysis of impartiality. For example, private international associations that are particularly powerful or controlling in a sphere of activity have been known to require oversight of their dispute resolution practices. A well-documented case is that of the former Court of Arbitration for Sport, which the Federal Tribunal of Switzerland found insufficiently independent from the all-powerful International Olympic Committee, particularly, but not only, where the Committee itself was a party to arbitration proceedings.[187] Under new arrangements, which were later approved by the Federal Tribunal, the Court of Arbitration is now administered and financed by an autonomous foundation and the Olympic Committee's input to the list of arbitrators has been significantly reduced.[188] In this instance, institutional considerations were relevant due, presumably, to the position of the International Olympic Committee and the way in which it is able to dictate the terms of contractual arrangements as sweeping in range as they are constraining for the ath-

186. *See generally* Yuval Shany, *Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings*, 30 LOY. L.A. INT'L & COMP. L. REV 473, 483–84 (2008) (suggesting that the judges *ad hoc* who sit on the International Court of Justice for the purpose of a particular case actually respond to standards that are different from those expected of other members of the Court). *Cf.* Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 486, 508 (1997) (arguing that codes of ethics mandating impartiality provide an arbitrator who wishes to act impartially a moral protection to do so).

187. *See* G. (Gundel) v. Fédération Équestre Internationale et Tribunal Arbitral du Sport, [1993] BGE 119 II 271; *see also* Richard T. Karcher, *Fundamental Fairness in Union Regulation of Sports Agents*, 40 CONN. L. REV. 355, 396 (2007) (stating that the Tribunal recognized the International Olympic Committee's close relationship to the Court of Arbitration for Sport and limited its holding to proceedings where the IOC was not a party). *See generally* Stephen A. Kaufman, *Issues in International Sports Arbitration*, 13 B.U. INT'L L.J. 527, 533–34 (1995) (discussing the close relationship between the Court of Arbitration for Sport and the International Olympic Committee and the legal community's doubt with respect to its impartiality in the action).

188. *See* A. et B. (Lazutina et Danilova) v. Comité International Olympique*, Fédération Internationale de Ski et Tribunal Arbitral du Sport*, [2003] BGE 129 III 445, *available in* [2003] *Journal du droit international* (Clunet) 1096; *see also* Jason Gubi, *The Olympic Binding Arbitration Clause and the Court of Arbitration for Sport: An Analysis of Due Process Concerns*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 997, 1013 (recognizing the changes made to the administration and funding of the Court of Arbitration for Sport). *See generally* Kaufman, *supra* note 187, at 542 (indicating that the Court of Arbitration for Sport was created in response to its lack of independence from the International Olympic Committee).

letes.[189] This raises the key issue of the relation between independence and impartiality, and party autonomy or sovereignty.

It is one thing to recognize the limits of independence in the context of international adjudication; it is quite another to identify the legal tools that can be wielded to achieve the result that is deemed most appropriate. In this respect, I would suggest that the potential of consent-based explanations needs further study, along the lines I suggest below, in my last set of remarks. These revolve around the notions of consent and waiver.

B. Consent and Waiver

In the famous words of a United States Supreme Court Justice, the task of judging an arbitrator's impartiality is "best consigned to the parties, who are the architects of their own arbitration process, and are far better informed of prevailing ethical standards and reputations within their business."[190] The passage is reflective of a familiar posture which takes independence and impartiality as matters of choice in the consensual realm of international adjudication.[191] Parties, public or private, are the masters of their procedure; the choice to have more or less independence, or even more or less impartiality, belongs to them.[192] In the words of a feisty defender of this position, consensual arbitration is part of a contractual process of self-determination.[193] "With respect to the neutrality of the arbitrators . . . the only serious inquiry ought to be one into the understanding and underlying assumptions of the contracting parties."[194]

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189. *See* Daniel H. Yi, *Turning Medals Into Metal: Evaluating the Court of Arbitration of Sport as an International Tribunal*, 6 ASPER REV. INT'L BUS. & TRADE L. 289, 298–99 (2006) (outlining institutional changes made to the Court of Arbitration in order to increase its institutional independence from the International Olympic Committee). *See generally* A. Jerome Dees, *Bring Back the Crowd? How Governing Bodies for Sports Should Provide Victims of Athlete Doping a Better Remedy,* 9 FLA. COASTAL L. REV. 179, 183–84 (2008) (noting that the appellate division for the Court of Arbitration was created to increase its independence and impartiality). *Contra* Leigh Augustine–Schlossinger, *Legal Considerations for Sponsorship Contracts of Olympic Althletes*, 10 VILL. SPORTS & ENT. L.J. 281, 283 (2003) (contending that although the International Olympic Committee does impose restrictions on athletes, it is the least restrictive of the bodies that govern Olympic athletes).

190. Commonwealth Coatings Corp. v. Continental Cas., 393 U.S. 145, 151–52 (1968) (White J., concurring).

191. *See generally* Samrat Ganguly, *The Investor—State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health*, 38 COLUM. J. TRANSNAT'L L. 113, 123–24 (1999) (explaining that while arbitrators are expected to be independent and impartial, they are often of the same nationality of the appointing party and likely to be biased toward that party).

192. *See* RICHARD GARNETT ET AL., A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION, 13–14 (2000) (noting that parties have discretion in selecting the rules governing proceedings, minimizing fears of bias or unfairness); *see also* Aleksandar Goldstajn, *Choice of International Arbitrators, Arbitral Tribunals and Centres: Legal and Sociological Aspects*, *in* ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION 27, 44–45 (Petar Sarcevic ed., 1989) (commenting that parties in arbitration have the discretion to appoint an arbitrator). *See generally* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 197–98 (2010) (recognizing that while arbitrators may have a desire to perpetuate the investment treaty system, they are likely more concerned with attaining credibility as independent and impartial arbitrators).

193. *See* Rau, *supra* note 186, at 487.

194. *See id.* at 487.

From that perspective, independence and impartiality, since they are provided in the various instruments that regularly apply to international adjudication proceedings, will be acknowledged as representing a default position for the parties.[195] Given the consensual nature of the process, however, the default position is meant to represent the usual expectations of parties involved in such processes rather that a disembodied, absolute standard that is somehow disconnected from the nature of their agreement.[196] This should hold water in regard to all ad hoc arrangements involving no institution at all, whether a permanent arbitral institution or a standing tribunal;[197] it should hold water so long as courts are not expected to help in the enforcement of the resulting decision.[198] In other words, this perspective is sustainable for ad hoc arbitration proceedings where self-help is the last resort for implementation.

In most cases, however, the parties and their interests are not isolated. Private arbitral institutions have been known to impose baselines on the parties in order to safeguard their brands, thus adding themselves as a party to the contractual equation.[199] As for standing public

195. *See* Kaufman, *supra* note 187, at 533 (recognizing that an arbitrators impartiality and independence are fundamental elements of international arbitration); *see generally* Julian M. Lew, *Introduction*, *in* THE IMMUNITY OF ARBITRATORS 2–3 (Julian M. Lew ed., 1990) (commenting that an arbitrators duty to act fairly and impartially is an implied obligation)

196. *See* UNIFORM ARBITRATION ACT § 23 (2000) (explaining the reasonable expectation of parties dealing with party appointed non-neutral arbitrators); *see also* ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 5–6 (2d ed. 2004) (1986) (stressing that an agreement by the parties to submit to arbitration is essential to modern international commercial arbitration); *see also* Sigvard Jarvin, *The Sources and Limits of the Arbitrator's Powers, in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 50 (Julian D. M. Lew ed.,1987) (1986) (framing the origins and limits of an arbitrator's power in the bounds of the laws of the relevant jurisdiction and will of the parties).

197. *See* DAVID ST. JOHN SUTTON ET AL., RUSSELL ON ARBITRATION ¶ 2-006 (23d ed., Sweet & Maxwell Ltd. 2007) (1849) (contrasting the use of the phrase "ad hoc" in international arbitration agreements with the use in domestic arbitration agreements). *But see* JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 199 (2007) (2002) (indicating the incompatibility between agreements calling for ad hoc arbitrations and agreements calling for institutional arbitrations); Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 991–92 (2005) (showing that the modern reality of arbitration is that parties want law-bound decisions derived from an institutionalized arbitration systems).

198. *Cf.* UNITED NATIONS COMM'N ON INT'L TRADE LAW [UNCITRAL], *UNCITRAL Model Law on International Commercial Arbitration*, G.A. Res. 61/33, art 1, U.N. DOC. A/RES/61/33 (Dec. 4, 2006), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (outlining the obligation that member states have to enforce arbitration awards regardless of state of issuance); Convention on the Recognition and Enforcement of Foreign Arbitral Awards arts. I–VIII, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (illustrating the framework of enforcement of foreign arbitral awards); Wang Sheng Chang, *Enforcement of Foreign Arbitral Awards in China*, 30 INT'L BUS. L. 133, 136 (2002) (commenting on several cases where ad hoc foreign arbitral awards were enforced by Chinese courts).

199. A good example of this phenomenon is what is sometimes called "ICC public policy," meaning the rules that the ICC International Court of Arbitration considers mandatory for all ICC arbitration proceedings. One such rule, from which the parties cannot depart unless they are prepared to go to another venue, is that which provides for the scrutiny of any award by the ICC Court prior to its being notified as an ICC award. International Chamber of Commerce Rules of Arbitration, art. 27 (1999).

international law courts and tribunals, their integrity can never be the exclusive affair of the two parties to a particular case.[200] They are independent institutions sponsored by large groups of states,[201] with rules that are beyond the reach of any two litigants.[202] In the many scenarios where courts of law lend the arm of the state to help implement arbitral decisions, finally, they will normally impose certain conditions.[203] In such scenarios, the equation is simple: the state helps the arbitral process for a purpose, which must be weighed against other purposes pursued by the state.[204] Thus, for example, states are prepared to enforce arbitral awards without review

200. *See* Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1202–3 (1999) (discussing the potentially adverse impact of arbitral procedures on judicial integrity); *see also* Daniel Terris et al., *Toward a Community of International Judges*, 30 LOY. L.A. INT'L & COMP. L. REV. 419, 464 (2008) (indicating that in most international courts the judges are responsible for maintaining the integrity of the institution); *see also* David E. Wagoner, *Managing International Arbitration*, 54 MAY DISP. RESOL. J. 15, 23 (1999) (mentioning the international business community's interest in maintaining the highest level of confidence in the integrity of international tribunals).

201. *See* Ben Chigara, *International Tribunal for the Law of the Sea and Customary International Law*, 22 LOY. L.A. INT'L & COMP. L. REV. 433, 435–36 (2000) (attributing the success of the International Tribunal for the Law of the Sea to its independence, comprehensive scope, and flexibility); *see also* Clyde Eagleton, *The United Nations: Aims and Structure*, 55 YALE L.J. 974, 983 (1946) (describing the International Court of Justice as a "highly independent" institution); *see also* Sara Anoushirvani, Comment, *The Future of the International Criminal Court: The Long Road to Legitimacy Begins With the Trial of Thomas Lubanga Dyilo*, 22 PACE INT'L L. REV. 213, 213–24 (2010) (chronicling the establishment of an effective independent international criminal court).

202. *See* Statute of the International Court of Justice arts. 1, 69 (creating the principal judicial organ of the United Nations and providing the rules for amendment it); *see also* Rome Statute for the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 90 (providing for an institution with the power to exercise jurisdiction over individuals accused of crimes of international concern); *see also* United Nations Convention on the Law of the Sea annex VI, 10 Dec., 1982, 1833 U.N.T.S 397 (establishing the International Tribunal for the Law of the Sea and setting forth the mechanism for membership).

203. The ICSID mechanism is peculiar in that the review procedure has been integrated as a second stage to the arbitral process to keep the matter away from national courts. This has been achieved in the Washington Convention by a provision which gives awards the same status as court judgments in the relevant countries. *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, 575 U.N.T.S 159, and the provision of an internal arbitral annulment procedure; *see also* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 52, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S 159. But here again, "a serious departure from a fundamental rule of procedure" is a ground for annulment, *see* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 52(1)(d), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S 159.

204. *See* Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983) (affirming a healthy regard for the federal policy favoring arbitration); *see also* Fradella v. Petricca, 183 F.3d 17, 19 (1st Cir. 1999) (indicating that the primary purpose served by the arbitration process is promoting an expeditious dispute resolution).

of the merits because it enhances the efficacy of the process (and therefore facilitates international relations and commerce);[205] but they will likely refuse to enforce an award which is shown to have been obtained by fraud.[206]

The problem often presents itself as one of balancing the perceived need for review with the risk of it being used as a delaying tactic. As one author explains, "To counter the use of challenges as a delaying tactic the municipal courts have used the concept of waiver to great effect."[207] It is now generally recognized that a party, "knowing facts bearing on the independence of an arbitrator, cannot wait and see whether an award is rendered in its favour and, if not, then raise those facts to challenge the award."[208] The principle mentioned here goes beyond independence; it applies to all cases of procedural irregularity.[209] Based on this waiver principle, awards have been protected from annulment in spite of serious issues of independence.[210]

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205. *See* Morelite Construction Corp. v. New York City District Council Carpenters Benefit Funds, 748 F.2d 79, 83–84 (2d Cir. 1984) (holding that the standard for disqualification of arbitrators is less than the standard for federal judges to maintain the efficacy of arbitration); *see also* Imperial Ethiopian Government v. Baruch-Foster Corp., 535 F.2d 334, 337 (5th Cir. 1976) (affirming enforcement of an award without considering the merits of the case and remarking on the unacceptable delay of enforcement).

206. *See* Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 147 n.1 (1968) (indicating that an award may be vacated where it was procured by corruption, fraud, or undue means); *see also* Lim v. Offshore Specialty Fabricators, Inc., 404 F.3d 898, 905 (5th Cir. 2005) (analogizing enforcement of an arbitral award to enforcement of a forum selection clause and noting that both may be held unenforceable if obtained by fraud or deemed contrary to public policy); *see also* Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 n.27 (3d Cir. 1969) (recognizing fraud as among several grounds for vacating arbitration awards).

207. *See* W. Michael Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 INT'L & COMP. L.Q. 26, 52 (1989). *But see* Subway Equipment Leasing Corp. v. Forte, 169 F.3d 324, 327 (5th Cir. 1999) (indicating that a 13-month delay did not constitute waiver).

208. *See* Garfield & Co. v. Wiest, 432 F.2d 849, 853 (2d Cir. 1970) (proclaiming that "disgruntled losers cannot first raise their objections after an award has been made"); *see also* Ilios Shipping & Trading Corp. v. American Anthracite & Bituminous Coal Corp., 148 F.Supp. 698, 700 (S.D.N.Y 1957) (denouncing a losing party for "clutching at straws" in an attempt to avoid the results of an arbitration award); *see also* Tupman, *supra* note 207, at 52.

209. *See* Canadian Union of Public Employees v. Ontario (Minister of Labour) (2003) 1 S.C.R. 539 (Can.) ¶189 (stating that the decision maker's independence and impartiality are components of natural justice).

210. *See* Sté 3R v. Sté Phoenix Richelieu, REVUE DE L'ARBITRAGE 329 (1999) (Cour d'appel de Paris).

Although this principle, like res judicata, may find support in the desideratum that there be an end to disputes, it can also be grounded in the notion that agreements, arbitral or otherwise, must be performed in good faith.[211] The broad recognition of this principle provides ample scope to approach the independence and impartiality of international adjudicators through the lens of party autonomy.

Through the lens of party autonomy, the adoption of standard rules of arbitration by commercial parties, for example, involves a clear waiver of any right the parties may have enjoyed to an adjudicator with security of tenure. A grant of jurisdiction to the International Court of Justice by a state, similarly, is a clear waiver of any right the state may have had to an ICSID-like tribunal free of any member whose nationality is that of a party.[212] My suggestion is that this line of reasoning may well be the most promising if one is to arrive at a coherent legal treatment of the independence and impartiality of international adjudicators. Working from the notion of consent has two distinct advantages: it allows differentiations to emerge naturally from the practices that have given rise to the several forms of international adjudication,[213] and it integrates the consensual feature that they share.[214]

But there is a difficulty. In the sphere of international arbitration, the issue is greatly complicated by the uneasy relationship between waiver and mandatory law. The provision of the UNCITRAL Model Law on waiver directly raises the question:

> A party who knows that any provision of this Law *from which the parties may derogate* or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is

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211. *See* Parklane Hosiery Co., Inc., et al. v. Shore, 439 U.S. 322, 326 (1979) (drawing similarities between res judicata and estoppel); s*ee also* Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera Industrial y Comercial, 745 F. Supp. 172, 175 (1990) (supporting the idea that arbitration can be based on good faith and the failure to do so can be categorized as non-compliance with the norms expected from a fiduciary); *see also* Loïc Cadiet, *La Renonciation à se prévaloir des irrégularités de la procédure arbitrale*, 3 REVUE DE L'ARBITRAGE 28 (2006).

212. *See* Jacob Katz Cogan, *Representation and Power in International Organization: The Operational Constitution and Its Critics*, 103 A.J.I.L. 209, 222 (2009) (explaining that the International Court of Justice states that the Court shall be composed of independent judges regardless of nationality). *See generally* Georges R. Delaume, *ICSID Arbitration and the Courts*, 77 AM. J. INT'L L. 784, 793 (1983) (applying the term "national" to physical and juridical persons); *see also* Vincent O. Nmehielle, *Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention)*, 7 ANN. SURV. INT'L & COMP. L. 21, 27 (2001) (defining "national" under article 25(2) of the ICSID).

213. *See generally* Anoosha Boralessa, *The Limitations of Party Autonomy in ICSID Arbitration*, 15 AM. REV. INT'L ARB. 253, 309 n.48 (2004) (explaining how ICSID arbitration rules take over once the parties in the arbitration consent); *see also* J. Kirkland Grant, *Securities Arbitration: Is Required Arbitration Fair to Investors?,* 24 NEW ENG. L. REV. 389, 491 (1989) (asserting that parties to an arbitration may present claims of a biased arbitration panel to an objective judge).

214. *See generally* Paul Michael Blyschak, *State Consent, Investor Interests and the Future of Investment Arbitration: Reanalyzing the Jurisdiction of Investor-State Tribunals in Hard Cases*, 9 ASPER REV. INT'L BUS. & TRADE L. 99 (2009) (explaining that consent is the main starting point from which courts should decide how to apply treaties to settle disputes); *see also* Grant, *supra* note 213, at 491 (asserting that through the consent of arbitration parties, the case can be presented to a judge).

> provided therefor, within such period of time, shall be deemed to have waived his right to object.[215]

The Model Law does not indicate which of its provisions are mandatory;[216] nor do the vast majority of the jurisdictions that have adopted it.[217] But it is easy to see that the most fundamental rules of process would tend to be treated as mandatory. This is hardly surprising in view of the constitutional (or, in the European context, "conventional") protection that they enjoy as fundamental rights in so many jurisdictions. Because they most often require some form of state involvement, these human rights protections may not formally extend to arbitration proceedings, but they undoubtedly have a profound impact, albeit mostly indirect, on the way in which the fundamental rules of process are understood and wielded in every context,

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215. *See* UNCITRAL Model Law on International Commercial Arbitration art. 4 (1985) (assessing whether this could become an issue for public international law, as procedural standards are not normally associated with *ius cogens*).

216. *See* Ljiljana Biukovic, *International Commercial Arbitration in Cyberspace: Recent Developments*, 22 NW. J. INT'L L. & BUS. 319, 348 (2002) (stating that some provisions of the UNCITRAL Model Law are not mandatory even with regard to electronic signatures); *see also* Gary Born, *Anniversary Contributions: International Litigation and Arbitration: The Principle of Judicial Non-Interference in International Arbitration Proceedings*, 30 U. PA. J. INT'L L. 999, 1020 (2009) (explaining that some procedural provisions of the UNCITRAL Model Law are mandatory, while others are not); *see also* Luca G. Radicati Di Brozolo, *International Payments and Conflicts of Laws*, 48 AM. J. COMP. L. 307, 317 (2000) (asserting that all the provisions of the Model Law are nonmandatory).

217. *See* Sinisa Triva, *Arbitral Settlement of International Commercial Disputes*, 1 CROAT. ARB. Y.B. 7, 16 (1994) (indicating that Croatia stressed the importance of UNCITRAL Model Law but does not indicate which provisions are mandatory); *see also* Natasha Wyss, *First Options of Chicago, Inc. v. Kaplan: A Perilous Approach to Kompetenz-Kompetenz*, 72 TUL. L. REV. 351, 376 (1997) (explaining that England's Article 16 of the UNCITRAL Model Law is not mandatory). *See generally* Blyschak, *supra* note 214, at 170 n.66 (describing Canada's non-mandatory arbitration provision before the ICSID tribunals).

including that of arbitration.[218] For example, the violation of a right which features in a constitutional document is more likely to be viewed as contrary to the international public policy of the relevant state and to lead to a refusal to enforce a foreign award.[219]

So the difficulty presented by mandatory law in this context should not be underestimated. The questions whether, how, and to what extent fundamental rules of process can be waived have been approached in various ways that need further exploration. Courts have found, for example, that the waiver of a right, including a procedural right, guaranteed under the European Convention of Human Rights must be asserted "unequivocally";[220] that the procedural equality of the parties to an international arbitration agreement cannot be waived before the dispute arises;[221] or that rules of public policy intended to protect interests going beyond those of the individual, including the requirements of independence and impartiality,

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218. *See also* Sébastien Besson, *Arbitration and Human Rights*, 24 ASA BULL. 395 (2006) (describing the relationship between the European Convention and arbitration); *see also* Thomas Schultz, *Human Rights: A Speed Bump for Arbitral Procedures? An Exploration of Safeguards in the Acceleration of Justice*, 9 INT'L A. L. R. 8, 2 (2006) (discussing how human rights laws affect the rules of process of arbitration).

219. *See* Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) (stating that the enforcement of foreign arbitral awards may be denied only when the enforcement would violate the forum's state's fundamental notions of justice and morality); *see also* J. Noelle Hicks, *Andrew P. Vance Memorial Writing Competition Winner Facilitating International Trade: The U.S. needs Federal Legislation Governing the Enforcement of Foreign Judgments*, BROOK. J. INT'L L. 155, 167 (2002) (emphasizing the ruling in Parsons that enforcement of foreign awards can be denied only if the enforcement would violate the state's "most basic notions of morality and justice"). *See generally* Homayoon Arfazadeh, *In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception*, 13 AM. REV. INT'L ARB. 43, 47 (2002) (explaining that public policy in arbitration is a means of promoting the interests of international trade).

220. *See* Neumeister v. Austria, No. 1936-63 (Strasbourg, May 7, 1974) (stressing that the waiver of procedural right must be clear and unambiguous); *see also* Pfeifer and Plankl v. Austria, 14 EUR. H.R. 692 (1992) (holding a waiver of a right guaranteed by the Convention must be established in a non-equivocal manner and requires minimum guarantees); *see also* Sejdovic v. Italy, 42 Eur. H.R. Rep 17 (holding a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance); *see also* Salduz v. Turkey, (2008) ECHR 36391/02 (holding the fairness of the applicant's trial was not prejudiced on account of the fact that he did not have access to a lawyer during the period in police custody).

221. *See* French Supreme Court (*Cour de cassation (1re Ch. civile)*), Jan. 7, 1992, *Sociétés BKMI et Siemens v. Société Dutco*, [1992] *Revue de l'arbitrage* 470 (Annot. Pierre Bellet); *see also* JEAN-FRANÇOIS POUDRET AND SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION, 481 (Sweet and Maxwell, Ltd 2007) (2002) (stating that the parties to arbitration cannot waive their fundamental procedural rights in advance); *see generally* Frank T. Schwarz, *The European and Middle Eastern Arbitration Review*, INT'L J. PRIV. & PUB. ARB., 2009, at 3, 4 (comparing the ECHR's policy of certain non-waivable procedural rights).

cannot be waived.[222] These jurisprudential reservations are all in need of further analysis, and it seems doubtful whether they should be allowed to play any significant role in international commercial or investment arbitration. This is not the place to engage in such analysis.[223] But I will raise one point that I think should be borne in mind in any analysis of waiver and mandatory law in this context.

In a Canadian case, an Ontario award made under the UNCITRAL Model Law was challenged on the basis of alleged unequal treatment and racial bias in violation of article 18, a provision considered mandatory.[224] The Court found that there had been no article 18 violation but went on to consider whether the applicant, Lei, had a case irrespective of this finding:

> Lei argues that the requirement of a full opportunity to present one's case and equality of treatment are mandatory provisions of the Model Law under art. 18 and that violation of them constitute grounds for setting aside an award. I accept this. Lei further argues that since the parties may not derogate from those fundamental principles in an arbitration agreement, it necessarily follows that they may not derogate from the only means under the Model Law for enforcing those principles. I accept the first part of this proposition, but I do not accept the second.

Excluding recourse to the courts to set aside an award is not contrary to art. 18 nor contrary to any other mandatory provision of the Model Law.[225]

In another Canadian case, a British Columbia trial court found that an explicit waiver, contained in the arbitration agreement, of the right to oppose the enforcement of an award under article 36 of the Model Law[226] was valid even in regard to grounds that touch upon fundamental rules of process (in this case the failure of the tribunal properly to address an allega-

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222. *See* Guy Keutgen, *L'indépendance et l'impartialité de l'arbitre en droit belge*, *in* L'IMPARTIALITÉ DU JUGE ET DE L'ARBITRE 275, 293 (Jacques van Compernolle & Giuseppe Tarzia eds., 2006) (commenting on a decision by the Brussels Court of Appeal (June 21, 2005, No 1222, unpublished)). It is useful to note that the IBA Guidelines rule out waiver entirely in certain circumstances. *See generally* IBA Guidelines (May 22, 2004) (illustrating certain situations that affect the arbitrator's impartiality and independence); *see also* TANNER DE WITT, THE IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION (2005), available at http://www.tannerdewitt.com/media/publications/iba-guidelines-on-conflicts-of-interest-international-arbitrations.php (stating that a party cannot waive conflicts on the non waivable Red List).

223. *See* Louis Perreau-Saussine, Annotations Under Paris Court of Appeal (*Cour d'appel de Paris*), March 18, 2004, *Brudey Frères v. Emeraude Lines*, (2006) *Revue de l'arbitrage* 192; *See generally* Audley Sheppard, *Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?*, 1 TRANSNATIONAL DISPUTE MANAGEMENT (2004) (commenting on whether there should be global standards for minimum procedural equality in international arbitration); *see also* Andrew M. Campbell, *Refusal to Enforce Foreign Arbitration Awards on Public Policy Grounds*, 144 A.L.R. FED. 481 (1998) (considering whether a violation of public policy is reason to dismiss an arbitration award).

224. *See* Noble China v. Lei Kat Cheong, [1998] 42 O.R.3d 69 (Can.) (challenging basis of an award because suspicion of bias).

225. *See id.* at 91, 93 (holding that exclusion of the setting aside procedure is not contrary to article 18 of the Model Law).

226. *See* UNITED NATIONS COMM'N ON INT'L TRADE LAW [UNCITRAL], *UNCITRAL Model Law on International Commercial Arbitration*, G.A. Res. 61/33, art 18, U.N. DOC. A/RES/61/33 (Dec. 4, 2006), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.18.

tion of partiality).[227] These decisions are certainly not the last word on such difficult issues. But they do hint at the point I have in mind and wanted to bring forth.

The point is that consent—and thus waiver—acquires a different texture when analyzed in relation to adjudication. That is because adjudication does not move on its own; it relies entirely on the litigants for bringing and defining the issues to be decided upon.[228] Because of this *principe dispositif*, or principle of "party initiative,"[229] adjudication remains a bastion of autonomy, or sovereignty, in the realm of law. No matter how important, universal, or mandatory a right may be, there should be no question of forcing anyone to pursue it in the adjudicative mode. In this limited but very real sense, any right can be waived.[230] What is more, when adjudication is consensual adjudication, where jurisdiction is established and the process controlled by consent, the significance of this point would appear to extend not only into the past,[231] but also into the future. Unless one is prepared to go back on the legal validity of an agreement to submit *future* disputes to an international tribunal—a principle enshrined notably in the Hague Convention of 1899[232] and the Geneva Protocol of 1923[233]—it is hard to see how one can limit the freedom of the parties to include procedural rules of their choice as part

227. *See* Food Servers of America v. PAN Pacific Ltd., [1997] 32 B.C.L.R. 3d 225 (Can.) (holding that the parties waived their right to oppose an award).

228. *See* Mark W. Janis, *The International Court*, *in* INTERNATIONAL COURTS FROM THE TWENTY-FIRST CENTURY 13, 20 (Mark Janis ed., 1992) (explaining how litigants play an active role in the arbitration process).

229. *See* ALI UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE Principle 10 (2004) (codifying the right of a party to modify or voluntarily terminate the procedural proceeding).

230. *See* First Interstate Bank of Denver, N.A. v. Central Bank & Trust Co. of Denver, 937 P.2d 855, 858 (Colo. App. 1996) (describing how both procedural and statutory rights may be waived so long as waiver is voluntary); *see also* Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26 BERKELEY J. INT'L L. 111, 144–45 (2008) (asserting how parties to an adjudication can submit to an arbitrator who may have a conflict of interest); *see also* Chapman and Cutler LLP, What If the Contractual Jury Trial Waiver Is Unenforceable? Some Practical Alternatives (May 2004) (describing how New York courts permit contractual jury waiver trials).

231. *See generally* Phillips v. Lagaly, 214 F.2d 527, 529 (10th Cir. 1954) (defining "waiver" as the intentional relinquishment of a known right, which implies that past rights are consensually waived).

232. *See* 1899 Convention for the Pacific Settlement of International Disputes art. 17, 1899 (stating that the Arbitration Convention covers both future and present questions); *see also* Charles H. Brower II, Symposium, *Public and Private Law in the Global Adjudication System: Article: The Functions and Limits of Arbitration and Judicial Settlement Under Private and Public International Law*, 18 DUKE J. COMP. & INT'L L. 259, 259 (2008) (claiming that lawyers tend to allow room for the settlement of future issues when drafting international agreements); *see also* Bartram S. Brown, *Nationality and Internationality in International Humanitarian Law*, 34 STAN. J. INT'L L. 347, 353 (1998) (praising the Hague Convention as being a major step forward for international law, especially because it distanced itself from the pre-existing state-centric methods of operation).

233. *See* Geneva Protocol on Arbitration Clauses art. 1, Sept. 24, 1923, 27 L.N.T.S. 157 (explaining that the contracting states all recognize the validity of an agreement concerning future differences between parties); *see also* Charles H. Brower II, Note, *What I Tell You Three Times Is True: U.S. Courts and Pre-Award Interim Measures Under the New York Convention*, 35 VA. J. INT'L L. 971, 1010 (1995) (stating that a contract will apply to present or future differences, that the parties recognize it as doing such, and that disputes can be referred to arbitration); *see also* Arthur Nussbaum, *Treaties on Commercial Arbitration—A Test of International Private-Law Legislation*, 56 HARV. L. REV. 219, 225 n.38 (1942) (explaining that both present and future conflicts are covered under the Geneva Protocol, including referral to arbitration when necessary).

of that *pre-dispute* agreement.[234] Agreements as to the governing rules of procedure may be distinct from agreements as to jurisdiction.[235] But they respond to the same basic policy consideration: these agreements may have serious consequences for the parties' rights, which may be difficult for anyone to assess properly before a dispute actually arises. The requirement that a waiver of a fundamental rule of process, including one which concerns independence and impartiality, be made after the dispute arises seems very similar indeed to the old requirement of a "*compromis*," or post-dispute submission agreement.[236]

Further investigation is clearly needed to work out the implications and limits of this point. The proper scope of consent may then become clearer, which in turn would likely be helpful in developing a coherent approach to independence and impartiality for international adjudicators.

IV. Conclusion

Although there is general agreement that independence and impartiality in international adjudication must be guaranteed, it has been broadly assumed that the standards and tests for ensuring independence and impartiality at the domestic adjudicatory level can simply be transposed to the arena of international adjudication.[237] This assumption has been the cause of much confusion.[238] Efforts have been made to help standardize independence and impartiality for international adjudication. But the diversity of international adjudication, from standing

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234. *See* James A.R. Nafziger, Supplement: Article: Sec. IIB, *Private International Law: The Louisiana and Oregon Codifications of Choice-of-Law Rules in Context*, 58 AM. J. COMP. L. 165, 179 (2010) (explaining that pre-dispute agreements are beneficial because they stabilize expectations).

235. *See* United Nations Conference on International Commercial Arbitration: Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 5, 1958 (establishing fully, for the first time, freedom of procedure); *see, e.g.,* Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123, 157 (2008) (discussing the Supreme Court's various rulings on forum selection clauses).

236. *See* Matthew Heaphy, *The Intricacies of Commercial Arbitration in the United States and Brazil: A Comparison of Two National Arbitration Statutes*, 37 U.S.F. L. REV. 441, 447–48 (2003) (describing the process that the United States and other foreign countries employ to deal with an arbitration agreement that requires a compromisso arbitral).

237. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 929–30 (discussing how variable bias presents a problem when defining "independence" in the international tribunal context); *see also* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 A.J.I.L. 179, 180 n.7 & 187 n.36 (2010) (noting the importance of independence and impartiality in an international tribunal); *see also* Ted L. Stein, *Contempt, Crisis, and the Court: The World Court and the Hostage Rescue Attempt*, 76 A.J.I.L. 499 (1982) (noting the importance of impartiality in international law).

238. *See* Mark L. Movsesian, *International Commercial Arbitration and International Courts*, 18 DUKE J. COMP. & INT'L L. 423, 425 (2008) (suggesting that international adjudication creates confusion because it contributes to a lack of global consensus); *see also* Eric A. Posner and John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 6 (2005) (claiming that international lawyers and skeptics are confused about the nature of interstate-to-transnational dispute resolution).

tribunals to ad hoc formations; from roaming arbitrators to permanent judges; from state-to-state adjudication to private commercial arbitration, has made the task difficult.[239]

Greater emphasis should be placed on the distinct character of the various forms of international adjudication, which developed within a different frame. In that frame, public and private litigants retain and wield significant control over much of the procedure, under the umbrella of sovereignty or party autonomy. Party control gives a different texture to international adjudication and poses different questions and challenges. By recognizing the differences between domestic and international adjudication, and those between different forms of international adjudication, this article provides a tentative first step toward a better understanding of independence and impartiality in international adjudication. The greatest hope for such understanding may well reside in a more refined analysis of the modes and limits of consent in adjudication.

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239. *See* Amy J. Cohen, *Against Settlement: Twenty-Five Years Later: Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143, 1153–56 (2009) (comparing public and private spheres of adjudication); *see also* John P. Gaffney, *Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System*, 14 AM. U. INT'L L. REV. 1173, 1202 (1999) (hypothesizing that ad hoc panelists may have a greater propensity for partiality than standing national members); *see also* Posner & Yoo, *supra* note 238, at 1. (detailing the diversity of international adjudication and pointing out the benefits and disadvantages of each).

The State of the ADR Movement in Italy: The Advancement of Mediation in the Shadows of the Stagnation of Arbitration

M. Henry Martuscello II*

Introduction

Alternative dispute resolution (ADR) processes appear perfectly adaptable to a country, such as Italy, whose civil justice system fails to meets the needs of many of its citizens who are involved in controversy.[1] Indeed, despite numerous reforms to the Italian Code of Civil Procedure,[2] the judicial system remains too costly, inefficient, and overburdened to offer an effective solution to many disagreements between parties.[3] At present, there are five million pending civil suits in Italy and this number is expected to increase by a million-and-a-half more cases next year.[4] A 2006 study by the *Confartigianato*, an association of Italian craftsmen and small

1. *See* Douglas L. Parker, *Standing to Litigate "Abstract Social Interests" in the United States and Italy: Reexamining "Injury in Fact,"* 33 COLUM. J. TRANSNAT'L L. 259, 299 (1995) (comparing Italian statutes to American standards and explaining how they fail); *see also* Lua Kamal Yuille, *No One's Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM. J. TRANSNAT'L L. 863, 886–88 (2004) (criticizing the Italian judicial system for excluding a broad spectrum of individuals). *But see* Matt Handley, *Why Crocodiles, Elephants, and American Citizens Should Prefer Foreign Courts: A Comparative Analysis of Standing to Sue*, 21 REV. LITIG. 97, 120–23 (2002) (listing at least three advantages that Italy has over the American court system).

2. *See* Gian Battista, *Reform of the Code of Civil Procedure in Italy*, 19 INT'L LEGAL PRAC. 10, 10 (1994) (noting the immediately enforceable provisions in the Italian Code of Civil Procedure reforms); *see also* Vincenzo Varano, *Civil Procedure Reform in Italy,* 45 AM. J. COMP. L. 657, 662 (1997) (listing the procedural reform in the area of individual labor and social security disputes in 1973 to Italy's Code of Civil Procedure); *see also* Marco Ventoruzzo, *Experiments in Comparative Corporate Law: The Recent Italian Reform and the Dubious Virtues of a Market for Rules in the Absence of Effective Regulatory Competition,* 40 TEX. INT'L L.J. 113, 115–121 (2004) (describing the advantages that the reforms brought to Italy's legal system).

3. *See* STEVEN C. GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS 104–5 (2006) (listing the five main reasons for existing problems in Italy's judicial system); *see also* HANNE PETERSEN ET AL., PARADOXES OF EUROPEAN LEGAL INTEGRATION 313–14 (2008) (stating that the longest trial record is held by a small town in Sicily where the average trial length is 13.15 years); *see also* Valerio Sangiovanni, *Current Development: Some Critical Observations on the Italian Regulation of Company Arbitration*, 17 AM. REV. INT'L ARB. 281, 282–86 (2006) (suggesting that the shift of emphasis to arbitration in Italian corporate law is inefficient).

4. *See* Ernesto L. Felli et al., *The "Demand for Justice," in* ITALY: CIVIL LITIGATION AND THE JUDICIAL SYSTEM, INSTITUTIONAL REFORMS: A PUBLIC CHOICE PERSPECTIVE 159, 159–61 (Fabio Padovano & Roberto Ricciuti eds., 2010) (noting that high numbers of pending and arising civil suits in Italy keep increasing because of the long length of an argument proceeding); *see also* Federica Invernizzi, *La Conciliazione Commerciale: Regole e Istruzioni per l'Uso*, VENTIQUATTRORE AVVOCATO 120, 120 (May 2009) (Italy) ("Attualmente in Italia sono pendenti oltre 5 milioni di cause civili, e si calcola che ogni anno ve ne siano un milione e mezzo in più rispetto all'anno precedente."); *see also* Tullio Jappelli, Marco Pagano, & Magda Bianco, *Courts and Banks: Effects of Judicial Enforcement on Credit Markets,* 37 J. MONEY CREDIT & BANKING 223, 223 (2007) (mentioning the unusually long length of a civil trial in Italy).

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companies,[5] revealed that a business must wait 1,765 days on average for the rendering of a civil verdict.[6] Given this delay in ordinary justice, it should not surprise anyone that a significant percentage of parties abandon civil trial before receiving a judgment or settle their disputes outside of court.[7] Moreover, such lengthy trials cause the superfluous spending of millions of Euros a year in litigation fees for businesses and administration expenses for the Italian State.[8] However, the long duration of civil suits costs Italy most in lost economic development.[9]

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5. *See* FRANZ TRAXLER & GERHARD HUEMER, HANDBOOK OF BUSINESS INTEREST ASSOCIATIONS, FIRM SIZE AND GOVERNANCE: A COMPARATIVE ANALYTICAL APPROACH 220 (2007) (identifying the *Confartigianato* system and its functions); *see also* Marco Biagi, *Employee Representation In Small and Medium-Sized Enterprises: A Comparative Overview,* 13 COMP. LAB. L. 257, 268 n.48 (1992) (identifying the *Confartigianato* as artisan employers); *see also* Giuseppe De Palo & Linda Costabile, *Promotion of International Commercial Arbitration and Other Alternative Dispute Resolution Techniques in Ten Southern Mediterranean Countries,* 7 CARDOZO J. CONFLICT RESOL. 303, 307 (2006) (mentioning that the *Confartigianato* is a non-political, autonomous organization open to all people in the Italian monuments industry).

6. *See* AUSTIN SARAT, THE BLACKWELL COMPANION TO LAW AND SOCIETY 120 (2004) (exploring why the extraordinary delays of a court proceeding in the Italian legal system have not resulted in progressive change for this notorious phenomenon); *see also* Tiziana Pompei, *La Cultura Della Giustizia E La Promozione Dell'ADR (Alternative Dispute Resolution), in* SECONDO RAPPORTO SULLA DIFFUSIONE DELLA GIUSTIZIA ALTERNATIVA IN ITALIA 195, 198 (2009) (Italy) ("Le imprese devono attendere in media 1.765 giorni (quasi 5 anni) per avere giustizia durante una causa civile."), *available at* http://www.camera-arbitrale.it/Documenti/secondo_rapporto_giustiziaalternativa.pdf; *see also* David Nelken, *Using the Concept of Legal Culture*, 27 AUSTL. J. LEGAL PHIL. 1, 12–14 (2004) (noting that it is too costly for businesses to revert to arbitration in return for a quicker verdict).

7. *See* Michael Abramowicz, *A Compromise Approach to Compromise Verdicts,* 89 CAL. L. REV. 231, 240 (2001) (explaining that most parties to a case avoid trial due to the cost as well as an uncertainty of the verdict outcome); *see also* Linda M. O'Bannon, *ABA Section Focus: Alternative Dispute Resolution: Employment Dispute Resolution — EDR 101,* 31 ALASKA BAR RAG 29, 30 (2007) (highlighting the efficiency of mediation for a settlement); *see also* Peter H. Schuck, *Commentary: Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DEPAUL L. REV. 479, 479 (1998) (affirming that while plaintiffs' lawyers claim to want a trial, they prefer to settle in the end).

8. *See* MAURO CAPPELLETTI, JOHN HENRY MERRYMAN & JOSEPH M. PERILLO, THE ITALIAN LEGAL SYSTEM: A.N INTRODUCTION 95 (1965) (revealing that it is a violation of the Code of Ethics in Italy to charge less than the maximum scheduled fee); *see also* CHARLES PLATTO, THE ECONOMIC CONSEQUENCES OF LITIGATION WORLDWIDE 225 (1999) (noting that the length of a legal proceeding has an impact on overall judicial costs and expense for a party). *See generally* Amanda Carmignaniy & Silvia Giacomelliz, *Too Many Lawyers? Litigation in Italian Civil Courts* 2–13 (Bank of Italy, Econ. Research Dept., Working Paper Series No. 745, 2009), *available at* http:ssrn.com/abstract=1431986 (suggesting that the lofty amount of litigation in Italy could be caused by the high amount of lawyers in Italy)

9. *See* Daniela Fabbri, *Legal Institutions, Corporate Governance and Aggregate Activity: Theory and Evidence* 3 (Center for Studies in Economics and Finance (CSEF), University of Naples, Italy, Working Paper No. 72, 2001) (mentioning that Italian firms with cases of short trial length receive more external funding); s*ee also* Davide Iacovoni & Alberto Zazzaro, *Legal System Efficiency, Information Production, and Technological Choice: A Banking Model,* QUADERNI DI RICERCA 1, 2–5 (2000), *available at* http://www.economia.unimore.it/marotta_giuseppe/murst/Iaczaz.pdf (explaining why countries with more legal enforcement have stronger economic growth than countries like Italy); *see also* Jappelli, *supra* note 4 (examining the relationship between judicial efficiency and credit market performance).

According to a 2008 World Bank Report, the slowness of the civil justice system has stifled economic development in Italy by generating uncertainty about exchanges and discouraging investment.[10] With the length of trials continuing to increase annually,[11] the attractiveness of ADR mechanisms to Italy are apparent.

Since the early 1990s, the Italian government has openly acknowledged the benefits of ADR methods[12] and enacted a series of statutes promoting arbitration and mediation, as both complements and alternatives to court proceedings.[13] Although failing to reduce the duration or number of ongoing civil trials,[14] these laws have been instrumental in supporting the slow but steady growth of the ADR movement in Italy.[15] The most influential of these laws has been

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10. *See* Giovanni Deodato, *La Seconda Edizione del Rapporto sulla Diffusione della Giustizia Alternativa in Italia: Sfera Giudiziale ed Extragiudiziale, i Due Profili Complementari dell'Accesso alla Giustizia*, *in* SECONDO RAPPORTO SULLA DIFFUSIONE DELLA GIUSTIZIA ALTERNATIVA IN ITALIA 3, 13 (2009) (Italy) ("Emerge . . . dal rapporto Doing Business 2008 della World Bank che la lentezza dei processi costituisce uno dei principali ostacoli allo sviluppo produttivo dell'Italia, in quanto genera incertezza negli scambi e demotiva gli investitori."). *See generally* WORLD BANK: THE WORLD BANK ANNUAL REPORT 2008: YEAR IN REVIEW (2008), *available at* http://siteresources.worldbank.org/EXTANNREP2K8/Resources/YR00_Year_in_Review_English.pdf (illustrating statistical research toward each country's financial situation in 2008). *See generally* ALBERT KOCOUREK & JOHN W. WIGMORE, FORMATIVE INFLUENCES OF LEGAL DEVELOPMENT 244–45 (1918) (exploring the economic influences on Italy's legal system).

11. *See* PETERSEN ET AL., *supra* note 3, at 315–16) (noting that trial length contributes to delays in the legal system); *see also* Nelken, *supra* note 6 (emphasizing the dramatic length of the average case in Italy's legal system); *see also* Domenico Sarno, *Financial and Legal Constraints to Firm Growth: The Case of Italy*, 3 J. APPLIED ECON. SCI. 293, 296–99 (2008) (illustrating the relationship between Italy's financial development and judicial system).

12. *See* NADJA MARIE ALEXANDER, GLOBAL TRENDS IN MEDIATION 277 (2006) (emphasizing the benefits of ADR to Italy's legal system); s*ee also* Giuseppe De Palo, Paola Bernadini & Luigi Cominelli, *Mediation in Italy: the Legislative Debate and the Future,* 29 ADR BULLETIN 1, 1–5 (2003) (discussing the introduction of new mediation laws in an attempt to mend the length of the Italian legal system). *See generally* Marinella Baschiera, *Introduction to the Italian Legal System, The Allocation of Normative Powers: Issues in Law Finding*, 34 INT'L J. LEGAL INFO. 279, 315 (2006) (establishing how ADR came about in Italy).

13. *See* PHILIPPE FOUCHARD, EMMANUEL GAILLARD & BERTHOLD GOLDMAN, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 54 (Emmanuel Gaillard & John Savage eds., 1999) (mentioning the 1994 Italian arbitration law which provides that at least one of the parties is to be a resident of Italy or have a substantial relationship with the location where the claim is brought); *see also* MICHAEL MCILWRATH & JOHN SAVAGE, INTERNATIONAL ARBITRATION AND MEDIATION: A PRACTICAL GUIDE 231 (2010) (noting the difficult issue of who a claimant should name as another party to the arbitration); *see also* MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 403 (2nd ed., 2001) (illustrating that the Italian Parliament enacted statutes regarding binding awards in arbitration to prevent court intervention).

14. *See* De Palo, Bernadini & Cominelli, *supra* note 12, at 1 (establishing that people entering the Italian legal system should expect their case to take 10 years to resolve); *see also* Otto Sandrock, *Praktische Rechtsvergleichung*, *in* RECHTSVERGLEICHUNG ALS ZUKUNFTSTRACHTIGE AUFGABE 1, 11–12 (2004) (F.R.G.) (explaining that the snail trials were 6 to 7 years long in the 1990s and are closer to 10 years now); *see also* Otto Sandrock*, The Choice Between Forum Selection, Mediation and Arbitration Clauses: European Perspectives*, 20 AM. REV. INT'L ARB. 8, 28–29 (2009) (hereinafter Sandrock, *Choice*) (describing the Italian judiciary as overloaded based on a 2010 report, and the court decisions as "snail proceedings," or slow-paced).

15. *See* Giuseppe De Palo & Luigi Cominelli, *Crisis of Courts and the Mediation Debate: The Italian Case*, *in* GLOBAL TRENDS IN MEDIATION 213, 219–20 (1st ed. 2003) (discussing the laws that have developed ADR in Italy); *see also* Christopher Hodges, *Backmatter: What Are People Trying to Do in Resolving Mass Issues, How Is It Going, and Where Are We Headed?*, 622 ANNALS 330, 342 (asserting that new legislation in Italy, among other states, encourages settlement and mediation).

legislative directive 580 of 1993, which designated the administration of arbitration and mediation as services of Italian Chambers of Commerce, because it recognized ADR procedures as a real alternative to litigation.[16] Ever since the implementation of 580/1993, the number of ADR procedures performed annually in Italy has increased noticeably from a couple hundred in the nineties to tens of thousands in recent years.[17] The fact that centers connected to Chambers of Commerce have performed the overwhelming amount of ADR proceedings in Italy has shown the serious impact of law 580/1993.[18]

Nonetheless, not all methods of ADR have shared the same success. Although Italy has had a longer history of arbitration[19] and signed several international conventions on the subject,[20] its growth has been very slow and contained when compared to that of mediation.[21]

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16. *See* Legge 29 dicembre 1993, n. 580(2)(4)(a), *in* G.U. 11 gennaio 1994, n.7 (Italy) (establishing the law in statute); *see also Report of the Ministry of Economic Development Department of Market Regulation Office X on Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection law*, at 13 (Jan. 30, 2009), *available at* http://ec.europa.eu/consumers/enforcement/ docs/ italy_report_en.pdf (discussing the effects of Law 580/1993 on the Chambers of Commerce); *see also* Baschiera, *supra* note 12, at 315 n.97 (stating that mediation centers have been established in Chambers of Commerce pursuant to Law 580/1993).

17. *See* ANTONIO CICCIA, LA CONCILIAZIONE DELLE CONTROVERSIE: PROCEDURE, NORMATIVA E MODULISTICA 15 (2005) (Italy) (discussing the types of mediation and arbitration Law 580/1993 affords the Chambers of Commerce); *see also* Giuseppi De Palo & Luigi Cominelli, *Mediation in Italy: Waiting for the Big Bang?*, *in* GLOBAL TRENDS OF MEDIATION 259, 265 (2nd ed. 2006) (establishing that in 2004, the number of ADR requests more than doubled). *But see* Giuseppi De Palo & Penelope Harley, *Mediation in Italy: Exploring the Contradictions*, 21 NEGOT. J. 469, 472 (2005) (explaining that no dispute resolution services have reported a significant caseload).

18. *See* CICCIA, *supra* note 17, at 15 (2005) (establishing that the Chambers of Commerce have the ability to mediate and arbitrate cases); *see also* Robert B. Davidson & Richard Chernick, *Current Development: Jams: A Longstanding Provider of Dispute Resolution Services to the International Business Community*, 15 AM. REV. INT'L ARB. 593, 597 (mentioning the ADR Center, an affiliate of the Chambers of Commerce, is a part of the international mediation alliance MEDAL); *see also* Roberta Regazzoni, *RisolviOnline: Online Mediation from a Very Practical Point of View*, *in* EXPANDING THE HORIZONS OF ODR: PROCEEDINGS OF THE 5th INTERNATIONAL WORKSHOP ON ONLINE DISPUTE RESOLUTION 32, 32 (2008) (promoting RisolviOnline, an online mediation service provided by the Milan Chamber of Commerce).

19. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (showing that Italy was involved in conventions related to arbitration and specifically signed on to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1969); s*ee also* Giorgio Bernini, *Domestic and International Arbitration in Italy After the Legislative Reform*, 5 PACE L. REV. 543, 545 n.7 (1985) (tracing arbitration in Italy back to 1865); *see also* William R. Spiegelberger, *The Enforcement of Foreign Arbitral Awards in Russia: An Analysis of the Relevant Treaties, Laws, and Cases*, 16 AM. REV. INT'L ARB. 261, 268–69 & n.40 (explaining that Italy has been involved in arbitration conventions going as far back as 1961).

20. *See* Davidson & Chernick, *supra* note 18, at 597 (describing MEDAL, an international convention signed by Italy and other countries regarding alternate dispute resolution); *see also* Spiegelberger, *supra* note 19, at 268–69 & n.40 (including Italy as part of the 1961 European Convention on international commercial arbitration). *See generally* Convention, *supra* note 19 (listing Italy as a part of the convention).

21. *See* Cecilia Carrara, *ADR Client Strategies in the EU: Leading Lawyers on Advising Multinational Clients, Navigating Recent Trends, and Understanding the Key Laws Governing ADR in the EU*, 2009 WL 4052830 at 2 (explaining that mediation continues to grow while arbitration has plateaued); *see also* Hiram E. Chodosh, Stephen A. Mayo, Fathi Naguib & Ali El Sadek, *Egyptian Civil Justice Process Modernization: A Functional and Systemic Approach*, 17 MICH. J. INT'L L. 865, 879 (1996) (discussing why Italy has been slow to adopt ADR procedures); *see also* De Palo & Cominelli, *supra* note 17, at 273 (emphasizing Italian preference of mediation over arbitration or trials).

Mediation has been and remains the preferred form of ADR in Italy and represents almost all of the tripling in ADR requests that occurred between 2005 and 2007.[22]

Yet, despite the dramatic increase in the use of mediation in recent years,[23] neither it nor arbitration appears to be a true substitute for traditional litigation.[24] Indeed, both ADR methods still have a too limited diffusion throughout Italy to be able to reduce the number of civil trials that occur annually in the country.[25] In order for arbitration and mediation to become true alternatives to ordinary justice that will improve the efficiency of the civil justice system by reducing the number of civil suits, the attitude of Italian judges, lawyers, and citizens toward ADR methods must change.[26] Judges and lawyers must realize the benefits of ADR techniques and recognize that they do not diminish their role in the civil justice system but rather augment their ability to provide relief to those involved in conflict.[27] Meanwhile, the Italian populace

22. *See* Carrara, *supra* note 21, at 2 (stating that ADR requests have tripled in the past three years); *see also* Giovanni Deodato, *La Seconda Edizione del Rapporto sulla Diffusione della Giustizia Alternativa in Italia: Sfera Giudiziale ed Extragiudiziale, i Due Profili Complementari dell'Accesso alla Giustizia*, *in* SECONDO RAPPORTO SULLA DIFFUSIONE DELLA GIUSTIZIA ALTERNATIVA IN ITALIA 3, 10 (2009) (Italy) ("Negli ultimi tre anni il numero globale delle domande inerenti il ricorso a questi strumenti [ADR] e più che triplicato, passando da 15.916 del 2005, a 26.896 del 2006 e 50.808 del 2007."); *see also* Esther Martin, *Searching for Common Ground*, 80 EUR. LAW. 31, 32 (2008) (showing that mediation is on the rise because of an increase of two hundred requests in 2007 compared to 2006).

23. *See* Davidson & Chernick, *supra* note 18, at 597 (mentioning that mediation is becoming more popular in Europe); *see also* De Palo & Cominelli, *supra* note 17, at 273 (discussing the increase in mediation in two different categories of disputes); *see also* Martin, *supra* note 22, at 31, 32 (explaining that mediation requests were two hundred more in 2007 versus in 2006).

24. *See* De Palo & Cominelli, *supra* note 17, at 216 (analyzing the Italian population's aversion to ADR even when taking into account the difference in cost); *see also* De Palo & Harley, *supra* note 17, at 470–72 (explaining that despite all the steps taken to encourage ADR, mediation numbers still remain low); *see also* Regazzoni, *supra* note 18, at 32, 35 (describing how businesses do not trust ADR, especially online ADR, which causes lower numbers of ADR requests).

25. *See* Giuseppe De Palo, Paola Bernadini & Luigi Cominelli, *Mediation in Italy: the Legislative Debate and the Future,* 29 ADR BULLETIN 1, 1–5 (2003) (discussing a survey about peoples' knowledge regarding the availability of mediation); *see also* Giuseppe De Palo & Luigi Cominelli, *Crisis of Courts and the Mediation Debate: The Italian Case*, *in* GLOBAL TRENDS IN MEDIATION 213 (explaining that many cases that should have been settled outside of court enter the court system because of a lack of alternatives); *see also* De Palo & Harley, *supra* note 17, at 472 (describing the limited categories of disputes resolved by ADR).

26. *See* Carrara, *supra* note 21, at 9 (stating that clients and lawyers both do not feel comfortable with ADR processes, and that changing that is the key to success); *see also* Martin, *supra* note 22, at 31, 32 (quoting the deputy secretary-general of the Chamber of National and International Arbitration of Milan that companies and lawyers in Italy do not like mediation); *see also* Christos Ravanides, *Arbitration Clauses in Public Company Charters: An Expansion of the ADR Elysian Fields or a Descent into Hades?*, 18 AM. REV. INT'L ARB. 371, 449–50 (2007) (explaining that Italy places a greater importance on keeping arbitration voluntary rather than making the system more efficient).

27. *See* Mauro Cappelletti, *Alternative Dispute Resolution Processes Within the Framework of the World-Wide Access-to-Justice Movement*, 56 MODERN L. REV. 282, 293 (1993) (arguing that judges are reluctant to accept alternate dispute resolution believing it would reduce their role in disputes, as seen through the experience of French judges); *see also* De Palo, Bernadini & Cominelli, *supra* note 25, at 51, 54 (stating that in order to be successful, it must be clear to lawyers and judges that ADR in Italy will complement the national public justice system by enhancing its efficiency, rather than creating an opposing mechanism for dispute resolution). *See, e.g.,* Timothy Hedeen, *Institutionalizing Community Mediation: Can Dispute Resolution "Of, By, and For the People" Long Endure?*, 108 PENN ST. L. REV. 265, 273–74 (2003) (noting the benefits of ADR to judicial efficiency, as explained in the U.S. reforms).

must become aware of ADR practices and abandon any skepticism about the security and utility of such processes.[28]

Italian legislators have facilitated this changing of attitudes in recent years by implementing reforms designed to strengthen the effectiveness and integrity of ADR procedures.[29] Such legislative efforts, along with those of the European Union towards the adoption of ADR techniques to settle cross-border disputes,[30] have made the future of the ADR movement in Italy

28. *See* Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want—Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 153–54 (1984) (indicating the reason that disputants do not use alternatives is because they think courts are better adept to protect their rights, help win battles, and provide vindication, rather than the belief that citizens are unaware of ADR); *see also* Carol Silver, *Models of Quality for Third Parties in Alternative Dispute Resolution*, 12 OHIO ST. J. DISP. RESOL. 37, 39–41 (1996) (describing mediation's value to negotiators, which greatly impacts the Italian public's conception of dispute resolution, especially the assistance mediation provides in improving the quality of information and communication between parties, and producing more efficient outcomes). *See generally* Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict,* 24 OHIO ST. J. DISP. RESOL. 1, 2–30 (noting that the European Union has successfully used ADR to foster the creation of private dispute resolution; however, in the context of a single national government ADR still exists in the shadow of national justice systems).

29. *See* Maria Rosaria Ferrarese, *Civil Justice and the Judicial Role in Italy*, 13 JUST. SYS. J. 168, 168–69 (1988–89) (arguing that the weight of criminal adjudication in the 1980s led to a crisis in Italy, the escape from justice, which in turn led to the implementation of reform); *see also* Joao Pedrosa & Catarina Trincao, *The (Re)Birth of the Justice of the Peace: Democratic or Technocratic Justice Reform? The Experiences of Italy, Spain, Brazil, and Portugal*, 27 BEYOND LAW 91, 95 (2005) (stating that Justices of the Peace began working in Italy in 1993 with the objective of providing citizens with rapid solutions to low-level civil and criminal conflicts, a position that was evocative of a mediator used to achieve an agreement both parties would deem satisfactory). *See, e.g.*, European Judicial Network in Civil and Commercial Matters, Alternative Dispute Resolution—Italy (Aug. 10, 2007), *available at* http://ec.europa.eu/civiljustice/adr/adr_ita_en.htm (stating that Section 185 of the Italian Code of Civil Procedure provides optional conciliation attempts that may be renewed during court proceedings).

30. *See* Stephen McAuley, *Achieving the Harmonization of Transnational Civil Procedure: Will the ALI/UNIDROIT Project Succeed?*, 15 AM. REV. INT'L ARB. 231, 246 (2004) (explaining that transnational disputes increasingly seek alternate dispute resolution methods, such as arbitration, where the availabilities of appeals is restricted); *see also* Alec Stone Sweet & Thomas Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92 AM. POLITICAL SCI. REV. 63, 65 (1998) (arguing that the crucial first step in overcoming national barriers to exchange is the establishment of an effective European system of dispute resolution). *See generally* Melissa Devak, *Intellectual Property as an Investment: A Look at How ADR Relates to the European Union's Proposal for Electronic Commerce in the Single Market*, 2 CARDOZO ONLINE J. CONFLICT RESOL. 57, 63 (2001) (stating the advantages arbitration has over multinational litigation, including (1) legal framework regarding dealing with conflicting national legal systems, and (2) process, how cost-effective dispute resolution best serves both parties' interests).

look very promising.[31] Having already achieved limited success in Italy,[32] use of mediation and arbitration will certainly increase in the coming years as Italians further accept and promote these methods as alternatives to litigation. The growth of arbitration and mediation practices in Italy will benefit all those who are involved in controversy by not only providing effective mechanisms to resolve disputes[33] but also easing some of the burden placed upon the ordinary justice system by the high number of pending civil suits.[34] Only time will tell, however, just how effective legislative efforts will have been at increasing the use of arbitration and mediation to solve Italian controversies as well as at making ADR methods true alternatives to civil justice.

This article will provide a portrait of Italian arbitration and mediation processes as well as predictions about and prescriptions for the future success of the ADR movement in Italy.

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31. *See* Julia A. Martin, *Arbitrating in the Alps Rather Than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution*, 49 STAN. L. REV. 917, 923 (1997) (explaining that ADR has experienced rapid growth and increased significance internationally in recent years due to the skyrocketing costs and long delays of traditional arbitration); *see also* Joao Pedrosa & Catarina Trincao, *supra* note 29, at 95 (noting that the justice of the peace has, since its inception, decreased the length of procedures to one-tenth that which the same proceeding would take in ordinary courts, an average duration of 124 days). *See generally* Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 L. & CONTEMP. PROBS. 279, 280 (2004) (arguing that state-supported ADR in a democracy can be successful only if it strengthens democratic governance and the civil society supporting it).

32. *See* Martin, *supra* note 31, at 923 (explaining that ADR has experienced rapid growth and increased significance internationally in recent years due to the skyrocketing costs and long delays of traditional arbitration); *see also* Joao Pedrosa & Catarina Trincao, *supra* note 29, at 95 (noting that the justice of the peace has, since its inception, decreased the length of procedures to one-tenth that which the same proceeding would take in ordinary courts, an average duration of 124 days). *See generally* Reuben, *supra* note 31, at 280 (arguing that state-supported ADR in a democracy can be successful only if it strengthens democratic governance and the civil society supporting it).

33. *See* Richard Cappalli, *The Style and Substance of Civil Procedure Reform: Comparison of the United States and Italy*, 16 LOY. L.A. INT'L & COMP. L.J. 861, 872–73 (1994) (noting that prior to reforms, Italian civil lawsuits were plagued with delays and were characterized by suspensions, extensions, and constant additions of new issues and proofs, and Italian judges were unable to sanction a party who ignored deadlines); *see also* Giuseppe De Palo & Linda Costabile, *Promotion of International Commercial Arbitration and Other Alternative Dispute Resolution Techniques in Ten Southern Mediterranean Countries*, 7 CARDOZO J. CONFLICT RESOL. 303, 304 (2006) (stating that ADR is recognized as having many advantages in dealing with disputes in Italy, including reduced expense, procedural flexibility, efficiency, confidentiality, and finality). *See, e.g.*, Vincenzo Varano, *Civil Procedure Reform in Italy,* 45 AM. J. COMP. L. 657, 663 (1997) (describing two important statutes that had the goal of reducing the delay in proceedings: the law of Nov. 26, 1990, no. 353 "emergency measures for civil procedure," and the law of Nov. 21, 1991, no. 374, which instituted the justice of the peace).

34. *See* Cappalli, *supra* note 33, at 871 (arguing that the increased responsibilities of the justice of the peace resulted in a downward shift of caseload responsibilities that decongested the main trial courts); *see also* Varano, *supra* note 33, at 657–58 (noting that the level of delay in Italian courts has become so bad that the country has been charged with human rights violations because of denial of justice). *See, e.g.,* De Palo, Bernadini & Cominelli, *supra* note 25, at 54 (explaining that as of 2003, the average duration of a civil case before trial in Italy was 1,300 days, the average criminal proceeding was 427 days, and the average wait until appeal was 555 days).

I. The State of Arbitration in Italy

The use of arbitration has grown in Italy due to promotion of it by ADR centers[35] and reforms to the Italian Code of Civil Procedure which provides the legal framework for its practice.[36] Although the importance of arbitration practitioners to the spread of arbitration cannot be understated,[37] it is only because of legislators that arbitration has become a progressively more accepted and effective mechanism to resolve disputes.[38] Indeed, legislators have increased the attractiveness and integrity of arbitration by placing the process within the law and providing provisions for the enforcement of awards.[39] The Italian Parliament has made arbitration appealing because it chose to provide only loose regulations rather than a rigid procedural model.[40] Thus, legislators have allowed parties to adapt the arbitration process to the requirements of their individual disputes. This adaptability has provided greater autonomy to parties

35. *See* De Palo & Costabile, *supra* note 33, at 306–07 (describing Project Consortium, which is led by the ADR Center, and is Italy's first and largest provider of negotiation, conflict management, and ADR services); *see also* Hedeen, *supra* note 27, at 273–74 (explaining how neighborhood justice centers in the United States make a variety of methods of processing disputes available, including arbitration, mediation, referral to small claims court as well as referral to the court of general jurisdiction). *See generally* Cappelletti, *supra* note 27, at 289 (noting the various alternatives of dispute resolution as provided by the Florence Access-to-Justice Project).

36. *See* CODICE DI PROCEDURA CIVILE [C.P.C.] art. 806 (Italy) (allowing arbitration as an alternative means of dispute resolution to a court decision); *see also* Oscar G. Chase, *Civil Litigation Delay in Italy and the United States*, 36 AM. J. COMP. L. 47, 66 (1988) (describing that the reforms to Italian judicial procedure fall into two categories, (1) the adoption of special summary procedures designed to promote speed for particular kinds of claimants, and (2) the expansion of court authority to award interim relief pending the resolution of an ordinary civil action). *See, e.g.,* European Judicial Network, *supra* note 29 (noting the various types of ADR provided by Italian legislation, including amicable settlements, mediation, judicial or extra-judicial conciliation, and arbitration).

37. *See* Richard N. Block & Jack Stieber, *The Impact of Attorneys and Arbitrators on Arbitration Awards*, 40 INDUS. & LAB. REL. REV. 543, 543–44 (1987) (explaining that the use of arbitrators has been shown in data to positively effect the reward received by clients in such instances); *see also* Silver, *supra* note 28, at 39 (arguing that mediators who focus on fostering empowerment and recognition not only attract clients, but keep them satisfied, thereby maintaining good relations and creating a practically and substantially viable practice).

38. *See* Varano, *supra* note 33, at 661 (explaining that the summary adjudication proceedings has increased dramatically in recent decades thereby encouraging the legislator to introduce a variety of anticipatory and provisional remedies into the Italian judicial system); *see also* Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict* 24 OHIO ST. J. DISP. RESOL. 1, 2–3 (2009) (noting that the work of Italian legislators in ADR helps the population accept the mechanism for disputes because people view rules as a definition of justice).

39. *See* De Palo, Bernadini & Cominelli, *supra* note 34, at 54 (stating that reforms give enormous impetus to mediation by reflecting the U.S. Uniform Mediation Act, in an attempt to make reforms available to the public). *See, e.g.,* C.P.C., *supra* note 36, at art. 806 (exemplifying reforms reflecting the need for ADR).

40. *See* Giorgio Bernini, *Domestic and International Arbitration in Italy After the Legislative Reform*, 5 PACE L. REV. 543, 543 (1985) (discussing the loose regulations surrounding contractual arbitration in Italy); *see also* Alessandra Casella, *On Market Integration and the Development of Institutions: The Case of International Commercial Arbitration*, 40 EURO. ECON. REV. 155, 161 (1996) (explaining regulation surrounding international arbitration and the control it provides courts and parties). *See generally* Mauro Rubino-Sammartano, *New International Arbitration Legislation in Italy*, 11 J. INT'L ARB. 77, 78–79 (1994) (acknowledging the Italian Parliament's power over arbitration and the scope of its power leaving much discretion to all parties involved).

to resolve controversy in their own way and reduced any anxiety that they would be trapped in a process that was no less burdensome or inefficient as civil litigation.[41]

Although arbitration in Italy has increased significantly over the last decade,[42] it has not done so at high enough rates to conclude that it represents a real substitute for ordinary civil justice.[43] According to a 2010 report by the Chamber of Arbitration of Milan, which surveyed the most well known Italian ADR centers, arbitration accounted for just 0.7% of ADR proceedings performed in 2008.[44] Although the accuracy of this report may be limited due to the private nature of ADR proceedings in general,[45] the findings seem fairly credible and confirm two previous studies by the same organization in 2008 and 2009, which recorded an increasing marginalization of arbitration within the Italian ADR movement.[46] Consequently, it is hard to

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41. *See* BAKER & MCKENZIE, THE BAKER & MCKENZIE INTERNATIONAL ARBITRATION YEARBOOK 2007 78–79 (2008) (discussing the different forms of arbitration available in Italy, particularly informal arbitration which allows parties freedom to contract as a way of resolving disputes); *see also* Valerio Sangiovanni, *Current Development: Some Critical Observations on the Italian Regulation of Company Arbitration*, 17 AM. REV. INT'L ARB. 281, 282–84 (2006) (explaining the different advantages parties enjoy through arbitration in Italy); *see also* Tampieri Tizana, *International Arbitration and Impartiality of Arbitrations: The Italian Perspective*, 18 J. INT'L ARB. 549, 550 (distinguishing the two kinds of arbitration which exist in Italy and how informal arbitration provides parties freedom to contract agreements).

42. *See* ANITA ALIBEKOVA & ROBERT CARROW, INTERNATIONAL ARBITRATION AND MEDITATION: FROM THE PROFESSIONAL PERSPECTIVE 39 (2007) (acknowledging the increase in arbitration cases in Italy during the past decade); *see also* Bernini, *supra* note 40, at 543 (discussing the loose regulations surrounding contractual arbitration in Italy). *See generally* Karen Halverson Cross, *Arbitration as a Means of Resolving Sovereign Debt Disputes*, 17 AM. REV. INT'L ARB. 335, 338 (2006) (commenting on the increasing preference of resolving transnational disputes through international arbitration).

43. *See* Chase, *supra* note 36, at 65 (discussing that although methods of ADR have provided civil litigants with a faster way to resolve disputes, ADR has not substituted civil litigation); *see also* Vincenzo Varano, *Civil Procedure Reform in Italy,* 45 AM. J. COMP. L. 657, 661 (1997) (explaining the large amount of cases in Italy's civil courts despite the alternative methods for dispute resolution available). *See generally* Maria Rosaria Ferrarese, *Civil Justice and the Judicial Role in Italy,* 13 JUST. SYS. J. 168, 173–74 (1989) (commenting on the extensive civil caseload in Italy and how arbitration is not making a significant contribution to relieve such burden).

44. *See* Vincenza Bonsignore, *La Diffusione della Giustizia Alternativa in Italia nel 2008: I Resultati di una Ricerca*, *in* TERZO RAPPORTO SULLA DIFFUSIONE DELLA GIUSTIZIA ALTERNATIVA IN ITALIA 13, 113 (2010) (Italy) ("Le procedure di ADR nel 2008 hanno raguinto la ragguardevole cifra di 101.659, delle quail la conciliazione rapresenta poco piu del 99%."), *available at* http://www.camera-arbitrale.it/Documenti/terzo_rapporto_giustiziaalternativa.pdf; *see also* Tiziano Treu, *The Neutral and Public Interests in Resolving Disputes in Italy,* 13 COMP. LAB. L.J. 470, 470 (1992) (acknowledging that arbitration is used scarcely in Italy despite its loose regulations). *See generally* Louka Mistelis & Crina Baltag, *Special Section on the 2008 Survey on Corporate Attitudes Toward Recognition and Enforcement of International Arbitral Awards*, 19 AM. REV. INT'L ARB. 319, 319 (2008) (surveying the various factors that affect the growth of arbitration use in Italy).

45. *See* Steven Kouris, *Confidentiality: Is International Arbitration Losing One of Its Major Benefits?*, 22 J. INT'L. ARB. 127, 127 (2005) (acknowledging the private nature and confidentiality surrounding arbitration proceedings); *see also* Edward R. Leahy & Carlos J. Bianchi, *The Changing Face of International Arbitration*, 17 J. INT'L. ARB. 19, 36 (2000) (explaining how confidentiality surrounding arbitration proceedings warrants enforcement of an arbitration agreement); *see also* Anjanette H. Raymond, *Confidentiality in a Forum of Last Resort: Is The Use of Confidential Arbitration a Good Idea for Business and Society?*, 16 AM. REV. INT'L. ARB. 479, 481 (2005) (discussing the use of confidentiality and privacy during arbitration proceedings as a contractual binding mechanism).

46. *See* Chamber of Arbitration of Milan, *Facts and Figures*, *available at* http://www.camera-arbitrale.it/Documenti/arbitration_stat_2009-en.pdf (identifying the very slight increases in arbitration requests in Italy during the years 2008 and 2009, which demonstrates arbitration is not a significant method of dispute resolution). *See generally* Treu, *supra* note 44, at 475 (addressing the societal norms which take priority and require traditional civil litigation, thereby diminishing the use and effectiveness of arbitration in Italy).

consider arbitration not marginal, especially given that while the number of mediations grew from tens of thousands to over a hundred thousand, only 520, 505, 557, and 681 institution arbitrations respectively occurred each year from 2005 through 2008.[47]

These figures do not document the number of Italian ad hoc arbitrations performed annually because they are even more private proceedings than institutional arbitrations and handled by attorneys.[48] Nonetheless, despite the little that is known about ad hoc arbitrations in Italy, it is safe to presume that that figure is not so dramatically high as to make arbitration appear to be a more significant part of the overall Italian ADR movement.[49] Indeed, considering that most ad hoc arbitrations are "referred to the Milan Chamber of Arbitration or the Arbitration Court of the International Chamber of Commerce in Paris" and, thus, become institutionalized,[50] these proceedings cannot possibly account for that many more arbitrations.[51]

The aforementioned 2008 study by the Chamber of Arbitration of Milan, which surveyed major Italian law firms, revealed that they handled just 14 ad hoc proceedings in 2005 and another 20 in 2006.[52] These figures might seem shockingly low to those who believe that more ad hoc proceedings must currently exist in order to provide the relief that traditional civil justice and other forms of ADR continue to fail to deliver. Nevertheless, given the incredible

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47. *See* Bonsignore, *supra* note 44, at 114 (showing that there were 520, 505, 557, and 681 new requests for institutional arbitration in Italy respectively in 2005, 2006, 2007 and 2008) ("Arbitrato Amministrato: Domande 2005 520; Domande 2006 505; Domande 2007 557; Domande 2008 681"); *see also* Chamber, *supra* note 46 (showing the amount of meditation request during the years 2008 and 2009).

48. *See* MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 4 (2nd ed., 2001) (discussing how informal arbitration allows parties to freely contract agreements); *see also* ALIBEKOVA & CARROW, *supra* note 42, at 39 (describing how ad hoc proceedings are often faster and more flexible than other forms of arbitration); *see also* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION COMMENTARY AND MATERIALS 12 (2nd ed. 2001) (explaining that ad hoc proceedings take place under the supervision of the parties to the agreement and are therefore more flexible and relaxed).

49. *See* BORN, *supra* note 48 (discussing that despite the flexibility of ad hoc arbitration, professional lawyers still prefer institutional arbitration); *see also* William K. Slate, *International Arbitration: Do Institutions Make a Difference*, 31 WAKE FOREST L. REV. 41, 42 (1996) (addressing the reasons for societal preference of institutional arbitration rather than ad hoc arbitration). *See generally* Jan Paulsson, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, 32 INT'L. & COMP. L.Q. 53, 56 (1983) (suggesting that the benefits of ad hoc arbitration should result in wider use of it throughout international commerce).

50. *See* ALAN REDFEN, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 46–47 (4th ed. 2004) (explaining that all ad hoc proceedings must adhere to regulations of the relevant association); *see also* Giovanni DeBerti, *Surveys Reveal Further Spread of Arbitration and Mediation*, INT'L L. OFFICE ARB. NEWSL., Jun. 12, 2008 (discussing international arbitration in Italy).

51. *See* ALIBEKOVA & CARROW, *supra* note 42, at 41 (describing the limitations of ad hoc arbitration which render it to be less favorable among lawyers); *see also* REDFEN, *supra* note 50, at 46–47 (describing the limitations of ad hoc proceedings). *See generally* Paulsson, *supra* note 49, at 56 (commenting on the benefits of ad hoc arbitration; however, formal arbitration is still preferred throughout international commerce).

52. *See* Chamber, *supra* note 46 (identifying the very slight increases in arbitration requests in Italy during the years 2008 and 2009, which demonstrates arbitration is not a significant method of dispute resolution).

growth of mediation, it is difficult to imagine that the number of ad hoc proceedings will ever make arbitration a true competitor to be the most popular form of ADR in Italy.

Though the number of arbitrations recently performed seems marginal when compared to the number of mediations conducted,[53] it still denotes a dramatic increase from a decade ago, when less than a hundred such proceedings occurred.[54] As previously stated, both the Italian Parliament and ADR practitioners have contributed to this limited increase in the diffusion of arbitration by promoting the practice.[55] While ADR centers have served a pivotal role in the rise of arbitration by administering and advertising such services,[56] most of the credit must be

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53. *See* Cecilia Carrara, *Understanding ADR in Italy*, ASPATORE, Nov. 2009, at 1 (stating that in the last few years mediation has accounted for 98 percent of Italian ADR requests); *see also* Giovanni DeBerti, *Growth of Mediation*, INT'L L. OFFICE ARB. NEWSL., Apr. 1, 2006 (commenting that mediation is the most common form of ADR in Italy). *See generally* Giuseppe De Palo & Leonardo d'Urso, *Explosion or Bust? Italy's New Mediation Model Targets Backlogs to 'Eliminate' One Million Disputes Annually*, 28 ALTERNATIVES TO HIGH COST LITIG. 93, 93 (2010) (explaining that the high number of mediations is due to a requirement that parties engage in mediation prior to accessing the courts).

54. *See* S. I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 AM. REV. INT'L ARB. 119, 128 (2010) (asserting that parties have more readily embraced arbitration in recent decades); *see also* Special Supplement, *European ADR 2000: European ADR Practice, Issues and Trends*, 18 ALTERNATIVES TO HIGH COST LITIG. 43, 43 (2000) (discussing how as of 1998 very few cases were arbitrated but that new legislation would likely change this fact). *See generally* Julia A. Martin, *Arbitrating in the Alps Rather Than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution*, 49 STAN. L. REV. 917, 962 (1997) (recognizing that in 1997, with increasing international commercial activity and with long delays in national court systems, many nations were beginning to welcome arbitration).

55. *See* JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 44–45 (2007) (asserting that the Italian government pass laws in 1994 and 2006 in order to encourage the use of arbitration to resolve disputes); *see also* Carrara, *supra* note 53, at 1 (stating that in response to a slow court system, Italy has encouraged arbitration); *see also* DeBerti, *supra* note 53 (discussing how legislation like Law 580/1993 was implemented to encourage arbitration for dispute resolution).

56. *See* NADJA MARIE ALEXANDER, GLOBAL TRENDS IN MEDIATION 259 (2006) (stating how the ADR center is reporting a 20 percent per year increase in the number of referrals they are receiving); *see also* Giuseppe De Palo & Linda Costabile, *Promotion of International Commercial Arbitration and Other Alternative Dispute Resolution Techniques in Ten Southern Mediterranean Countries*, 7 CARDOZO J. CONFLICT RESOL. 303, 306 (2006) (discussing how the ADR Center is the first and largest provider in Italy of negotiation, conflict management, and ADR services); *see also* CPR News, *CPR on the Podium*, 19 ALTERNATIVES TO HIGH COST LITIG. 184, 184 (2001) (demonstrating that Italy's ADR Center is publicizing ADR by cosponsoring a conference on the subject in Italy).

conceded to lawmakers, who have endowed awards with enforceability and imparted integrity to the arbitration process through legislative reforms.[57] Nevertheless, despite the growth of arbitration in Italy, it has not yet become a true substitute for traditional litigation.[58]

A. Current Italian Arbitration Law

In Italy, Book IV, Title VIII of the Italian Code of Civil Procedure (Articles 806-840) regulates arbitration.[59] In 1983,[60] 1994,[61] and 2006[62] legislators made significant revisions to these sections, which had the effect of increasing the popularity of arbitration.[63] The most recent reform modernized the procedure "by extending to all arbitration proceedings the rules, which previously applied only to international arbitration."[64] The elimination of a distinction between domestic and international proceedings facilitated the use and spread of arbitration by creating a uniform set of rules for both foreigners and Italians that reduced much of the complexity of and confusion about the procedure.[65] The 2006 reform pronounced for the first time

57. *See* Vera van Houtte, Stephan Wilske & Michael Young, *What's New in European Arbitration?* 61 DISP. RESOL. J. 10, 11 (2006) (analyzing how Italy has amended its Code of Civil Procedure in order to be a more favorable location for arbitration proceedings); *see also* Chiara Giovannucci Orlandi, *Ethics for International Arbitrators*, 67 UMKC L. REV. 93, 97–98 (1998) (explaining the provisions of the new parts of the Italian Code of Civil Procedure and how these reforms are extremely positive); *see also* Eugenia Stefani, *ADR in Italy*, 24 NO. 6 ACC DOCKET 130, 130–31 (2006) (discussing how Italian legislators favor promoting arbitration as well as other ADR and have put forth legislation and reforms consistent with that notion)

58. *See* ALEXANDER, *supra* note 56 (acknowledging that Italians view legal jurisdiction as sacrosanct and therefore generally oppose changes to their longstanding litigation system for resolving disputes); *see also* Carrara, *supra* note 53, at 1 (stating that although ADR is becoming more popular as an alternative, litigation is still increasing); *see also* Stefani, *supra* note 57, at 130–31 (holding that traditional litigation is still favored in certain cases because arbitrators cannot order any injunctions or interim measures).

59. *See* CODICE DI PROCEDURA CIVILE [C.P.C.] arts. 806–840 (describing current regulations on arbitration).

60. *See id.* (passing regulations on arbitration that served to meet the demands of international arbitration).

61. *See id.* (enacting regulations making Italian law more agreeable towards commercial arbitration).

62. *See id.* (making rules which were previously granted exclusively to international arbitration apply to all cases of arbitration).

63. *See* Giovanni De Berti & Michelangelo Cicogna, *Arbitration and Mediation in Italy*, 10 METRO CORP. COUNSEL 26, 26 (2002) (discussing a 300% increase in the number of arbitration proceedings filed since 1994 and attributing the increase to revisions of the Code of Civil Procedure); *see also* Martin, *supra* note 54, at 962 (explaining how revisions to the Code were made to encourage international arbitration).

64. *See* C.P.C., *supra* note 59, at arts. 806–840 (displaying the rules which were previously granted exclusively to international arbitration and now apply to all arbitration); *see also* POUDRET & BESSON, *supra* note 55, at 45 (stating that the distinction between international and domestic arbitration rules had been abolished); *see also* Giovanni DeBerti, *supra* note 53 (explaining how the new rules do not distinguish between domestic and international arbitration).

65. *See* POUDRET & BESSON, *supra* note 55, at 45 (explaining that the removal of the distinction between international and domestic arbitration in the 2006 reform was to simplify the proceedings and increase the effectiveness); *see also* van Houtte, Wilske & Young, *supra* note 57, at 11 (holding that by eliminating the distinction between international and domestic arbitration proceedings, the 2006 reforms clarify a number of issues that existed in the Code previously). *See generally* ANITA ALIBEKOVA & ROBERT CARROW, INTERNATIONAL ARBITRATION AND MEDITATION: FROM THE PROFESSIONAL PERSPECTIVE 43 (2007) (assessing that there is some confidence that the new rules will positively impact and change the perception that Italians have of arbitration).

provisions that permit multiparty arbitration,[66] third-party intervention,[67] and the assistance of Italian courts and expert witnesses in the taking of evidence.[68] Multiparty arbitration and third-party intervention have made arbitration adaptable to disputes involving more than two parties and hence, have greatly increased the possibilities for this process to be applied to more complex controversies than it could previously.[69] By providing for expert witnesses,[70] court

66. *See* C.P.C., *supra* note 59, at arts. 806–840 ("Qualora più di due parti siano vincolate dalla stessa convenzione d'arbitrato, ciascuna parte può convenire tutte o alcune delle altre nel medesimo procedimento arbitrale se la convenzione d'arbitrato devolve a un terzo la nomina degli arbitri, se gli arbitri sono nominati con l'accordo di tutte le parti, ovvero se le altre parti, dopo che la prima ha nominato l'arbitro o gli arbitri, nominano d'accordo un ugual numero di arbitri o ne affidano a un terzo la nomina."); *see also* Mario Riccomagno, *Italy: Reform of Arbitration Law in Italy*, II ARBITRATION COMMITTEE NEWSL. (Int'l Bar Ass'n Legal Practice Div.), Sept. 2006, at 24, 24–25 (informing that the 2006 reform allows for multiparty arbitration). *See generally* Redazione camera di commercio, *La Riforma Dell'Arbitrato*, at A1 (2008) (Italy) (stating the multiparty arbitration aspect of the 2006 reform).

67. *See* C.P.C., *supra* note 59, at arts. 806–40 ("L'intervento volontario o la chiamata in arbitrato di un terzo sono ammessi solo con l'accordo del terzo e delle parti e con il consenso degli arbitri."); *see also* Redazione, *supra* note 66 (listing the ways in which the 2006 reform allows for intervention). *See generally* Gabriele Crespi Reghizzi and Marco Frigessi di Rattalma, *Italy: International Arbitration*, COMM. DISPUTE RES., Aug. 1, 2009 (showing that third parties can intervene in arbitration proceedings).

68. *See* C.P.C., *supra* note 59, at arts. 806–840 ("L'istruttoria o singoli atti di istruzione possono essere delegati dagli arbitri ad uno di essi. Gli arbitri possono assumere direttamente presso di sé la testimonianza, ovvero deliberare di assumere la deposizione del testimone, ove questi vi consenta, nella sua abitazione o nel suo ufficio. Possono altresì deliberare di assumere la deposizione richiedendo al testimone di fornire per iscritto risposte a quesiti nel termine che essi stessi stabiliscono. Se un testimone rifiuta di comparire davanti agli arbitri, questi, quando lo ritengono opportuno secondo le circostanze, possono richiedere al presidente del tribunale della sede dell'arbitrato, che ne ordini la comparizione davanti a loro. Nell'ipotesi prevista dal precedente comma il termine per la pronuncia del lodo e' sospeso dalla data dell'ordinanza alla data dell'udienza fissata per l'assunzione della testimonianza. Gli arbitri possono farsi assistere da uno o più consulenti tecnici. Possono essere nominati consulenti tecnici sia persone fisiche, sia enti. Gli arbitri possono chiedere alla pubblica amministrazione le informazioni scritte relative ad atti e documenti dell'amministrazione stessa, che e' necessario acquisire al giudizio."); *see also* Mario Riccomagno, *supra* note 66, at 1 (indicating that the court may assist arbitrators in the collecting of evidence); *see also* Redazione, *supra* note 66, at A1 (explaining how the new reform allows for courts to weigh in regarding evidence in party disputes).

69. *See* Sandra Obuljen, *Joint Venture Agreements Drafting the Arbitration Clause*, 6 CROAT. ARB. Y.B. 141, 152–53 (1999) (explaining how multiparty arbitration can handle more complex cases); *see also* Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 473 (1987) (asserting the simplification benefits of multiparty arbitration); *see also* S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 MICH. J. INT'L L. 1017, 1040–41 (2009) (comparing differences in multiparty arbitration and class actions).

70. *See* CODICE DI PROCEDURA CIVILE (C.P.C.), art. 816-ter, (stipulating that the code allows expert witnesses to be called); *see also* S.I. Strong, *Resolution of the IBA Council, IBA Rules on the Taking of Evidence in International Arbitration*, 20 AM. REV. INT'L ARB. 119, 150 (2010) (stating the reform allows for expert commentary to fill in the gaps); *see also* Resolution of the IBA Council, *IBA Rules on the Taking of Evidence in International Arbitration* (2010) (illustrating how the new reform allows for expert witnesses).

assistance in the procurement of evidence,[71] and the judicial summoning of witnesses,[72] the latest reform gives parties involved in arbitration many evidentiary benefits, which were previously only available by recourse in court, without the added expense that comes with litigation.[73] Nonetheless, the 2006 reforms represent only part of the reason that arbitration usage has steadily grown.

Rather than resulting from radical reforms, the progress made by Italian legislators in promoting arbitration is primarily due to their rather loose approach to regulation.[74] The Italian Parliament has provided wide discretion to parties to use arbitration to resolve all contractual and non-contractual controversies except those involving inalienable rights or public concerns, such as civil status, marital separation, or the capacity of an individual.[75] This leeway in what may be arbitrated has allowed the application of arbitration to almost any private dispute[76] while preserving the resources of the courts for those conflicts that are most important to the state.[77]

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71. *See* C.P.C., *supra* note 70, at art. 819-ter, (setting rules for when a judge can intervene). *See generally* Daniel J. Rothstein, *A Proposal to Clarify U.S. Law on Judicial Assistance in Taking Evidence for International Arbitration*, 19 AM. REV. INT'L ARB. 61, 61 (2008) (showing examples of judicial assistance to private arbitrations). *See generally* Reghizzi & di Rattalma, *supra* note 67 (providing evidence that courts can assist arbitration proceedings).

72. *See* C.P.C., *supra* note 70, at art. 816-ter, (exhibiting the rule for judicial summoning of witnesses); *see also* Riccomagno, *supra* note 66, at 1, (discussing the fact that a judge can summon witnesses in arbitration). *See generally* Daniel A. Zeft, *The Applicability of State International Arbitration Statutes and the Absence of Significant Preemption Concerns*, 22 N.C.J. INT'L L. & COM. REG. 705, 705 (1997) (describing how witnesses can be forced to testify in arbitration hearings).

73. *See* Christos Ravanides, *Arbitration Clauses in Public Company Charters: An Expansion of the ADR Elysian Fields or a Descent Into Hades?*, 18 AM. REV. INT'L ARB. 371, 449–50 (2007) (noting how Italian arbitrative law provides an alternative to expensive litigation); *see also* Resolution, *supra* note 70 (commenting that the only fees necessary for arbitration are the arbitrator's own fees).

74. *See* Valerio Sangiovanni, *Current Development: Some Critical Observations on the Italian Regulation of Company Arbitration*, 17 AM. REV. INT'L ARB. 281, 281–82 (2006) (stating company arbitration was unregulated until 2006). *See generally* Greg J. Bamber, *Industrial Relations in the New Europe*, 15 COMP. LAB. L. 561, 563 (1994), (concluding Italy has weak institutional regulation); *see generally* Sheila Clahely, *Trade and the Environment*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 181, 181 (1996) (alleging Italy has exhibited weak performance in other areas).

75. *See* Angelo Anglani, *Italy, in* GETTING THE DEAL THROUGH; ARBITRATION 2009 159, 160 (Gerhard Wegen & Stephan Wilske eds., 2009) (displaying Italy's wide discretion toward issues which may be arbitrated); *see also* 1 ITALY LAW DIGEST 9.02 (2009) (stating that arbitration can handle contractual and non-contractual claims, as well as covering everything except public concerns and inalienable rights). *See generally* Edita Culinovic-Herc & Vlatka Butorac Malnar, *Arbitration of Disputes between Investors and Listed Companies on the Breach of Duty to Disclose Information on Capital Markets*, 16 CROAT. ARB. Y.B. 141, 141 (2009) (showing how Italy limits arbitration to issues not affecting inalienable rights).

76. *See generally* KARIM YOUSSEF, CONSENT IN CONTEXT: FULFILLING THE PROMISE OF INTERNATIONAL ARBITRATION (2009) (remarking on the wide array of private disputes which may be arbitrated); *see generally* Cecilia Carrara, *Understanding ADR in Italy*, ASPATORE, November 2009, at 1 (recognizing the leeway granted to ADR participants); *see generally* ITALY LAW DIGEST, *supra* note 75 (asserting that the nature of arbitration proceedings allows them to be applied to almost any private dispute).

77. *See generally* Cory Alpert, *Financial Services in the United States and United Kingdom: Comparative Approaches to Securities Regulation and Dispute Resolution*, 5 BYU INT'L L. & MGMT REV. 75, 83 (2008) (indicating the scarce resources devoted to arbitration, as compared with courts); *see generally* Olagoke O. Olatawura, *The "Privy to Arbitration" Doctrine: The Withering of the Common-Law Privity of Contract Doctrine in Arbitration Law*, 16 AM. REV. INT'L ARB. 429, 458–59 (2005) (emphasizing the court's limited resources).

Besides setting broad arbitrability, legislators have facilitated the growth of arbitration by requiring very few formalities for arbitration agreements.[78] Arbitration agreements must only be in writing (including electronic formats) and define the subject matter of the dispute.[79] The simplicity of these requirements has made the adoption of arbitration extremely easy because parties can draft agreements without fear that they will be declared null and void due to formalistic defect.[80] Courts will always find arbitration agreements which adhere to these two requirements to be enforceable unless: (1) the contracting parties terminate the agreement; (2) both parties commence civil action; (3) or one party fails to object in a timely manner to the civil suit of the other.[81]

However, the most attractive feature of Italian arbitration law is that it procedurally preserves the autonomy of parties to settle their disputes in their own way.[82] The Italian Code of Civil Procedure supplies only a few rudimentary requirements and default rules regarding arbitration procedure.[83] Under its provisions, parties "can freely determine the rules, the language

78. *See* Youssef, *supra* note 76 (reporting the broad discretion Italian legislators have allowed for in arbitration proceedings). *See generally* Carrara, *supra* note 76, at 1 (outlining the simplification of Italy's arbitration system); *see generally* Giuseppe De Palo, Paola Bernadini & Luigi Cominelli, *Mediation in Italy: The Legislative Debate and the Future,* 29 ADR BULLETIN 1, 53 (2003) (arguing that the Italian legislature has not placed many formalities in the way of ADR).

79. *See* C.P.C., *supra* note 70, at art. 807 ("Il compromesso deve, a pena di nullita, essere fatto per iscritto e determinare l'oggetto della controversia."); *see also* Niccolo Landi, *Arbitration Agreements: The Written Form Requirement and New Means of Communication Under Italian Law*, 4 MIGALHAS INT'L ARB. 1, 1 (2010) (citing that the arbitration must be "in writing and must indicate the subject matter of the dispute); *see also* Renzo Morera, *Arbitration in Europe: Contemporary Issues and New Developments: New Trends of Arbitration in Italy,* 2 CROAT. ARB. YEARBOOK 47, 50 (1995) (affirming that the arbitration must be in writing or else it is "null and void").

80. *See* Olsher Metals Corp. v. La Magona d'Italia, No. 01-3212, 2002 U.S. Dist. LEXIS 28451, at *3 (Fla. Dist. Ct. App. Oct. 22, 2002) (demonstrating that having the agreement in writing allows the court to easily determine whether it is null and void); *see also* Fabrizio Marrella, *Emerging Dilemmas in International Economic Arbitration: Unity and Diversity in International Arbitration: The Case of Maritime Arbitration*, 20 AM. U. INT'L L. REV. 1055, 1091 (2005) (asserting that under Italian law, the formal requirements have been simplified especially when dealing with international arbitration); *see also* Morera, *supra* note 79, at 50 (stating that the agreement must be in writing to prevent it from being null and void).

81. *See* Anglani, *supra* note 75, at 159; *see also* Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, GEO. WASH. INT'L L. REV. 17, 94 (2002) (noting that in some situations the arbitration agreement may not be enforceable); *see also* Brette L. Steele, Comment, *Enforcing International Commercial Mediation Agreements As Arbitral Awards Under The New York Convention*, 54 UCLA L. REV. 1385, 1396 (stating that sometimes arbitration agreements must be enforced through other means such as an Italian court order).

82. *See* Chiara Giovannucci Orlandi, *Ethics for International Arbitrators*, 67 UMKC L. REV. 93, 97 (1998) (showing how the parties are able to choose the means through which they settle agreements); *see also* Ravanides, *supra* note 73, at 449–50 (distinguishing Italian arbitration law from Brazilian and Chinese law based on the value placed on the "voluntary nature" of arbitration); *see also* Valerio Sangiovanni, *supra* note 74, at 282–83) (indicating that sometimes the ability to choose a judge is a power that is not necessarily reserved for the parties).

83. *See* CODICE DI PROCEDURA CIVILE [C.P.C.] art. 807 (showing that the Italian Code of Civil Procedure provides very little requirements for arbitration procedure); *see also* Europcar Italia v. Maiellano Tours Inc., 156 F. 3d 310, 313 (1998) (describing how some forms of Italian arbitration have very few procedural safeguards); *see also* Hrvoje Sikiric, *Selection of the Place of Arbitration*, 3 CROAT. ARB. YEARBOOK 7, 18 (1996) (illustrating the flexibility of Italian arbitration and how the parties are able to decide which type of procedure they wish to use).

and the seat of the arbitration" or if they fail to do so, then arbitrators can.[84] Additionally, parties have the freedom to decide upon any odd number of arbitrators,[85] the method of appointment for arbitrators,[86] the choice of applicable law,[87] the ability of arbitrators to issue an award based on equity,[88] and a time limit for rendering an award.[89] The only mandatory rule of the procedural process is that arbitrators must respect due process by providing "equal rights to parties to be heard and to defend themselves during arbitral proceedings."[90] Since there are very few regulations[91] and parties can create an arbitration procedure that addresses their own indi-

84. *See* C.P.C., *supra* note 83, at art. 816 (reiterating that the parties choose the rules and the seat of arbitration); *see also* Giorgio Bernini, *Italian Law of Arbitration,* J. ON ARBIT. (forthcoming 2010) (citing that the parties "can freely determine the rules, the language and the seat of arbitration"); *see also* Sikiric, *supra* note 83, 18 (noting that Italian arbitration law is similar to French and Swiss laws of arbitration, in that the parties can freely choose the rules of arbitration).

85. *See* Rhone Mediterranee Compagnia v. Lauro, 712 F.2d 50, 54 (1983) (noting that sometimes an agreement cannot be enforced if there fails to be an odd number of arbitrators); *see also* Karamanian, *supra* note 81, at 54–55 (reaffirming that an arbitration clause that asks for an even number of arbitrators is null and void); *see also* Monroe Leigh, *Arbitration: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 78 AM. J. INT'L L. 217, 217 (1984) (emphasizing that under Italian law, an arbitration clause is only valid if there are an odd number of arbitrators)

86. *See* C.P.C., *supra* note 83, at art. 810 (stating that the parties are able to choose the method through which they appoint arbitrators); *see also* Orlandi, *supra* note 82, at 97 (citing that pursuant to Article 815, a party can "refuse an arbitrator whom he has not appointed); *see also* Valerio Sangiovanni, *Current Development: Some Critical Observations on the Italian Regulation of Company Arbitration*, 17 AM. REV. INT'L ARB. 281, 282 (2006) (opining that an advantage of Italian arbitration is the ability of the parties to choose their own arbitrators).

87. *See* C.P.C., *supra* note 83, at art. 816 (stating that the parties have the ability to determine the rules of the arbitration procedure); *see also* Karamanian, *supra* note 81, at 55 (asserting that under Article V, the court can either apply the law which the parties have chosen or the law of the place where the arbitral award is enforced); *see also* Sikiric, *supra* note 83, 16 (comparing Italian law to Swiss law in that the arbitral tribunal should rule based on the law chosen by the parties).

88. *See* Bernini, *supra* note 84 (stating that the parties can decide whether the arbitrators should decide the merit of the dispute based on equity); *see also* Giorgio Bernini, *Domestic and International Arbitration in Italy After the Legislative Reform*, 5 PACE L. REV. 543, 545 (1985) (indicating that in both informal and formal Italian arbitration, the parties have the ability to determine whether the award should be in equity); *see also* Sikiric, *supra* note 83, at 137 (opining that the ability for the arbitrators to decide *secondo equita* ("in equity") must be presented to the arbitrators in writing).

89. *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, 38 (2000) (reaffirming that an award will be set aside when not completed within the specified time limit); *see also* Antonio Lordi, *The Italian Construction Contract: A Contribution to the Study of the European Construction Law*, 24 J.L. & COM. 97, 109 (2004) (explaining that the time limit provision in Article 820 is also subject to the provisions of Article 821); *see also* Renzo Morera, *Arbitration in Europe: Contemporary Issues and New Developments: New Trends of Arbitration in Italy*, 2 CROAT. ARB. YEARBOOK 47, 51 (1995) (stating that an award may be set aside if it was not rendered within the time limit that the parties set).

90. *See* C.P.C., *supra* note 83, at art. 829 (acknowledging that one of the grounds for nullity is if "due process has not been respected in the arbitration proceedings"); *see also* Bernini, *supra* note 84 (citing that "arbitration shall respect the mandatory rule of due process, granting equal rights to the parties to be heard and to defend themselves during the arbitral proceedings"); *see also* Orlandi, *supra* note 82, at 97 (suggesting that a judge or arbitrator can be challenged on the basis of disrespecting due process through impartiality).

91. *See* Angelo Anglani, *Italy, in* GETTING THE DEAL THROUGH: ARBITRATION 2009 159, 160 (Gerhard Wegen & Stephan Wilske eds., 2009) (illustrating the few regulations required in Italian arbitration); *see also* Europcar, *supra* note 83, at 313 (stating that *arbitrato irrituale* (informal arbitration) has very few procedural safeguards); *see also* Fabrizio Marrella, *Emerging Dilemmas in International Economic Arbitration: Unity and Diversity in International Arbitration: The Case of Maritime Arbitration*, 20 AM. U. INT'L L. REV. 1055, 1091 (2005) (reiterating that the simplicity of Italian arbitration due to lack of many formal requirements).

vidual needs (including cost allowances and time restrictions),[92] arbitration should appeal to those who wish to avoid many of the formalities that make the civil court system complex and inefficient.[93]

Besides its adaptability, arbitration is an appealing form of dispute resolution because legislators have provided protections that insure the integrity of the process.[94] The Code of Civil Procedure contains provisions that allow parties to both challenge biased arbitrators and remove inefficient ones.[95] A party may challenge an arbitrator, who lacks either independence or the necessary qualifications that are stipulated in the arbitration agreement.[96] The first of the grounds for challenging an arbitrator ensures that the arbitration process is fair and balanced,[97] while the second one preserves the autonomy of parties to determine their own procedural rules.[98]

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92. *See* Lordi, *supra* note 89, at 109 (showing that Italian law respects the rights of parties to tailor the procedures and rules of arbitration to their needs); *see also* Niccolo Landi, *Arbitrability of Antitrust Claims*, 9 VINDOBONA J. INT'L COM. L. & ARB. 313, 324–25 (2005) (illustrating that Italian law does not discourage arbitration if the parties have agreed to it). *See generally* Robert C. Reuland, *The Recognition of Judgments in the European Community: The Twenty-Fifth Anniversary of the Brussels Convention*, 14 MICH. J. INT'L L. 559, 563–65 (1993) (indicating that Italy is a party to the Brussels Convention and is thus obligated to facilitate arbitration by respecting judgments and enforcing awards).

93. *See* Kirby Behre, *Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?*, 16 PUB. CONT. L.J. 66, 70–71 (1986) (detailing the benefits of arbitration over litigation); *see also* Heinrich Kronstein, *Business Arbitration-Instrument of Private Government*, 54 YALE L.J. 36, 38–39 (1944) (explaining that arbitration is sometimes more efficient than litigation). *See generally* Bradley Dillon-Coffman, *Revising the Revision: Procedural Alternatives to the Arbitration Fairness Act*, 57 UCLA L. REV. 1095, 1102 (2010) (stating that opponents of arbitration downplay its benefits over litigation).

94. *See* Emanuele Menegatti, *The Choice of Law in Employment Contracts' Covenants Not to Compete Under the Italian Legislation*, 31 COMP. LAB. L. & POL'Y J. 799, 820 (2010) (showing how Italian arbitration rules help to maintain the reliability and integrity of the process). *See generally* Vera van Houtte, Stephan Wilske & Michael Young, *What's New in European Arbitration?,* 61 DISP. RESOL. J. 10, 11 (2006) (describing improvements made to the arbitration provisions of the Italian Code of Civil Procedure by the legislature); *see also* Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 131–33 (1999) (listing reforms and improvements made to the Italian Code of Civil Procedure in 1995).

95. *See* CODICE DI PROCEDURA CIVILE (C.P.C.) art. 813 (outlining reasons for removing an arbitrator); *see also* Chiara Giovannucci Orlandi, *Ethics for International Arbitrators*, 67 UMKC L. REV. 93, 97 (1998) (demonstrating that arbitrators in Italy may be removed for impartial behavior). *See generally* James H. Carter, *International Bar Association: Guidelines for International Arbitrators*, 26 I.L.M. 583, 585 (1987) (stating that removal of unethical arbitrators is standard practice globally).

96. *See* C.P.C., *supra* note 95, at art. 815 (stating that parties have the right to challenge arbitrators); *see also* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (confirming that international law provides mechanisms through which parties to arbitration can challenge the decisions of arbitrators). *See generally* Milo Molfa, *Pathological Arbitration Clauses and the Conflict of Laws*, 37 HONG KONG L.J. 161, 178 (2007) (explaining that Italian law provides many protections for arbitrating parties because there used to be a distrust of arbitration in Italy).

97. *See* C.P.C., *supra* note 95, at art. 815 (showing that the law provides a mechanism through which to challenge arbitrators); *see also* Orlandi, *supra* note 95, at 97 (explaining that bias is a valid reason for removing an arbitrator under Italian law). *See generally* Menegatti, *supra* note 94, at 820 (demonstrating that Italian arbitration law takes fairness seriously).

98. *See* C.P.C., *supra* note 95, at art. 816 (proving that Italian law allows parties to control the procedural rules of their arbitration proceedings). *See generally* Behre, *supra* note 93, at 71 (illustrating that parties directly control the arbitration process); *see generally* Lordi, *supra* note 89, at 109 (proving that Italian law respects the rights of arbitrating parties to make their own procedural rules).

Legislators have also helped to preserve the efficiency of the procedural process by providing for removal of arbitrators who fail either to perform their duties or do so in an untimely manner.[99] The removal provision, and another article which imposes liability upon arbitrators who act fraudulently or negligently in either performing their duties, delaying the proceeding or rendering an award,[100] discourage misfeasance by and promote professionalism among arbitrators.[101] These provisions increase the appeal of arbitration by guaranteeing that proceedings will neither be unfair to one side nor run wild due to the fact that the parties are free to determine their own rules.[102]

Lastly, by listing several grounds upon which to challenge an arbitration award, legislators have ensured parties that a court will not uphold an award that is unfair.[103] An Italian appellate court may invalidate an award if: (1) an arbitration agreement is invalid; (2) the arbitrators were not appointed according to the requirements of the code; (3) someone unable to be appointed as an arbitrator rendered the award; (4) the award exceeded the scope of the arbitration agreement; (5) the award failed to include the decision, reasons for it, or the signatures of the arbitrators; (6) the time limit expired before the rendering of the award; (7) procedural formalities agreed upon by the parties were not followed; (8) the award contradicts a previous award or judgment involving the parties; or (9) the proceeding violated the principle of due process.[104] The ability of a court to overturn an award provides a mechanism of last resort that

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99. *See* C.P.C., *supra* note 95, at art. 813 (stating that an award can be annulled if not made in a timely manner); *see also* Franck, *supra* note 89, at 38 (explaining that Italian arbitration law holds arbitrators liable for delays in rendering awards and for fraud). *See generally* Carter, *supra* note 95, at 585 (stating that the standard sanction for ethical breach by arbitrators is removal).

100. *See* C.P.C., *supra* note 95, at art. 813 (outlining reasons for removing an arbitrator); *see also* JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 374 (2007) (listing two cases where arbitrators incur liability). *See generally* Dana H. Freyer, *Practical Considerations in Drafting Dispute Resolution Provisions in International Commercial Contracts: A U.S. Perspective*, 15 J. INT'L ARB., Dec. 1998, at 7, 8 (listing the international standards arbitrators must follow in relation to arbitral proceedings and awards).

101. *See* C.P.C., *supra* note 95, at art. 813 (stating that arbitrators who fail to perform their duties can be removed); *see also* Fabrizio Marrella, *Unity and Diversity in International Arbitration: The Case of Maritime Arbitration*, 20 AM. U. INT'L L. REV. 1055, 1097 (2005) (underlining that Italian law discourages misfeasance by forcing arbitrators to distribute authentic texts of an award to the parties involved in an arbitration proceeding). *See generally* 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, 38 (2000) (demonstrating that Italian arbitration law holds arbitrators liable for delays in rendering awards and for fraud).

102. *See* Giovanni DeBerti, *Surveys Reveal Further Spread of Arbitration and Mediation*, INT'L L. OFFICE ARB. NEWSL. Jun. 12, 2008 (explaining that arbitration is growing in popularity in Italy because of its greater efficiency and speed over litigation). *See generally* Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT'L L. REV. 17, 56 (2002) (declaring that Italian public policy favors arbitration).

103. *See* C.P.C., *supra* note 95, at art. 829 (citing cases where an Italian court may set aside an arbitration award); *see also* Convention, *supra* note 96 (showing that international law generally allows parties a mechanism to set aside unfair awards). *See generally* Freyer, *supra* note 100, at 38–40 (asserting that arbitration awards may be set aside by competent courts as according to domestic law).

104. *See* C.P.C., *supra* note 95, at art. 829 (citing cases where an Italian court may set aside an arbitration award). *See generally* William Grantham, *The Arbitrability of International Intellectual Property Disputes*, 14 BERKELEY J. INT'L L. 173, 208 (1996) (claiming that certain cases cannot be arbitrated under Italian law); *see generally* Molfa, *supra* note 96, at 178 (explaining that Italian law poses obstacles to arbitration because there used to be a distrust of arbitration in Italy).

ensures the integrity and increases the attractiveness of the arbitration process by reducing skepticism about the legality and fairness of such proceedings.[105]

B. Improvements Needed for the Further Spread of Arbitration

Even though the loose regulatory approach of Italian legislators has led to the growth of arbitration by making it a process that can be easily adapted to the needs of parties in dispute,[106] the Code of Civil Procedure[107] requires further reforms in order for the use of arbitration to continue to increase. Indeed, the number of institutional arbitrations performed annually seems to have reached a plateau that is stable in time and does not suggest any grand developments in the future.[108]

Moreover, there is much room for the expansion of arbitration usage in Italy. The abovementioned 2008 study by the Milan Chamber of Arbitration revealed that the law firms surveyed handled a drastically different type of proceeding than arbitration centers.[109] Law firms mainly conducted arbitrations concerning international disputes of a high economic value

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105. *See* Otto Sandrock, *Praktische Rechtsvergleichung*, *in* RECHTSVERGLEICHUNG ALS ZUKUNFTSTRACHTIGE AUFGABE 1, 38 (2004) (F.R.G.) (emphasizing the importance of choosing the place of arbitration because of the state's courts' power of review). *See, e.g.,* Christos Ravanides, *Arbitration Clauses in Public Company Charters: An Expansion of the ADR Elysian Fields or a Descent into Hades?*, 18 AM. REV. INT'L ARB. 371, 449–50 (2007) (explaining that restrictions of the applicability of Italy's corporate arbitration law are due to concern for the rights of shareholders).

106. *See* POUDRET & BESSON, *supra* note 100, at 45 (explaining that the 2006 reform was intended to simplify arbitration); *see also* PHILIPPE FOUCHARD, EMMANUEL GAILLARD & BERTHOLD GOLDMAN, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 79 (Emmanuel Gaillard & John Savage eds., 1999) (1999) (approving of the 1994 reform that liberalized Italian international arbitration rules). *But see* Daniele Cutolo & Antonio Esposito, *The Challenging of Arbitrators and the Setting of Time Limits*, 24 J. INT'L ARB. 48, 60 (arguing that the reform of 2006 made Italian arbitration law less appealing to parties than it previously had been because the new rules were excessively formal).

107. *See* CODICE DI PROCEDURA CIVILE (C.P.C.) arts. 806–40 (incorporating the 2006 revision).

108. *See* Vincenza Bonsignore, *La Diffusione della Giustizia Alternativa in Italia: i Risultati di una Ricerca, in* SECONDO RAPPORTO SULLA DIFFUSIONE DELLA GIUSTIZIA ALTERNATIVA IN ITALIA 20, 94 (2009) (Italy) ("L'arbitrato amministrato appare quindi aver conseguito una propria quota di procedure, assai stabile nel tempo e che non sembra lasciar presagire grandi sviluppi futuri."); s*ee also* Chamber of Arbitration of Milan, *Facts and Figures* (showing 102, 99, 118, and 153 requests for arbitration to the Chamber of Arbitration of Milan in 2006–9 respectively). *See generally* Livia Oglio, *Ad Hoc and Institutional Arbitration: Pros and Cons From an Italian Perspective*, *in* INTERNATIONAL ARBITRATION AND MEDIATION—FROM THE PROFESSIONAL'S PERSPECTIVE 39 (Anita Alibekova & Robert Carrow eds., 2007) (noting that use of ad hoc as opposed to institutional arbitration is widespread in Italy though difficult to quantify).

109. *See* VINCENZA BONSIGNORE, PRIMO RAPPORTO SULLA DIFFUSIONE DELLA GIUSTIZION ALTERNATIVA IN ITALIA 16 (2008) (Italy) ("Le Camere Arbitrali . . . amministano, infatti, procedimenti di carattere nazionale, di valore economico piu basso e relativi a societa di persone. mentre [gli studi legali] si occupano anche di arbitrati internazionali, promossi nella maggior parte dei casi da societa di capitali e di valore economico medio sei volte superiore."), *available at* http://www.camera-arbitrale.it/Documenti/primo_rapporto_giustiziaalternativa.pdf. *See generally* Oglio, *supra* note 108, at 41–44 (comparing ad hoc and institutional arbitration in Italy). *See generally* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 9 (2008) (laying out differences between ad hoc and institutional arbitration).

involving large public corporations,[110] while arbitration centers primarily handled proceedings of a lower value involving small companies and partnerships.[111] Considering law firms handle an extremely low number of arbitrations annually[112] and many more foreigners and Italians are undoubtedly involved in disputes,[113] there exists a need for more proceedings of an international nature.[114] However, more proceedings involving large public companies do not seem to be required, as almost all of the Italian economy consists of small and medium sized companies.[115]

Italian legislators could increase the use of arbitration by first eliminating the peculiarity of the Italian system that is *arbitrato irrituale*. The Italian Code of Civil Procedure continues to provide a form of arbitration known as *arbitrato irrituale* in which awards do not represent a

110. *See* BONSIGNORE, *supra* note 109, at 16 ("Le Camere Arbitrali . . . amministano, infatti, procedimenti di carattere nazionale, di valore economico piu basso e relativi a societa di persone. mentre [gli studi legali] si occupano anche di arbitrati internazionali, promossi nella maggior parte dei casi da societa di capitali e di valore economico medio sei volte superiore."). *See generally* MICHAEL MCILWRATH & JOHN SAVAGE, INTERNATIONAL ARBITRATION AND MEDIATION: A PRACTICAL GUIDE 34 (2010) (suggesting that companies use ad hoc instead of institutional arbitration in Italy because counterparties deal regularly with one another).

111. *See* BONSIGNORE, *supra* note 109, at 16 ("Le Camere Arbitrali . . . amministano, infatti, procedimenti di carattere nazionale, di valore economico piu basso e relativi a societa di persone. mentre [gli studi legali] si occupano anche di arbitrati internazionali, promossi nella maggior parte dei casi da societa di capitali e di valore economico medio sei volte superiore."); *see also* Carlo Mosca, *Solitary Violins: Commercial Mediation in Italy,* 3 MEDIATION COMMITTEE NEWSL. (Int'l Bar Ass'n Legal Practice Div.) July 2007, at 23, 24 (noting that mediation overseen by the Italian chambers of commerce is largely confined to small claims). *See generally* Ravanides, *supra* note 105, at 448–49 (arguing that Italy's corporate arbitration law is favorable to closely held corporations).

112. *See* BONSIGNORE, *supra* note 109, at 51 (comparing the small number of arbitrations requested to the large number of conciliations); *see also id*., at 66 (comparing the number of applications for arbitration the chambers of commerce received to the number of applications for conciliation). *See generally* MCILWRATH & SAVAGE, *supra* note 110, at 34 (reporting that Italy was chosen as a forum for ICC arbitration only 8 times in 2008 compared to 87 and 61 for France and the United Kingdom respectively).

113. *See* Valerio Sangiovanni, *Current Development: Some Critical Observations on the Italian Regulation of Company Arbitration*, 17 AM. REV. INT'L ARB. 281, 282 (2006) (arguing that the slow pace of litigation in Italy may lead to increased reliance on arbitration); *see also* Steven Wilske, *The Global Competition for the 'Best' Place of Arbitration for International Arbitrations*, CONTEMP. ASIA ARB. J. 21, 52 (2008) (noting that international demand for arbitration is on the rise); *see also* Chamber, *supra* note 108 (showing that 10% of parties to arbitrations directed by the Chamber of Arbitration of Milan were not Italian).

114. *See* Mario Riccomagno, *Italy: Reform of Arbitration Law in Italy,* II ARBITRATION COMMITTEE NEWSL. (Int'l Bar Ass'n Legal Practice Div.), Sept. 2006, at 24, 24–25 (2006) (lamenting the lack of attention paid to international arbitrations in the 2006 reform); *see also* Ravanides, *supra* note 105, at 448–49 (criticizing corporate arbitration law in Italy because it cannot be used to resolve disputes between shareholders and public companies). *See generally* Wilske, *supra* note 113, at 52 (encouraging states to compete to be ideal fora for international arbitration because of high demand).

115. *See* CENT. INTELLIGENCE AGENCY, ITALY, IN THE CIA WORLD FACTBOOK (2010), *available at* https://www.cia.gov/library/publications/the_world_factbook/index.html (reporting that Italy's economy is largely driven by small- and mid-size manufacturers); *see also* Stefano Azzali, Sec. Gen. of the Chamber of Arbitration of Milan, Remarks on Arbitration in Italy and Beyond at the NYSBA Committee on International Arbitration and ADR Luncheon (Nov. 18 2009) (saying that "97% of the Italian Economy is made up of small and medium sized companies"); *see also* Francesco del Bene, *Significant Role Played by Small and Medium-Sized Enterprises in the Italian Financial Market,* 31 INT'L BUS. LAW 123 (2003) (indicating that small and medium-sized enterprises employ 77% of Italy's manufacturing industry's workforce).

binding judgment but rather a contractual agreement between parties.[116] Legislators have already helped to limit this type of arbitration by requiring parties who wish to have such proceedings, to express their desire clearly in writing.[117] Nonetheless, these requirements are not enough because the existence of *arbitrato irrituale* continues to undermine the use of arbitration in general.[118] If lawmakers removed this peculiarity from the Code of Civil Procedure,[119] much of the public confusion around arbitration would be removed[120] and many Italians would see the procedure as a more secure substitute to litigation.[121]

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116. *See* JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 21 (2007) (criticizing *arbitrato irrituale* as outdated); *see also* FOUCHARD, GAILLARD & GOLDMAN, *supra* note 106, at 129 (suggesting that *arbitrato irrituale* was a response to Italy's unnecessarily restrictive procedural arbitration rules). *See generally* THE WORLD BANK, DOING BUSINESS 2010: ITALY 41 (2009) (noting that Italy ranked 156th in enforcement of contracts out of 183 economies studied in 2010).

117. *See* CODICE DI PROCEDURA CIVILE (C.P.C.) art. 808-*ter* ("La validità della clausola compromissoria deve essere valutata in modo autonomo rispetto al contratto al quale si riferisce; tuttavia, il potere di stipulare il contratto comprende il potere di convenire la clausola compromissoria."); *see also* POUDRET & BESSON, *supra* note 116, at 22 (explaining that as of the 2006 revision use of *arbitrato irrituale* must be specified in writing). *See generally* Mario Beltramo, *Italy, in* INTERNATIONAL CIVIL PROCEDURE (007) II 57, 90 (Christian Campbell ed., 2007) (noting that parties may opt for *arbitrato irrituale* but they must make an agreement to do so).

118. *See* Andrew K. O'Connell, *Survey of International Law & Trade: When Does the Arbitration by a Foreign Country Become Final So That It Can Be Enforced by the U.S. Court System?*, 23 MD. J. INT'L L. & TRADE 357, 358 (1999) (citing Europcar Italia v. Maiellano Tours Inc., wherein the defendant argued that because the parties used *arbitrato irrituale*, the informal arbitration process, it was not binding and should not be treated deferentially); *see also* Tiziani Tampieri, *International Arbitration and Impartiality of Arbitrators: The Italian Perspective,* 18 J. INT'L ARB. 549, 550 (2001) (declaring that the binding power of the final award rendered from *arbitrato irrituale* is a purely contractual instrument). *See generally* 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, 53 (2000) (stating that the inconsistency in behavior of arbitrators significantly undermines the respect for and integrity of the international arbitration process).

119. *See* C.P.C., *supra* note 117, at art. 808 (including an arbitration clause providing an explanation of *arbitrato irrituale*).

120. *See* POUDRET & BESSON, *supra* note 116, at 23 (explaining how a lack of international recognition of *arbitrato irrituale* renders the arbitration unenforceable in some, but not all, countries leading to international confusion); *see also* Edin Karakas, *Croation Arbitration Law: Concept of Arbitral Award Under Croatian and Comparative Law,* 13 CROAT. ARB. Y.B. 29, 50 (2006) (demonstrating the ambiguity and large debate surrounding awards arising out of *arbitrato irrituale* with respect to its recognition and enforcement internationally under the N.Y. Convention); *see also* Brette L. Steele, Comment, *Enforcing International Commercial Mediation Agreements as Arbitral Awards Under the New York Convention*, 54 UCLA L. REV. 1385, 1396 (showing how public uncertainty exists as to the enforceability of *arbitrato irrituale* as exemplified by challenges made by Germany against including it in the N.Y. Convention).

121. *See* Karakas, *supra* note 120, at 50 (commenting that judgments resulting from *arbitrato irrituale* are not secure because they are binding upon the parties only in the same manner as a contract and lack any executory force); *see also* Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, GEO. WASH. INT'L L. REV. 17, 94–96 (2002) (demonstrating that *arbitrato irrituale* is less secure than other forms of litigation by discussing a situation where German and U.S. forums have attempted to refuse enforcement of these awards, although they do recognize other judgments from Italy that result from more secure forms of litigation); *see also* Steele, *supra* note 120, at 1395–97 (describing the international uncertainty on whether or not judgments of *arbitrato irrituale* are enforceable and how arising settlements do not have the same enforcement mechanisms as other forms of litigation).

Moreover, the Italian Parliament can add provisions to the Code of Civil Procedure[122] that could greatly increase the appeal of the procedure by providing more integrity and benefits to the process. Lawmakers could require arbitrators to disclose any possible conflicts of interest that could possibly preclude them from rendering an impartial award.[123] Almost all of the major arbitration chambers already require such disclosure[124] and the best ones require notification if events occur during the proceeding which may affect the independence of an arbitrator.[125] Having such a requirement in the law would increase the willingness of parties to submit a matter to arbitration because they would know that the process was fair and objective.[126]

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122. *See* C.P.C., *supra* note 117, at arts. 808–810 (containing clauses for Italian arbitration rules and procedures).

123. *See* Thomas E. Carbonneau, *"Arbitracide": The Story of Anti-Arbitration Sentiment in the U.S. Congress*, 18 AM. REV. INT'L ARB. 233, 269 (2007) (exemplifying how in the U.S., in accordance with ABA-AAA standards, arbitrators must engage in comprehensive disclosures of any likely conflicts of interest and refuse cases in which such conflicts might occur). *See*, *e.g.*, Thomas E. Carbonneau, *At the Crossroads of Legitimacy and Arbitral Autonomy*, 16 AM. REV. INT'L ARB. 213, 223–24 (2005) (describing how the FAA requires arbitrators to be impartial and, therefore, they must disclose possible conflicts of interest); *see*, *e.g.*, Mark S. Hamilton, Comment, *Sailing in a Sea of Obscurity: The Growing Importance of China's Maritime Arbitration Commission*, 3 ASIAN-PACIFIC L. & POL'Y J. 10, 10 (showing how the CMAC requires arbitrators to declare any conflict of interest and regulates this by evaluating the conduct and performance of arbitrators in order to protect their reputation as a fair and impartial tribunal).

124. *See* International Chamber of Commerce, Rules of Arbitration, 36 I.L.M. 1604, 1609, art. 7(2) (1997) (requiring disclosure, in writing, of any facts or circumstances that would affect the independence or impartiality of an arbitrator); *see also U.N. Comm'n on Int'l Trade Law* [UNCITRAL], UNCITRAL Arbitration Rules, arts. 11–13 (2010), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/pre-arb-rules-revised.pdf (displaying the rules requiring disclosures by arbitrators regarding impartiality); *see also* Hans Smit, *Delinquent Arbitrators and Arbitration Counsel*, 20 AM. REV. INT'L ARB. 43, 44 (2009) (reviewing how arbitrators are asked to disclose whether there are any circumstances that in the mind of a reasonable person would create any doubt as to their impartiality as well as the frequent instances of arbitral misconduct and the corresponding appropriate remedies).

125. *See* Ana Stanic, *Arbitration-Selected Issues: Challenging Arbitrators and the Importance of Disclose: Recent Cases and Reflections*, 16 CROAT. ARB. Y.B. 205, 219 (2009) (citing the UNICTRAL model laws which impose a duty on an arbitrator to disclose any conflicts of interest 'throughout the arbitral proceedings' without delay). *See*, *e.g.*, Tom Stilwell, *Correcting Errors: Imperfect Awards in Texas Arbitration*, 58 BAYLOR L. REV. 467, 497–98 (2006) (detailing a case where it was found that the arbitrator had a duty to reveal any new circumstances that could create a reasonable impression of partiality; this requirement continues throughout the proceeding). *See generally* 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, 254 (2000) (examining the Omani Arbitration Act, where an arbitrator must take the initiative to inform the parties of any circumstances that are likely to cause doubts as to impartiality, even if such circumstances arise during the proceedings).

126. *See* Fuyong Chen, *Striving for Independence, Competence, and Fairness: A Case Study of the Beijing Arbitration Commission*, 18 AM. REV. INT'L ARB. 313, 340 (2007) (concluding that impartiality and fairness are considered the most important aspects of both training and examining arbitrators, as is exemplified in the Ethical Standards For Arbitrators of the BAC). *See*, *e.g.*, Collin G. Warren, *A Recent Summary of International Commercial Arbitration the United States versus Mexico and Canada*, 10 CURRENTS: INT'L TRADE L.J. 75, 80 (2001) (noting that, in the realm of international arbitration, parties tend not to trust the others' judicial system, making a neutral arbitrator essential to ensure confidence in the process); *see*, *e.g.*, Linden Fry, Note, *Letting the Fox Guard the Henhouse: Why the Fifth Circuit's Ruling in Positive Software Solutions Sacrifices Procedural Fairness for Speed and Convenience*, 58 CATH. U. L. REV. 599, 606–7 (2009) (reviewing Justice Black's opinion on the importance of fairness and impartiality in arbitration proceedings).

In addition, legislators should ensure the confidentiality of arbitration proceedings by requiring such by law and providing legal consequences for failure to comply.[127] This is again a subject on which the major arbitration centers have rules.[128] Confidentiality requirements would make parties feel more protected because they would know that what occurs during arbitration could not later be used against them.[129] Such secrecy would bring arbitration closer in nature to civil litigation, in which a violation of confidentiality comes with legal consequences.[130] The Code of Civil Procedure[131] should certainly be amended to include confidentiality and disclosure requirements so that parties feel as secure using arbitration as they do using the ordinary civil justice system.

However, considering that Italian legislators last made major comprehensive revisions to the Code of Civil Procedure in 2006,[132] these additional reforms do not seem forthcoming for many years.

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127. *See* Hans Smit, *Breach of Confidentiality as a Ground for Avoidance of the Arbitration Agreement*, 11 AM. REV. INT'L ARB. 567, 581–82 (2000) (explaining that for breach of confidentiality, sanctions similar to breach of contract should be used). *See*, *e.g.*, Gu Weixia, Note, *Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?*, 15 AM. REV. INT'L ARB. 607, 633–34 (2004) (recognizing that if confidentiality is breached, certain remedies such as direct injunctive relief should be called on). *See generally* Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L L. REV 969, 972–73 (2001) (finding that a duty of confidentiality is presumed to be inherent in the arbitration process and is often cited as an advantage of arbitration over litigation).

128. *See* Emmanuela Truli, *Liability v. Quasi-Judicial Immunity of the Arbitrator: The Case Against Absolute Arbitral Immunity*, 17 AM. REV. INT'L ARB. 383, 391 (2006) (commenting on the guidelines set forward by the IBA which affirm the arbitrator's duty of confidentiality within the arbitral tribunal). *See*, *e.g.*, International Chamber of Commerce, *supra* note 124, at app. II, art. 1 (2010) (listing the rules of the international court of arbitration on the confidential character of arbitration); *see*, *e.g.*, Am Arb. Ass'n International Dispute Resolution Procedures art. 34 (2009), *available at* http://www.adr.org/sp.asp?id=33994 (generalizing that confidential information revealed during arbitration proceedings will not be disclosed by an arbitrator).

129. *See* Brown, *supra* note 127, at 972–73 (discussing how documents prepared for and used during arbitration cannot be disclosed per a mutual obligation of confidentiality by all parties involved); *see also* Hvroje Sikiric, *Selected Issues: Confidentiality in Arbitral Proceedings*, 13 CROAT. ARB. YEARBOOK 131, 154 (2006) (explaining how the confidential nature of protecting trade secrets is one of the most important reasons for a party to engage in arbitrational proceedings). *See generally* Anjanette H. Raymond, *Confidentiality in a Forum of Last Resort: Is the Use of Confidential Arbitration a Good Idea for Business and Society?*, 316 AM. REV. INT'L ARB. 479, 479 (2005) (discussing the intentional silence of some international institutions regarding confidentiality in arbitration proceedings and its effects in different countries).

130. *See* Peter Ashford, *Documentary Discovery and International Commercial Arbitration*, 17 AM. REV. INT'L ARB. 89, 130 (2006) (suggesting that any threatened or actual breach of confidentiality in arbitration should have the consequence of an injunction to restrain breach or a claim for damages); *see also* Brown, *supra* note 127, at 991 (discussing how although numerous countries, including Italy, have passed extensive arbitration legislation, none have adequate provisions for confidentiality); *see also* Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 632 (2001) (discussing possible sanctions imposed by an arbitrator for a breach of confidentiality during the course of a private arbitration).

131. *See* CODICE DI PROCEDURA CIVILE(C.P.C.) arts. 806–40 (governing ADR).

132. *See* JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 44–46 (2007) (commenting that arbitration law in Italy is the result of reforms in 1994 and 2006); *see also* Emanuella Agostinelli, *Italy: Modern Solutions*, LEGAL WK. (U.K.), June 29, 2006 (noting that 2006 reforms sought to modernize arbitration procedures and create a more flexible means of dispute resolution). *But see* Christina Giorgiantonio, *Civil Procedure Reforms in Italy: Concentration Principle, Adversarial System or Case Management?*, 66 BANCA D'ITALIA: QUADERNI DI RICERCA GIURIDICA 7, 25–26 (2009) (Italy) (highlighting reforms to the Italian Code of Civil Procedure in 2009).

II. The State of Mediation in Italy

Since the Italian legislature first made mediation a widespread means of dispute resolution with law 580/1993,[133] the practice has progressively gained popularity as a non-contentious way to settle controversy.[134] Although ADR centers have greatly contributed to the growth of mediation by administering such proceedings,[135] it is only because of lawmakers that mediation has become an accepted and effective mechanism to resolve disputes.[136] Indeed, legislators have served a pivotal role in increasing the number of mediations performed annually by providing for such proceedings in general and special provisions of the Italian Civil Code and Code of Civil Procedure.[137] By compelling parties in many of these statutes to engage in mediation before a civil court will hear certain types of suits,[138] the Italian Parliament has forced Italians to use this less costly ADR method before resorting to litigation.[139]

Prior to the latest reforms, most Italian legislation on mediation had dealt "only with administrative mediation and mainly—although not exclusively—with mediation proceedings

133. *See* Law No. 580 of Dec. 29, 1993 (It.), Gazz. Uff. No. 7 (Jan. 11, 1994) (empowering chambers of commerce to create a mediation service for the resolution of B2C and B2B disputes).

134. *See* NADJA MARIE ALEXANDER, GLOBAL TRENDS IN MEDIATION 273 (2006) (noting that the number of mediation referrals is increasing by twenty percent a year); *see also* Francesca Rolla & Daniele La Cognata, *Italy*, *in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: LITIGATION & DISPUTE RESOLUTION 2010 178, 184 (commenting that since Law 580/1993 was passed, ADR methods have been increasingly accepted as a real alternative to litigation); *see also* Giuseppi De Palo & Penelope Harley, *Mediation in Italy: Exploring the Contradictions*, 21 NEGOT. J. 469, 478 (2005) (observing that over one hundred chambers of commerce have established conciliation offices throughout Italy, and a number of leading Italian companies have adopted mediation).

135. *See* Giuseppe De Palo, *A Transatlantic "ADR Movement"—The Flow of Co-operation Between JAMS and ADR Center Srl of Italy*, *in* THE METROPOLITAN CORP. COUNS. (Oct. 2000) (pointing to continued growth of mediation services rendered through private sector ADR); *see also* 32 Chiara Albanese, *ADA, Corsa ad Uscire dai Tribunali*, ITALIAOGGI, Sept. 13, 2010, at 740 (identifying the trend of increased reliance on ADR and noting the surge in mediations anticipated at the ADR Center in Italy). *But see* De Palo & Harley, *supra* note 134, at 470–75 (arguing that the growth of mediation has been slow despite the rise of ADR centers).

136. *See* Matthew Hirst, *Alternative Dispute Resolution; Leaning Towards ADR*, POST MAG., June 5, 2003, at 21 (explaining that the development of mediation in Italy is dependent upon legislation); *see also Intricate Work*, LEGAL WK. (U.K.), Nov. 5, 2009 (describing extensive Italian legislative efforts in alternate dispute resolution). *But see* ALEXANDER, *supra* note 134, at 271 (criticizing legislators for providing insufficient means for implementing and enforcing ADR regulations).

137. *See* C.P.C., *supra* note 131, at arts. 806–840 (regulating ADR); *see also* De Palo & Harley, *supra* note 134, at 475 (indicating that Italy leads Europe in mediation-related legislation, including reforming civil procedure); *see also* Giorgiantonio, *supra* note 132, at 20–26 (highlighting legislative efforts including the 1990 reform, special procedures for corporate disputes, the competitiveness law and law 69/2009).

138. *See* C.P.C., *supra* note 131, at arts. 806–840 (containing rules governing ADR); *see also id.*, at arts. 320, 410 & 708 (directing mandatory or court-annexed mechanisms of mediation and conciliation); *see also* Albanese, *supra* note 135, at 740 (commenting that Legislative Decree 28/2010 is expected to reduce the burden on Italian courts by compelling mediation in over 50 percent of disputes); *see also Legal Update: Mandatory Mediation—Working Together*, POST MAG. (U.K.), May 27, 2010, at 25 (reporting on new Italian legislation that will require mediation before cases will be accepted at trial).

139. *See* ALEXANDER, *supra* note 134, at 267 (comparing the capped, fixed fee structure of mediation with litigation costs, which typically rise based on the number of briefs and hearings); *see also* De Palo & Harley, *supra* note 134, at 478 (explaining that mediation fees are calculated according to the value of the dispute to keep costs low and encourage companies to mediate); *see also Legal Update*, *supra* note 138, at 25 (announcing that the Italian government is the first in Europe to introduce mandatory mediation for civil and commercial disputes).

administered by Chambers of Commerce."[140] For years this narrow focus greatly helped the growth of mediation before Chambers of Commerce[141] but did nothing to increase the number of proceedings performed outside that circuit.[142] Such is evident by a comparison of the amount of activity that each type of mediation center has experienced. For example, Chambers of Commerce performed 2,391 and 3,215 proceedings respectively in 2005 and 2006, while independent mediation centers handled only 42 and 57 proceedings in those same years.[143] That Chambers of Commerce received 14,183 and 20,246 new requests for mediation respectively in 2007 and 2008,[144] a figure that dramatically dwarfs the 706 and 244 requests received

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140. *See* ALEXANDER, *supra* note 134, at 267 (listing Italian mediation laws and noting the role of the chambers of commerce in administering proceedings); *see also* De Palo & Harley, *supra* note 134, at 471 (highlighting Italian legislation in the 1990s enabling chambers of commerce to conduct mediation).

141. *See* Rolla & La Cognata, *supra* note 134, at 184 (recognizing that as a result of legislation, mediation services offered by Chambers of Commerce have been increasingly viewed as a viable alternative to litigation); *see also* De Palo & Harley, *supra* note 134, at 471 (indicating that more than one hundred chambers of commerce have established conciliation offices throughout Italy as a result of legislation). *But see* ALEXANDER, *supra* note 134, at 219 (arguing that the adoption of mediation was not geographically widespread in 2001, with half of the 864 requests managed by only four or five chambers).

142. See De Palo & Harley, *supra* note 134, at 478 (suggesting that the legislatively prescribed fee structure for mediation may be stifling the independent growth of the profession); *see also* Matthew Hirst, *supra* note 136, at 21 (noting that the number of private mediation providers in Italy is relatively low); *see also* Andrea Rizzo, *L'editoriale dei lettori Prima di arrivare davanti al giudice, una nuova figura di professionisti cercherà un accordo tra le parti. Una soluzione per decongestionare i tribunali? Più mediatori civili meno cause* (The editorial of the readers before arriving at court, a new figure will seek an agreement between the parties. A solution to relieve congestion in courts? More mediators less civil cases), LA STAMPA (Italy), Mar. 22, 2010, at 323 (reflecting on recent legislation and recognizing public opinion that there needs to be more room for private practitioners in civil and commercial mediation).

143. *See* VINCENZA BONSIGNORE, PRIMO RAPPORTO SULLA DIFFUSIONE DELLA GIUSTIZION ALTERNATIVA IN ITALIA 118 (2008) (providing statistics from the First Annual Report); *see also* Cinti di Chiara, *Giustizia alternative L'Italia Ora Accelera; Crescono Arbitrato e Conciliazone* [Alternatives for justice in Italy now accelerates; Arbitration and Conciliation Grow], ITALIAOGGI (Italy), Feb. 26, 2008, at 656 (reporting that the ADR system in Italy is growing but requests for arbitration administered outside the chambers of commerce remain relatively low).

144. *See* Vincenza Bonsignore, *La Diffusione della Giustizia Alternativa in Italia nel 2008: I Resultati di una Ricerca*, *in* TERZO RAPPORTO SULLA DIFFUSIONE DELLA GIUSTIZIA ALTERNATIVA IN ITALIA 13, 114 (2010) (Italy) (showing that Chambers of Commerce received 14, 183 and 20, 246 new demands for mediation respectively in the years 2007 and 2008); *see also* Press Release, Unioncamere, conciliazione: Superata Quote 20mila: Boom di concilliazioni nel 2008. Al Mezzogiorno la palma d'oro del ricorso alla giustizia alternativa [Unioncamare, reconciliation: exceeded 20 thousand: Boom to reconcile in 2008. To the South the golden palm for the use of alternative justice] (June 22, 2009), *available at* http://www.unioncamere.gov.it/index.php?option=com_content&colsr=1&task=view&id=734 &Itemid=37 (explaining that the Chambers of Commerce received 20, 246 mediation requests in 2008); *see also Camere di Commercio: sfondata Quota 10mila Conciliazioni in 6 Mesi*, *l'80% in Più del 2007* (Chambers of Commerce: 10,000 reconcile in 6 months breaks the record, 80% more than in 2007) (Oct. 20, 2008) (Italy), *available at* http://www.unioncamere.gov.it/index.php?option=com_content&colsr=1&task=view&id=566 &Itemid=37 (reporting that the total of number of mediation requests to the Chambers of Commerce in 2007 was 14,183).

by independent mediation centers,[145] is further evidences how legislative support has really only benefited the growth of mediation before Chambers of Commerce.[146]

Legislation on Chambers of Commerce has been particularly influential in facilitating the growth of this speedier alternative to ordinary justice because it made the mediation services offered by these bodies very cheap for many years and more recently free.[147] Indeed, although the fees at independent mediation centers are often relatively low, if not nominal,[148] they cannot seem to compete with the lower prices and better known product of the Chambers of Commerce.[149]

Outside of the Chamber of Commerce circuit, specific legislation that has made mediation mandatory in all telecommunication disputes has also had a significant impact on media-

145. *See* Bonsignore, *supra* note 144, at 114 (showing that independent centers only received 706 and 244 requests respectively in 2007 and 2008). *See generally* Peter L. Murray, *Mediation and Civil Justice: A Public-Private Partnership?*, *in* MAKING TRANSACTIONAL LAW WORK IN THE GLOBAL ECONOMY 560, 566–67 (Pieter H. F. Bekker et al. eds., 2010) (positing that a reason for the inherent distrust of private mediation is that private mediators have a personal economic interest in the mediation's outcome).

146. *See* Bonsignore, *supra* note 144, at 114 (showing that the chambers of commerce received 14, 183 and 20, 246 new demands for mediation respectively in the years 2007 and 2008 while independent centers only received 706 and 244 requests in that same period); *see also* Giuseppi De Palo & Penelope Harley, *Mediation in Italy: Exploring the Contradictions*, 21 NEGOT. J. 469, 471–72 (2005) (declaring the implementation of a number of government-issued legislative decrees, including one creating a registry of mediation centers, will benefit public, as opposed to private, corporate mediation); *see also* Lorenza Porciello, *Italy: Mediation: Current Status and Future Developments*, I MEDIATION COMMITTEE NEWSL. (Int'l Bar Ass'n Legal Practice Div.), Aug. 2005, at 35, 36 n.6 (stating that, in 2003, the Chambers of Commerce administered 87% more mediations than in the previous year).

147. *See* Livia Oglio, *Ad Hoc and Institutional Arbitration: Pros and Cons From an Italian Perspective*, *in* INTERNATIONAL ARBITRATION AND MEDIATION — FROM THE PROFESSIONAL'S PROSPECTIVE 39, 40 (Anita Alibekova & Robert Carrow eds., 2007) (declaring that when parties are concerned about saving money in mediation, they will often pick mediation bodies set up within the chambers of commerce); *see also* De Palo & Harley, *supra* note 146, at 471 (explaining that, as of 2005, public mediations were free from the stamp tax duty which applies to all other official documents).

148. *See* F. Peter Phillips, *ADR As a Human Rights Violation*, BUS. CONFLICT BLOG (June 14, 2010, 9:35 a.m.), http://businessconflictmanagement.com/blog/2010/06/ (reporting that private mediation is still at a cost as of mid-year 2010). *See generally* Carlo Mosca, *Solitary Violins: Commercial Mediation in Italy*, 3 MEDIATION COMMITTEE NEWSL. (Int'l Bar Ass'n Legal Practice Div.), July 2007, at 23, 24 (opining that Italy lacks legitimate legislation that protects independent mediation, causing a slower development in private mediation).

149. *See* Giovanni DeBerti, *Growth of Mediation*, INT'L L. OFFICE ARB. NEWSL., Apr. 1, 2006 (explaining how Italian legislation mainly benefits the better known chambers of commerce mediation); *see also* Mosca, *supra* note 148, at 63 (proclaiming that private mediation has suffered due to the legislative push toward public mediation); *see also* Oglio, *supra* note 147, at 40 (highlighting among administered chamber of commerce mediations benefits: low cost, prior knowledge of procedural rules and deadlines).

tion's spread.[150] Corecom, the government agencies responsible for handling all telecom disputes,[151] not only performed 13,173 proceedings from 2005 to 2006[152] but also received 33,167 and 38,801 additional requests for mediation respectively in 2007 and 2008.[153] Such statistics reveal just how effective legislators can be in promoting mediation (and other ADR techniques) when they make such procedures mandatory.

Companies have also contributed to the growth of mediation within Italy by providing for such proceedings in contracts with consumers as a way to offer better customer service and reduce litigation costs.[154] Corporations often offer such mediation services in conjunction with

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150. *See* Delibera n. 182/02/CONS: Adozione del Regolamento Concernente la Risoluzione delle Controversie Insorte nei Rapporti tra Organismi di Telecomunicazioni ed Utenti [Resolution no. 182/02/CONS: Adoption of the Rules for the Settlement of Disputes in Relationships Between Telecommunications Operators and Users], 167 GAZZETTA UFFICIALE DELLA REPUBBLICA ITALIANA (Italy) (July 18, 2002), *translated at* http://www2.agcom.it/eng/resolutions/2002/d182_02_CONS.pdf (mandating telecommunications disputes be settled through mediation); *see also* Sara Carmeli, *Enforcement of Mediation in Italy*, 3 MEDIATION COMMITTEE NEWSL. (Int'l Bar Ass'n Legal Practice Div.), Dec. 2007, at 23, 23 (citing the controversy surrounding mandatory mediation in the telecommunications industry); *see also* Giovanni de Berti, *ECJ Finds Italian Rules on Mandatory Mediation Consistent with EU Law*, INT'L L. OFFICE ARB. NEWSL., Apr. 29, 2010 (recapitulating a recent European Court of Justice case holding mandatory mediation of telecommunications disputes allowable under current European Union directives and general principles).

151. *See Resolution on Adoption of the Rules for the Settlement of Disputes in Relationships Between Telecommunications Operators and Users*, 167 OFFICIAL J. ITAL. REPUBLIC, July 18, 2002 at 3, *available at* http://www2.agcom.it/eng/resolutions/2002 (citing "Corecom" as the administrative body that conducts "compulsory" mediations between parties of a telecommunications dispute); *see also* Coordinamento Italiano dei Corecom (Italy), *available at* http://corecomitalia.it (follow "Funzioni" hyperlink; then follow "Controversie TLC") (indicating that Corecom's role was important to the resolutions of telecommunications disputes because it offered a quick, free and easy mediation to parties); *see also* Sara Carmeli, *supra* note 150, at 23–24 (describing Regional Communication Committees ("CoReCom") as the governmental agency that is responsible for handling controversies between telecommunication organizations and their users).

152. *See* VINCENZA BONSIGNORE, PRIMO RAPPORTO SULLA DIFFUSIONE DELLA GIUSTIZION ALTERNATIVA IN ITALIA 145 (2008) (Italy) ("I Corecom hanno . . . gestito 13.173 procedimenti (di cui 4.133 nel 2005 3 0.040 nel 2005)"); *see also I dati del conciliazoni camerali* (Unioncamere, 2006), *available at* http://www.retecamere.it / area_clienti/Conciliazione/Newsletter/sapere06.htm (reporting that in 2005, approximately 60% of total mediation procedures handled by the Chambers of Commerce were within the telecommunications sector); *see also* CHAMBER OF ARBITRATION OF MILAN, *Facts and Figures* (chart showing a 2% increase in telecommunications mediations from 2005 to 2006).

153. See Bonsignore, *supra* note 144, at 114, (showing a table that enumerated 33,167 requests for mediation in 2007 and chart demonstrating 38,801 requests for mediation in 2008); *see also* CHAMBER, *supra* note 152 (showing an eleven percent spike in telecommunications mediations performed between 2006 and 2007, making telecommunications the second leading sector of disputes mediated in 2007); *see also* Tuscany Corecom, *Sintesi Statische Attivita' di Concilizione nelle Controversie Tra Gestori del Servizio di Telecomunicazione ed Utenti 2004–2010* (2010) (Italy), *available at* http://www.consiglio.regione.toscana.it/corecom/documenti/Statistiche_stampa_sito.pdf (illustrating the significant increase of 235 mediations conducted on average in the Tuscany branch to almost 4,000 conducted in 2008).

154. *See* Guiseppe De Palo & Luigi Cominelli, *Mediation in Italy: Waiting for the Big Bang?*, *in* GLOBAL TRENDS IN MEDIATION 264 (Nadja Alexander ed., 2d ed. 2006) (explaining that most mediations comprised mid-value disputes between business and consumers between 1993 and 2006); *see also* CHAMBER, *supra* note 152 (describing a steady and sizable increase of 147 in business/consumer mediation requests in 2005 to 371 in 2008). *See generally* Lorenza Porciello, *Italy: Mediation: Current Status and Future Developments*, I MEDIATION COMMITTEE NEWSL. (Int'l Bar Ass'n Legal Practice Div.), Aug. 2005, at 35, 36 n.6 (discussing the effect that 2005 protocols created by companies had on increasing the efficiency and quality of business and consumer mediations).

consumer organizations.[155] Known as joint conciliation, the proceeding entails a mediator trying to reach agreement between an appointed representative for both the company and the consumer.[156] Joint conciliation has enjoyed the strongest growth of any type of ADR in Italy with new requests for such proceedings increasing steadily from 572 in 2005 to 41,492 in 2008.[157]

Although the amount of mediation performed in Italy seems marginal when compared to the number of pending civil suits,[158] it still shows significant growth from a decade ago when

155. *See* De Palo & Cominelli, *supra* note 154, at 264 (citing Law No. 281, which offers certain consumer organizations the opportunity to engage in mediation with a business before the Chambers of Commerce); *see also* Giovanni de Berti, *The Growth of Mediation*, INT'L L. OFFICE ARB. NEWSL., July 20, 2006 (summarizing the enforceability implications of Italian mandatory corporate mediation laws). *See generally* Studio Legale Sutti, *Referring Company Law Matters to Arbitration*, International Law Office (Oct. 19, 2000), http://www. nternationallawoffice.com/Newsletters/detail.aspx?g=a20c8246-d46c-4677-97c8-5240a2e6dd3d&redir=1 (outlining the nature of a corporate dispute between business and consumer).

156. *See Relations with Consumer Associations and Conciliation*, Telecom Italia (June 15, 2010), http://www.telecomitalia.it/tit/en/corporate/sustainability/customers/relations_with_consumer_associations_and_conciliation.html (summarizing how the conciliation process is a way of amicably reaching a desired goal, often between corporation and consumer organization). *See generally* Tiziana Pompei, *La Cultura Della Giustizia E La Promozione Dell'ADR (Alternative Dispute Resolution), in* SECONDO RAPPORTO SULLA DIFFUSIONE DELLA GIUSTIZIA ALTERNATIVE IN ITALIA 195, 206–07 (2010) (Italy) (reiterating the pervasiveness of joint conciliations by listing numerous Italian companies that presently offer conciliation services); *see generally Enel and Industry Federations Sign Agreement on Conciliation*, ENEL.COM (July 7, 2010), http://www.enel.com/en-GB/media/press_releases/release.aspx?iddoc=1634645 (defining conciliation as a valid, inexpensive means of settling disputes which is grounded in parties' voluntary attempt to reach an amicable settlement); *see generally* ROBERT H. FOLSOM & JOHN H. MINAN, LAW IN THE PEOPLE'S REPUBLIC OF CHINA 158 (1989) (describing joint conciliation as an attractive type of dispute resolution because it allows parties to gain insight into the opposing parties' views on a legal issue).

157. *See* Vincenza Bonsignore, *La Diffusione della Giustizia Alternativa in Italia nel 2008: I Resultati di una Ricerca, in* TERZO RAPPORTO SULLA DIFFUSIONE DELLA GIUSTIZIA ALTERNATIVA IN ITALIA 13, 114 (2010) (Italy) (showing 572, 8,330, 14,904, and 41,492 new requests for joint mediation respectively in the years 2005, 2006, 2007, and 2008); *see also* Pompei, *supra* note 156, at 206–07 (2009) (noting that some of the major Italian companies now offer joint conciliation); *see also* Vincenzo Vigoriti, Nodo dell'Organizzazione e Limature Tecniche ma L'Istituto Resta Un'Opportunità per I Legali (2010) (Italy), *available at* http://www.guidaaldiritto.ilsole24ore.com/Doc.aspx?Numero=17&cmd=GuidaDiritto_Archivio&IdDocumento=11579773&Data=2010-0424&IdFonteDocumentale=53&Sezione=na&Image=tit_guida.gif&MenuOn=menu_gd_archivio (illustrating the 572, 8,330, 14,904, and 41,492 new requests for joint mediation respectively in the years 2005, 2006, 2007, and 2008).

158. *See* Federica Invernizzi, *La Conciliazione Commerciale: Regole e Istruzioni per l'Uso* 120 *(*2009) (Italy), *available at* http://www.camera-arbitrale.it/Documenti/invernizzi_conciliazione_commericale.pdf (noting that there are currently over 5,000,000 pending civil cases and that each year the number of pending cases increases by 1,500,000 from the year before); *see also* M. Antonietta Calabrò, *Alfano: Dialogare È Possibile se Si Evita L'Antiberlusconismo; L'Intervista Il Ministro della Giustizia: nel Merito Toghe e Governo Propongono Diagnosi e Terapie Simili,* CORRIERE DELLA SERA (Italy), Jan. 30, 2010, at 3 (stating that in the past year, 4,800,000 civil cases were being litigated and 4,600,000 cases were closed by the end of the year); *see also* Poletti Fabio, *Alfano: Riforme Subito o alle Urne Il Guardasiglio Insiste e Ghedini Spinge sull'Acceleratore: Basta Trattare*, LA STAMPA (Italy), Sept. 27, 2010, at 5 (recognizing that there are 5,000,000 civil cases which involve 10,000,000 individuals each year).

little more than a hundred proceedings were performed.[159] The fact that mediation is much newer to Italy than arbitration and accounts for more than 99% of the ADR proceedings on the peninsula shows its success.[160] The mediation movement owes much of this achievement to legislators who not only promoted the practice[161] but also made it mandatory in many cases as a prerequisite to commencing civil action.[162] The individual success of Corecom[163] and the Chambers of Commerce[164] must be noted to demonstrate the significant influence that legislation has had upon mediation's spread. Indeed, mediation appears as a real complement, if not

159. *See* Giovanni De Berti, *Surveys Reveal Further Spread of Arbitration and Mediation,* INT'L L. OFFICE ARB. NEWSL., June 12, 2008 (stating that mediation has grown continuously, from just over 100 cases in 1997 to more than 9,300 in 2006). *See generally* NADJA MARIE ALEXANDER, GLOBAL TRENDS IN MEDIATION 6 (2006) (asserting that mediation is arguably the fastest growing form of ADR that exists today); *see generally* ANITA ALIBEKOVA & ROBERT CARROW, INTERNATIONAL ARBITRATION AND MEDIATION FROM THE PROFESSIONAL'S PERSPECTIVE 266 (2007) (indicating the marked increase in the number of mediation requests in the past few years).

160. *See* Bonsignore, *supra* note 157, at 113 (recognizing that in 2008 joint conciliation represented slightly more than 99% of all ADRs); *see also* Giuseppe De Palo & Penelope Harley, *Mediation in Italy: Exploring the Contradictions*, 21 NEGOT. J. 469, 470–75 (2005) (indicating that in Italy, mediation is a newer concept than arbitration and that mediation laws have been enacted since the early 1990s). *See generally* C.P.C. arts. 806–40 (Italy) (demonstrating the strength of arbitration through showing its roots and history in Italy).

161. *See* De Palo & Harley, *supra* note 160, at 470 (suggesting that of the various countries in Europe, Italy has enacted the most mediation legislation); *see also* GIUSEPPE DE PALO, CROSS-BORDER COMMERCIAL MEDIATION: HOW LEGISLATION AFFECTS MEDIATION USE (2007), http://www.europarl.europa.eu/comparl/juri/hearings/200 71004/depal5_en.pdf (recognizing the substantial amount of legislative action that occurred during the past 15 years in Italy). *See generally* ALESSANDRA SGUBINI, INTERNATIONAL MEDIATION LEGISLATIONS AND THE PRACTICAL USE 1, 4–5 (2009), http://www.bridge-mediation.com/main/ingles/documents/inter_med_legisl_final.pdf (summarizing the mediation legislation in Italy).

162. *See* Giuseppe De Palo & Leonardo D'Urso, *Explosion or Bust? Italy's New Mediation Model Targets Backlogs to 'Eliminate' One Million Disputes, Annually*, 28 ALTERNATIVES TO THE HIGH COST OF LITIGATION, 93, 93–95 (2010) (stating that mandatory pretrial mediation exists in neighbor disputes; property rights; division of goods; trusts and estates; family-owned business; landlord/tenant disputes; loans; leasing of companies; disputes arising out of car and boat accidents; medical malpractice; libel; insurance, banking and financial contracts); *see also* De Palo & Harley, *supra* note 160, at 475 (noting that voluntary mediation is available for consumer disputes, equal opportunity questions, and corporate law while mandatory out-of-court mediation has been introduced in Italy only recently in the areas of employment disputes, public employment, and certain copyright issues). *See generally* Decreto Legislativo 28/2010 (Italy), *available at* mondoadr.it/cms/?p=2244 (implementing a prior mediation law aimed at conciliation of civil disputes and commercial disputes).

163. *See* CONCILIAZIONE OBBIGATORIA E AGEVOLATA DEL FISCO CON IL D.LGS 29/2010, Rapporto Cuneo 313, 314 (2010) (Italy), *available at* http://images.cn.camcom.it/f/Studi/rapportocuneo2010/54/5473_CCIAACN_652010.pdf (indicating that during 2008, there were 38,801 mediation procedures at Corecom); *see also* Bonsignore, *supra* note 157, at 114 (presenting charts demonstrating that there were 33,167 requests for mediation before Corecom in 2007 and 38,801 requests for mediation before Corecom in 2008). *See generally* Comitato Regionale per le Comunicazioni (Italy), *available at* http://www.consiglio.regione.toscana.it/corecom/chisiamo/comitato.htm (discussing the general functions of Corecom).

164. *See* VINCENZA BONSIGNORE, PRIMO RAPPORTO SULLA DIFFUSIONE DELLA GIUSTIZIA ALTERNATIVA IN ITALIA 118, 175 (2008) (Italy) (quoting that "Le Camere di Conciliazione Amministrata nel 2005 hanno . . . gestito 42 procedimenti, mentre nel 2006 . . . sono salite . . . i procedimenti a 57" e "nel 2005 sono stati gestiti 2.391 procedimenti di conciliazione e nel 2006 3.215 [dalle Camere di Commercio]"); *see also* De Palo & Harley, *supra* note 160, at 471 (noting that in 1993, the Italian Parliament passed 580/1993 which allowed the Chambers of Commerce to establish mediation services and as a result, more than 100 chambers of commerce have established conciliation offices throughout Italy).

substitute, for traditional civil justice in many types of disputes because of its speed, low cost, and sometimes obligatory nature.[165]

A. Italian Mediation Law

Unlike arbitration, which has its own title in the Italian Code of Civil Procedure,[166] mediation has yet to receive a uniform set of regulations from the Italian Parliament.[167]

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165. *See* De Palo & D'Urso, *supra* note 162, at 94 (emphasizing the need to shorten the average eight-year civil-case time frame and indicating that mandatory pretrial mediation exists in neighbor disputes; property rights; division of goods; trusts and estates; family-owned business; landlord/tenant disputes; loans; leasing of companies; disputes arising out of car and boat accidents; medical malpractice; libel; insurance, banking and financial contracts). *See generally* Decreto Legislativo 28/2010 (Italy), *available at* mondoadr.it/cms/?p=2244 (indicating who the law applies to and which individuals are required to undergo mediation); *see generally* Norton Rose, *The European Mediation Directive—What Does It Mean for You?* (2008), *available at* http://www.nortonrose.com/knowledge/publications/2008/pub16352.aspx?lang=en-gb&page=all (declaring that mediation is a cost-effective and speedy alternative to civil litigation in the cross-border dispute context).

166. *See* C.P.C. arts. 806–40.

167. *See* ALESSANDRA SGUBINI, INTERNATIONAL MEDIATION LEGISLATIONS AND THE PRACTICAL USE 1, 4–5 (2009), http://www.bridge-mediation.com/main/ingles/documents/inter_med_legisl_final.pdf (summarizing the mediation legislation processes in Italy); *see also* Palo & Harley, *supra* note 160, at 470 (acknowledging that since the early 1990s, the Italian Parliament has introduced numerous mediation laws in a piecemeal fashion which contributed to disjunctive and inconsistent approaches to the practice of mediation). *See generally* Herbert Smith, *Compulsory Mediation Launched in Italy's Civil Courts* (2010), *available at* http://www.herbertsmith.com/NR/rdonlyres/FEAB5357-8D94-486F-8803-938B02F73955/0/Alternativedisputeresolutionebulletin.html (indicating the legislature's recognition of the lack of uniformity resulted in the March, 2010 legislative decree which addressed "mediation aimed at conciliation of civil and commercial disputes").

Instead, Italian legislators throughout the years have issued both general and specific decrees dealing with mediation.[168] The frequency of these statutes has significantly increased

168. *See* SGUBINI, *supra* note 167, at 4–5 (providing a good summary of Italian mediation legislation) ("General Legislation: Art. 912 of the Code of Civil Procedure clearly explains what mediation (conciliation) is in the controversy between two or more owners of 'non-public waters and the role of the judge as a mediator' (year 1942); Art. 185 of the Code of Civil Procedure (recently amended) provides parties with an 'attempt of mediation' before the judge only when the parties agree to do so (beforehand the 'attempt' was compulsory for the judge, but the law was not applied since the parties simply didn't attend the relevant hearing); Art. 420 of the Code of Civil Procedure in the field of Labor Law requires the plaintiff to file before a special Mediation Commission an 'attempt of mediation' with the defendant, prior to going to court in case the mediation fails. In case of lack of such previous step, the judge stops the procedure and orders mediation; Art. 708 of the Code of Civil Procedure in the field of Family Law (separation and divorce) obliges the President of the Tribunal at the first hearing to try to mediate the controversy although it is often only a formality since the parties have already decided to settle all of the matters together with their attorneys; Art. 320 of the Code of Civil Procedure provides that the Justice of Peace (Giudice di Pace, formerly Giudice Conciliatore) must perform an 'attempt of mediation' at the first hearing. This enactment is not so much applied as is the case in out-of-court conciliations. Art. 322 of the Code of Civil Procedure in the field of out-of-court conciliation before the Justice of Peace provides the parties with an opportunity to handle the matter without any litigation proceeding. In this case, the Justice of Peace acts like a mediator but if the settled matter is out of his judicial competence, the mediation agreement may not have any legal enforcement.") (Special Legislation: Online mediation: This procedure is regulated by legislative decree n. 70 of 2003, which has been enacted in accordance with European Directive 2000/31/CE on e-commerce; Agriculture Contracts: Law n. 203 of 1982 obliges the parties to try an "attempt of mediation" before going to the court, as is the case for Labor Law Litigation; Reorganization of the Chambers of Commerce: Law n. 590 of 1993 has obliged all one hundred and three Chambers of Commerce of Italy to create Mediation and Arbitration services; Proceedings before the Public Administration and Public Works Contracts: various laws provide for a "pro bono agreement" (accordo bonario) such as Presidential Decrees n. 109 of 1999 and n. 170 of 2005 and Legislative Decree n. 163 of 2006; Tourism: a restatement of the national laws on tourism (law n. 165 of 2001, art. 4) provides for mediation in the controversy arising out of misconduct of the tourism agency or tour operator; Consumer Code: Legislative Decree n. 206 of 2005, enacted under pressure of European Authorities, provides for mediation, mainly organized by the Chambers of Commerce or by Consumers' Associations; Copyright: Legislative Decree n. 68 of 2003, which applies a European Directive on such field, provides for mediation especially in the use of reproduction rights of any kind by multimedia devices; Social Security: Legislative Decree n. 124 of 2004 providing for a rationalization of the inspection functions has approved the use of mediation for social cases in some circumstances; Financial Investments and Savings: Law n. 265 of 2005 provides for several mediation procedures organized by banks together with Consumers' Associations; Family Agreements on Enterprise Succession: Law n. 55 of 2006 provides for mediation as regulated by the reform of Company Law (see below) with the purpose of preserving the management of a family enterprise in case of succession; Franchising: Law n. 129 of 2004 provides for mediation as regulated by the reform of Company Law (see below); Sport Law: Any controversy is to be solved outside the ordinary courts either in mediation or in arbitration procedures before special Sport Chambers. The most recent law in this field is Law n. 280 of 2003; Harbour Pro Bono Agreement: The Harbour Commander has authority to solve any dispute arising within the harbour in the field regulated by art. 598 of Navigation Code; Public Utility Service, Energy and Gas: Law n. 481 of 1995 and Authorities' Regulations n. 127 of 2003 and n. 45 of 2005 provide for mediation in these matters before a special mediation commission organized by the relevant authorities; Company Law: Legislative Decree n. 5 of 2003 has reformed the civil procedure rules for the controversy in Company law and other similar fields, and has provided for new rules concerning mediation and arbitration, creating special public and private organisms for training of mediators and offering mediation services, under the supervision of the Ministry of Justice; Outsourcing and Subcontractors: Law n. 192 of 1998 has provided for a compulsory attempt of mediation and a subsequent non-compulsory arbitration in such type of litigation cases; Telecom, Postal Services and Insurance: such field in which controversy is widespread is regulated by autonomous mediation regulation in accordance with Consumers' Associations; Public Waters: Royal Decree n. 1775 of 1933 provides for mediation in this field; Parental Responsibility: Law n. 54 of 2006, which has modified art. 155 the Code of Civil Procedure, provides for mediation services proposed by the judge for solving disputes concerning the parental responsibility (joint education of minors) in Family law; Agreement by Adhesion and Collaborative Repent: Legislative Decree n. 218 of 1997 provides for pro bono agreement in the field of taxation to solve disputes with the Income Tax Authorities; Pro Bono Agreement in International Fiscal Disputes: Law n. 99 of 1993, ratifying Brussels Convention of 1990 on avoidance of double taxations and providing for mediation between the concerned Countries in matter of taxation.).

since the passing of law 580/1993,[169] due to the continued acknowledgment of legislators of the benefits of mediation.[170]

After lawmakers focused on applying mediation to consumer and labor disputes for most of the 1990s and early 2000s,[171] their concentration shifted to using such procedures for the resolution of corporate disputes.[172] In 2003, legislators enacted the first detailed statute (law 5/2003) dealing with corporate mediation proceedings.[173] By expanding mediation to corporate disputes and providing specific provisions on the training of mediators, the confidentiality of proceedings, and enforceability of awards,[174] Parliament sparked particular interest in the practice among attorneys and businessmen[175] who have since been instrumental to mediation's growth.[176]

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169. *See* Decreto Legislativo 580/1993 (Italy) (recognizing ADR as a valid alternative to litigation and designating arbitration administration and mediation duties to the Chambers of Commerce as a means to pave the way for the future mediation legislation).

170. *See* DE PALO, *supra* note 161, at 2 (indicating that the number of cases going to mediation in Italy has been surprisingly low despite the increased volume of 1990s legislation supporting the development of mediation); *see also* De Palo & D'Urso, *supra* note 162, at 93–94 (demonstrating that legislators encourage mediation through tax incentives and credits).

171. *See* NADJA MARIE ALEXANDER, GLOBAL TRENDS IN MEDIATION 272 (2006) (discussing the role of Italy's Conciliation Commission in mediating consumer disputes in the 1990s); *see also* Stefano Azzali, *The Mediation Service of the Milan Chamber of Arbitration*, 3 TIJDSHRIFT VOOR MEDIATION 1, 3 (2003), *available at* http://www.camera.arbitrale.it/Documenti/azzali_caruso_03_mediation.pdf (last visited Oct. 1, 2010) (indicating that mediation was the best means of settling consumer-related disputes in Milan in the early 90s); *see also* Giuseppe De Palo, Paola Bernadini & Luigi Cominelli, *Mediation in Italy: The Legislative Debate and the Future*, 6 ADR BULL. 51, 51 (2003) (establishing that Italian mediation law No. 580 led to the formation of conciliation offices that dealt primarily with consumer disputes).

172. *See* ALEXANDER, *supra* note 171, at 265 (2006) (stating that Decree No. 5 governs mediation in Italian corporate disputes); *see also* GIUSEPPE DE PALO, CROSS-BORDER COMMERCIAL MEDIATION: HOW LEGISLATION AFFECTS MEDIATION USE, 1, 7–8 (reflecting the increase in the number of corporate disputes that are being settled by mediation); *see also* Krzysztof Oplustil & Christoph Teichmann, THE EUROPEAN COMPANY: ALL OVER EUROPE 175 (2004) (discussing the role of Italian Decree No. 5 in incorporation mediation laws to corporate statutes).

173. *See* Decreto legislativo 17 gennaio 2003, n. 5.

174. *See* De Palo, Bernadini & Cominelli, *supra* note 171, at 51–52 (discussing how Italian Law No. 5 allows mediated settlements to be judicially enforced); *see also* Valerio Sangiovani, Current Development: *Some Critical Observations on the Italian Regulation of Company Arbitration*, 17 AM. REV. INT'L ARB. 281, 284 (2006) (emphasizing the advantage confidentiality of proceedings in mediations conducted in Italy). *See generally* Alessandra Sgubini, *Mediation and Culture: How Different Cultural Backgrounds Can Affect the Way People Negotiate and Resolve Disputes,* MEDIATE.COM (March 2006), *available at* http://www.mediate.com /articles/sgubiniA4.cfm (referencing the expansion of mediation to corporate disputes in Italy and the standards provided to the companies involved).

175. *See* Stefano Azzali, *The Mediation Service of the Milan Chamber of Arbitration*, 17 AM. REV. INT'L ARB. 281, 284 (2006) (emphasizing the advantage of the confidentiality of proceedings when using mediation in Italy). *See generally* Sgubini, *supra* note 174 (referencing the expansion of mediation to corporate disputes in Italy and the standards provided to the companies involved).

176. *See* ALEXANDER, *supra* note 171, at 272 (explaining the process by which lawyers utilize mediation services in Italy); *see also* Giovanni De Berti, *Surveys Reveal Further Spread of Arbitration and Mediation*, INT'L LAW OFFICE ARB. NEWSL. Jun. 12, 2008, at 1 (listing business persons as a major influence on the proliferation of mediation as a mode of resolving disputes). *But see* DE PALO, *supra* note 172, at 2 (mentioning that despite recent legislation the mediation case load in Italy remains low).

Although there have been no uniform rules for Italian mediation,[177] there have been some common features of most types of mediation.[178] The first commonality is that almost all of mediation in Italy has been facilitative.[179] Facilitative mediation means that the "mediator [has] helped the parties without suggesting solutions to them and without examining the merits of the case."[180] Facilitative mediation has allowed parties to feel that mediators would not judge them or work against their interests and has preserved the impartial nature of the proceeding.[181] By not giving mediators the ability to adjudicate an outcome,[182] Italian legislators long protected the place of arbitration and litigation within the civil justice system while stifling mediation.[183]

Legislators have made corporate mediation different, however, by providing parties with an option for evaluative mediation. Specifically, the parties to a corporate mediation have been

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177. *See* DE PALO, *supra* note 172, at 6, (remarking on the skepticism towards Italian mediation that a resulted from a lack of clear definition, scope, and procedure in Parliament's laws). *See generally* Albert Bates Jr.*, Arbitrator Disclosure Obligations Under 2004 IBA Guidelines on Conflicts of Interest, in* INTERNATIONAL ARBITRATION AND MEDIATION: FROM THE PROFESSIONAL'S PERSPECTIVE 105, 186 (Anita Alibekova & Robert Carrow eds.) (stressing that there is a lack of uniform standards in International mediation); *see generally* MICHAEL MCILWRATH & JOHN SAVAGE, INTERNATIONAL ARBITRATION AND MEDIATION: A PRACTICAL GUIDE 159 (2010) (emphasizing that there exists a lack of standards in international mediation).

178. *See* Giuseppe De Palo & Penelope Harley, *Mediation in Italy: Exploring the Contradictions*, 21 NEGOT. J., 469, 476–77 (2005) (describing Italian draft bill 5492, which establishes certain mediation procedures to be followed); *see also* World Intell. Prop. Org. (WIPO), Guide to WIPO Mediation, at 5 (Jan. 2009), *available at* http://www.wipo.int/freepublications/en/arbitration/449/wipo_pub_449.pdf (referring to mediation as an informal and unstructured process); *see also* Alessandra Sgubini, *supra* note 174 (specifying that Italy has prescribed standards for companies that want to be registered in mediation).

179. *See* Stefano Azzali, *The Mediation Service of the Milan Chamber of Arbitration*, 3 TIJDSHRIFT VOOR MEDIATION 1, 1–2 (2003) (distinguishing between the American evaluative mediation model and the Italian facilitative mediation model). *But see* Giuseppe De Palo, Paola Bernadini & Luigi Cominelli, *Mediation in Italy: The Legislative Debate and the Future*, 6 ADR BULL. 51, 52 (2003) (establishing that Italian Decree No. 5 of 2003 mandates an evaluative mediation model). *See generally* Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, MEDIATE.COM (Sept. 2000), http://www.mediate.com/articles/zumeta.cfm (explaining why facilitative mediation is the preferred method among mediators).

180. *See* Stefano Azzali, *supra* note 179, at 1 (comparing the roles and duties of a facilitative mediator with that of an evaluative mediator); *see also* Nancy D. Erbe, *Appreciating Mediation's Global Role in Promoting Good Governance*, 11 HARV. NEGOT. L. REV. 355, 371 (2006) (examining the process of facilitative mediation and the roles of the parties involved); *see also* Chris Guthrie, *Symposium: Misjudging*, 7 NEV. L.J. 420, 450 (2007) (establishing the role of mediators in the process of facilitative mediation).

181. *See* WIPO, *supra* note 178 (emphasizing the importance of the interests of the parties on behalf of the facilitative mediator); *see also* Carole J. Brown, *Facilitative Mediation: The Classic Approach Retains Its Appeal*, MEDIATE.COM (Dec. 2002), http://www.mediate.com/articles/brownc.cfm (stating that the focus of the facilitative mediator is to assist the parties by focusing on their interests); *see also* Zumeta, *supra* note 179 (suggesting that facilitative mediation empowers the parties involved and allows them to take responsibility for the dispute).

182. *See* MARIEKE KLEIBOER, THE MULTIPLE REALITIES OF INTERNATIONAL MEDIATION 6 (1998) (showing that mediators may assist parties but do not have the ability to give a ruling on an issue); *see also* Erbe, *supra* note 180, at 371 (claiming that facilitative mediators are unable to enforce a settlement); *see also* Yves Heijmans et al., *Effective Cross Border Mediation in Europe*, ACC DOCKET 1, 1 (Ass'n of Corp. Counsel, July 2006), *available at* http://www.crowell.com/pdf/newsroom/EUBriefingsArticle.pdf (contrasting the role of the arbitrator who can issue a binding decision and the mediator who cannot impose a resolution).

183. *See* GARY P. POON, THE CORPORATE COUNSEL'S GUIDE TO MEDIATION 103 (2010) (arguing that mediation is facing resistance as an alternative to litigation in civil law countries like Italy); *see also* De Palo & Harley, *supra* note 178, at 472 (indicating that despite Italian legislation on mediation the number of cases remain low); *see also* Valerio Sangiovani, *supra* note 174, at 281–82 (2006) (maintaining that Italian legislative Decree No. 5 allows corporations to settle disputes via arbitration or court proceedings).

allowed to request a settlement proposal from the mediator after their failure to reach an agreement.[184] The rejection of a settlement proposal for unjustified reasons has carried the consequence of possibly influencing allocation of litigation costs.[185] This exception to the facilitative nature of mediation has given an arbitration-like mechanism to corporate proceedings[186] that has ensured the willingness of parties to negotiate in good faith[187] and has eliminated any incentive for blocking a settlement without just cause.[188] Such evaluative features have eliminated some of the voluntary nature of the corporate mediation[189] while making it into a more effective form of alternative justice for businesses.[190]

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184. *See* Zumeta, *supra* note 179 (expressing that evaluative mediation allows the mediator to recommend settlement options). *See generally* De Berti, *supra* note 176, at 1 (analyzing Italian mediation legislation and its success rate); s*ee generally* Valerio Sangiovani, *supra* note 183 (discussing rules that the Italian legislature made specifically for corporations).

185. *See* Azzali, *supra* note 179 (contrasting facilitative and evaluative mediation; evaluative mediation focuses on practical outcomes); *see also* E. Patrick McDermott & Ruth Obar, *"What's Going on" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style of Party Satisfaction and Monetary Benefit*, 9 HARV. NEGOT. L. REV. 75, 86 (2004) (showing that solution recommendation is an element of evaluative mediation).

186. *See* Azzali, *supra* note 179 (citing statistics showing an increase in corporate mediation use and explains that (1) cost-efficiency and (2) relationship management as reasons for the increase); *see also* Albert W. Alschuler, *Mediation With a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 9 HARV. L. REV. 1808, 1836 (1986) (predicting that cost shifts in litigation reallocation will likely lower needless litigation and encourage settlements). *See generally* Giovanni De Berti, *Surveys Reveal Further Spread of Arbitration and Mediation*, INT'L L. OFFICE ARB. NEWSL., June 12, 2008 (identifying speed and cost as attractive benefits unique to corporate mediation).

187. *See* Thomas Schultz, Gabrielle Kaufmann-Kohler, Dirk Langer & Vincent Bonnet, *Online Dispute Resolution: The State of the Art and the Issues* (E-Com Research Project of the University of Geneva (Dec. 2001), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=899079 (emphasizing that evaluative mediation's solution driven "deal-making" model is an exception to the more communicative, facilitative mediation); *see also* De Berti, *supra* note 186 (identifying *Project Conciliamo*, a recently launched court-induced binding mediation frontier). *See generally* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 29–31 (1996) (demonstrating that evaluative mediators focus on creating outcomes and subsequently urging parties to comply).

188. *See* Michael Henry Martuscello II, *The State of the ADR Movement in Italy: The Advancement of Mediation in the Shadows of the Stagnation of Arbitration*, (Dec. 7, 2009) (the present article) (predicting that Italian legislation providing for binding arbitration-like mechanism will provide corporations an incentive to negotiate in good faith); *see also* Brian P White, Comment, *Walking the Queen's Highway: Peace, Politics and Parades in Northern Ireland*, 1 SAN DIEGO INT'L L.J. 175, 253–54 (2000) (showing that a mediator's primary goal is to make sure both parties negotiate in good faith); *see also* PHILIP LE B. DOUGLASS, RESOLVING PROJECT DISPUTES 47 (Commercial Law and Practice Course Handbook Series, 1995), *available at* 734 PLI/Comm 47 (identifying a mandatory cooling off period as an example of a "good faith" negotiation measure in a corporate international setting).

189. *See* Martuscello, *supra* note 188 (stating that the binding nature of corporate mediation eliminates incentive for blocking a settlement without cause); *see also* John Lande, *Principles for Policymaking About Collabrative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 620, 648–49 (2007) (emphasizing the shift in meaning from facilitative to evaluative mediation); *see also* Scott R. Belhorn, Note, *Settling Beyond the Shadow of the Law: How Mediation Can Make the Most of Social Norms*, 20 OHIO ST. J. ON DISP. RESOL. 981, 991–92 (2005) (emphasizing that parties that seek mediation jointly expect a mutually beneficial settlement).

190. *See* Michael Bradley, Cindy A. Schipani, Anant K. Sundaram & James P. Walsh, *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 LAW & CONTEMP. PROBS. 9, 79 (1999) (emphasizing that an impartial judiciary is needed to enforce laws in a corporate infrastructure); *see also* Guiseppe De Palo, Paola Bernadini, & Luigi Cominielli, *Mediation in Italy: The Legislative Debate and the Future*, 6 ADR BULL. 53, 53 (2003) (noting that legislature's new laws have limited the voluntary aspect of corporate mediation by forcing mediators to evaluate and award judicial costs). *See generally* McDermott & Obar, *supra* note 185 (distinguishing evaluative mediation as "result oriented").

Another common mediation characteristic has been that most settlement agreements in Italian mediations have lacked the force of a civil judgment. The settlement agreement "normally has [had only] the effect of a private agreement (i.e. it [was] binding between the parties, but not executory, so that a party must [have sought] court assistance if the other party fail[ed] to perform)."[191] The contractual nature of past settlement agreements reinforced the voluntary nature of the proceeding[192] but it also severely limited mediation's effectiveness at resolving disputes because many parties later refused to honor their commitments with full knowledge that they could only be held liable for breach of contract.[193]

Legislators again made an exception for corporate mediation, in which a settlement agreement, "signed by the parties and the mediator and confirmed by the local court, has [had] the executory force of a court judgment."[194] The enforceability of settlement agreements has not only made corporate mediation much more attractive to companies,[195] but also encouraged

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191. *See* Hiram E. Chodosh, Stephen A. Mayo, Fathi Naguib & Ali El Sadek, *Egyptian Civil Justice Process Modernization: A Functional and Systematic Apprach*, 17 MICH. J. INT'L L. 865, 871–74 (1996) (emphasizing that litigation delay makes mediation a faster and more cost effective alternative to litigation in Italy); *see also* Lisa C. Thompson, *International Dispute Resolution in the United States and Mexico: A Practical Guide to Terms, Arbitration Clauses, and the Enforcement of Judgments and Arbitral Awards*, 24 SYRACUSE J. INT'L L. & COM. 1, 22 (1997) (concluding that mediation is an excellent alternative due to high success rate and limited cost involved). *See generally* Diana Bentley, *Mediation: Making a Difference?,* 62 INT'L BAR NEWS 33, 35 (2008) (emphasizing that even in Europe, especially Italy, where court proceedings are lengthy, large companies are interested in mediation as an alternative to litigation).

192. *See* Edin Karakas, *Croation Arbitration Law: Concept of Arbitral Award Under Croatian and Comparative Law,* 13 CROAT. ARB. YEARBOOK 29, 41–42 (2006) (differentiating procedural law used in Croatia that establishes a settlement to be a contract, allowing for judicial enforcement); *see also* Giovanni De Berti & Michelangelo Cicogna, *Arbitration and Mediation in Italy*, 10 METRO. CORP. COUNSEL 8, 8 (2002) (noting that an arbitrators' power is not binding and thus requires judicial assistance to achieve force of civil judgment). *See generally* De Berti, *supra* note 186 (discussing new initiatives providing judicial support for mediation).

193. *See* Martuscello, *supra* note 188 (stating that even though the contractual nature of previous settlement agreements reinforced the noncompulsory spirit of mediation, it limited the power of mediation); *see also* Robert W. Mendenhalt, *Post-Settlement Settlements: Agreeing to Make Resolutions Efficient*, 1996 J. DISP. RESOL. 81, 111 (1996) (arguing that parties with authority to opt-out of new agreements are more inclined to follow through on them due to their voluntary nature). *See generally* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L REV. 7, 7 (1996) (illustrates that contractual, mutually beneficial interests and agreements reinforce the mediator's ability to address to goals of the parties).

194. *See* Stefano Azzali, *The Mediation Service of the Milan Chamber of Arbitration*, 3 TIJDSHRIFT VOOR MEDIATION 1 (2003) (showing that Italian mediation creates outcomes enforceable as a binding contract; thus, the remedies are limited to breach of contract); *see also* Walter G. Gans, *Saving Time and Money in Cross-Border Commercial Disputes*, 52 DISP. RES. J. 50, 53 (1997) (noting that commencement of litigation alleging breach of contract, a traditional legal remedy, is not a remedy suited to modern mutual business goals). *See generally* Gabriel M. Wilner, *Determining the Law Governing Performance in International Commercial Arbitration a Comparative Study*, 19 RUTGERS. L. REV. 646, 648 (1965) (showing that because parties entering commercial agreements have the power to provide for arbitration in the contract, the arbitrator must consider the possibility of judicial review).

195. *See* Edin Karakas, *supra* note 192, at 50 (emphasizing that awards arising from *arbitrato irrituale* have purely contractual value and have no executive force, like civil law contracts); *see also* Brette L. Steele, Comment, *Enforcing International Commercial Mediation Agreements as Arbitral Awards Under the New York Convention*, 54 REGENT U. L. REV. 1385, 1396 (2007) (distinguishing Italy's formal arbitration procedures as having the force of a court judgment). *See generally* De Berti, *supra* note 186 (identifying speed and cost as the main motivators for arbitration with businesses).

them to try honestly to reach a resolution, which would be quicker and cheaper than arbitration or litigation and still legally binding.[196]

One of the weaknesses of most mediation legislation has long been its failure to guarantee the confidentiality of most proceedings.[197] However, legislators fortified corporate mediation by providing that "no use may be made nor evidence be given or requested on the basis of statements issued by the parties" in such a proceeding.[198] Such confidentiality requirements have encouraged parties to engage more fully in corporate proceedings without fear that a settlement would not be reached and things that they revealed would later be used against them in a civil suit.[199] By giving parties a more secure proceeding, confidentiality requirements have surely helped corporate mediations to increase in number while other types of mediation, which were not confidential until very recently, have lagged behind.[200]

A final problem that persisted with Italian mediation law until very recently was that except in corporate disputes, the commencement of a proceeding did not pause the statute of

196. *See* Guiseppe De Palo & Penelope Harley, *Mediation in Italy: Exploring the Contradictions*, 21 NEGOT. J. 469, 471 (2005) (identifying two features included in legislative mediation settlements, but absent from private mediation: expedited judicial enforceability and tax relief); *see also* Wang Lin, *Mediation: Better Way to Solve Business Disputes*, BUS. DAILY UPDATE, Aug. 11, 2005 (emerging international mediation co-operations including U.S.-Italy are favored by businesses as the mediation process maintains relationships and avoids expensive, time-consuming, and embarrassing court proceedings). *See generally* Diana Bentley, *Mediation: Making a Difference?*, 62 INT'L BAR NEWS 33, 35 (2008) (discussing how Italy's increase in mediation practice is encouraging other international European companies to join).

197. *See* Oscar G. Chase, *Civil Litigation Delay in Italy and the United States*, 36 AM. J. COMP. L. 41, 41 (1988) (emphasizing the difficulty Italy experiences in protracted litigation delay); *see also* Kerry A. Jung, *How Punitive Damage Awards Affect U.S. Businesses in the International Arena: The Northcon I v. Mansei Kogyo Co. Decision*, 17 WIS. INT'L L.J. 489, 499 (1999) (describing popularity of arbitration alternation internationally for its: (1) privacy, (2) enforceability in foreign courts, (3) speed and inexpensiveness of the process, and (4) conciliatory nature of the process); *see also* Robert A. Kagan, *On Surveying the Whole Legal Forest*, 28 LAW & SOC. INQUIRY 833, 835 (2003) (distinguishing negotiation or mediation as non-hierarchical party driven solutions instead of expert or political judgment of the formal legal method).

198. *See* Cecilia Carrara, *Leading Lawyers on Advising Multinational Clients, Navigating Recent Trends, and Understanding the Key Laws Governing ADR in the EU*, ADR CLIENT STRAT. IN THE E.U., at 5, *available at* 2009 WL 4052830 (ASPATORE) (2009) (describing mechanisms that impose sanctions regarding costs to guard confidentiality); *see also* Nancy Nelson, *Better Solutions For Business: Commercial Mediation in Europe, Excerpts*, INT'L. BUS. LIT. & ARB., 409, 437 (2006), *available at* 739 PLI/Lit 409 (explaining that especially in European countries, and particularly if lawyers are present, mediation is confidential).

199. *See* JAMS., *International Mediation Rules*, INT'L ADR CENTER, at ¶11, (July 15, 2009) (indicating recent standard rules on confidentiality, namely that all information exchanged during the mediation shall remain confidential and cannot be relied upon in further arbitral or judicial proceedings); *see also* Giovanni De Berti, *The Model Mediation Agreement of the Chartered Institute of Arbitrators*, 76 ARB. 136, 138 (2010) (citing the tight confidentiality clause found in Model Mediation Agreement modeled after recent European Union and national legislation, including that the very occurrence of the mediation must remain confidential during and after proceedings); *see also* NADJA ALEXANDER, GLOBAL TRENDS IN MEDIATION 265 (2006) (stating that the 2004 mediation reforms provided corporations with oversight by the Italian National Register of the Ministry of Justice, and guaranteed independence, impartiality and confidentiality during the mediation process).

200. *See* De Palo & Harley, *supra* note 196, at 471 (stating that in contrast to the extensive mediation legislation passed by the government, mediation in areas other than corporation disputes has not caught on). *See generally* Christos Ravanides, *Arbitration Clauses in Public Company Charters: An Expansion of the ADR Elysian Fields or a Descent into Hades?* 18 AM. REV. INT'L ARB. 371, 448 (2007) (referring to past mediation legislation that focused only on corporations).

limitations for commencing a civil suit.[201] By letting the limitation period run, legislators discouraged people from using mediation for many years because seeking such an alternative to litigation could have impaired their ability later to pursue a judgment in court,[202] something that one has a legal right to do in Italy.[203]

While focused legislation has helped corporate mediation to be an effective tool for Italian businesses,[204] it has only partially made mediation a true alternative to civil justice because the number of mediations performed a year in Italy has still seemed minimal when compared to the number of ongoing civil suits.[205] However, very recent legislation that makes all civil and commercial mediations more like corporate mediations should surely increase the effectiveness of mediation and make it a more real alternative to civil justice for parties other than businesses.[206]

B. Major Change to Italian Mediation Law

Most recently, the Italian Parliament passed a law that should drastically increase the use of mediation throughout Italy. Italian law 69/2009[207] seeks to implement the requirements of

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201. *See* Mauro Rubino-Sammartano, *New International Arbitration in Italy*, 11 J. INT'L ARB. 77, 84 (1994) (indicating the 1994 mediation legislation introduced a reform to the statute of limitations issue). *See generally* De Berti, *supra* note 199, at 136 (referring to considerations given towards the statute of limitations clause in recent mediation reforms).

202. *See* Law No. 69 of June 18, 2009, 140 Gazz. Uff. (Italy), June 19, 2009 (preserving the option of a court hearing for parties in the event mediation fails); *see also* Rubino-Sammartano, *supra* note 201, at 84 (stating that the 1994 legislative reform allowed parties engaged in ADR to go to court in the event they did not come to a settlement).

203. *See* Art. 24 Costituzione [cost.] (Italy) (giving all citizens the right to take judicial action to protect their individual rights and legitimate interests); *see also* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: CIVIL PROCEDURE 58 (Mauro Cappelletti ed., 1984) (stating that the Italian Constitution explicitly gives individuals the right to pursue grievances in the court system); *see also* Vincenzo Varano, *Civil Procedure Reform in Italy*, 45 AM. J. COMP. L. 657, 660–61 (1997) (referring to the constitutional right of access to the courts).

204. *See* De Palo & Harley, *supra* note 196, at 471 (listing some benefits for corporations resulting from a 2003 mediation legislation reform). *See generally* Ravanides, *supra* note 200, at 448 (stating that the 2003 mediation legislation aimed to incentivize corporations to mediate by emphasizing greater party autonomy and a rapid and agile dispute resolution process).

205. *See* ERNESTO L. FELLI ET AL., THE "DEMAND FOR JUSTICE" IN ITALY: CIVIL LITIGATION AND THE JUDICIAL SYSTEM, ITALIAN INSTITUTIONAL REFORMS: A PUBLIC CHOICE PERSPECTIVE 159, 159 (Fabio Padovano & Roberto Ricciuti eds., 2008) (emphasizing the heavy caseload burden in Italian civil courts, and specifically citing to a twenty-one percent increase between the years1995 and 2003); *see also* De Palo & Harley, *supra* note 196, at 472 (contrasting the numerous mediation reforms with the minimal use of mediation as an ADR option).

206. *See* Law No. 69 of June 18, 2009, 140 Gazz. Uff. (Italy), June 19, 2009 (preserving the option of a court hearing for parties in the event mediation fails and emphasizing the importance of confidentiality); *see also* Cristina Giorgiantonio, *Civil Procedure Reforms in Italy: Concentration Principle, Adversarial System or Case Management?,* 66 BANCA D'ITALIA QUADERNI DI RICERCA GIURIDICA 2, 28 (2009), *available at* http://www.bancaditalia.it/pubblicazioni/quarigi (stating that the 69/2009 legislation 69/2009 enhances the possibility for ADR for all civil suits by making it more like corporate mediation); *see also* Francesca Rolla & Daniele La Cognata, *Italy, in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO LITIGATION AND DISPUTE RESOLUTION 178, 184 (Global Legal Group ed., 2010) (stating that old legislation providing special mediation procedures for only corporate-related claims was now repealed by the new law 69/2009).

207. *See* Law No. 69 of June 18, 2009, 140 Gazz. Uff. (Italy), June 19, 2009 (incorporating EU mediation directive 2008/52/EC into Italian mediation).

the EU Mediation Directive (2008/52/EC), which mandates that member nations must pronounce statutory provisions to promote mediation in all cross-border disputes involving civil and commercial matters.[208] The EU directive directly deals with such issues as the training of mediators, confidentiality of proceedings, enforceability of settlement agreements, and ability of parties to utilize other means to resolve disputes if mediation fails.[209] The Italian law will undoubtedly prove influential to the spread of mediation throughout Italy because Italian legislators have chosen to apply the principles of the EU directive to domestic disputes as well as international ones.[210]

On March 4, 2010, the Italian Council of Ministers approved a legislative directive[211] to implement Italian law 69/2009.[212] Legislative directive 28/2010 will undoubtedly increase the use of mediation by requiring anyone wishing to commence a civil action concerning joint ownership, property rights, partition, inheritance, family obligations, leasing, bailment, medi-

208. *See* Directive 2008/52/EC, 2008 O.J. (L 136) 3 (mandating Member States to facilitate mediation as an alternative form of resolution for civil and commercial disputes within the EU, when one party to the dispute is domiciled in a different member State from that of the other party); *see also* Dr. Pablo Cortes, *Can I Afford Not to Mediate? Mandatory Online Mediation for European Consumers: Legal Constraints and Policy Issues*, 35 RUTGERS COMP. & TECH. L.J. 1, 12–14 (2008) (stating the application of the 2008/52/EC Directive extends to civil and commercial mediations where parties are domiciled in different member states); *see also* Jiaqi Liang, Note & Comment, *The Enforcement of Mediation Settlements in China*, 19 AM. REV. INT'L ARB. 489, 492–93 (2008) (stating that under the new EU Directive, Member States are required to develop legal mechanisms to enforce the settlement agreements in civil and commercial mediations).

209. *See* Cortes, *supra* note 208, at 13–14 (explaining that the EU Directive 2008/52/EC emphasizes the importance of confidentiality in the mediation process, and only allows disclosure of information in limited situations, such as when it is a matter of public policy to protect children or to implement the mediation judgment); *see also* JAMS., *International Mediation Rules*, INT'L ADR CENTER, at ¶11, (July 15, 2009) (indicating recent standard rules on mediation, including the option to access the courts if mediation fails). *See generally* Directive 2008/52/EC, 2008 O.J. (L 136) (encouraging Member States to provide appropriate training to mediators so that parties have confidence in the legitimacy of the mediation process and the resulting judgments).

210. *See* Giovanni De Berti, Lorraine Brennan & Michael Cover, *Developing the Mediation Market: What Should the Profession be Doing? in* CIARB'S MEDIATION COMPENDIUM 12, 18 (A. Hudson-Tyreman et al. eds., 2009) (stating that the success of mediation depends upon Member States adopting similar policy as the EU); *see also* Rolla & Cognata, *supra* note 206, at 184 (stating that the new law is drafted in line with relevant EU legislation and applies to Italian domestic mediation); *see also* Cortes, *supra* note 208, at 12–14 (stating the application of the Directive extends to civil and commercial mediations where parties are domiciled in different member states).

211. *See* Decreto Legislativo 28/2010 of Mar. 4 2010, 53 Gazz. Uff. (Italy), Mar. 5 2010 (implementing provisions making it compulsory in some areas of civil litigation for parties to engage in a pre-trial phase before a specialized body, aimed at assisting parties to reach an agreement on the matter in dispute).

212. *See id.* (implementing the European Mediation Directive 2008/52/EC, to promote and develop mediation in cross-border civil and commercial disputes, into Italian law); *see also* Law 69/2009 of June 18, 2009, 140 Gazz. Uff. (Italy), June 19, 2009 (adopting policies from the 2008/52/EC Directive into domestic civil law, by requiring certain parties to engage in pre-trial mediation before appearing before a court).

cal malpractice, libel, defamation, or insurance, banking, or financial contracts to attempt mediation first.[213]

Directive 28/2010 sets a standard for mediation by extending to all civil and commercial mediations many provisions that provide both freedom and security to the parties involved.[214] The law consciously avoids prescribing a formalistic procedure for mediations.[215] Instead, it states that procedural rules must only guarantee the confidentiality of proceedings, a mode for nominating mediators that insures their impartiality, and suitability for quickly and competently completing their duty.[216] By avoiding formalism, the law allows parties and mediators to decide together how best to go about seeking an agreement.[217] Such procedural leeway makes

213. *See* Decreto Legislativo*, supra* note 211 ("Chi intende esercitare in giudizio un'azione relativa ad una controversia in materia di condominio, diritti reali, divisione, successioni ereditarie, patti di famiglia, locazione, comodato, affitto di aziende, risarcimento del danno derivante dalla circolazione di veicoli e natanti, da responsabilità medica e da diffamazione con il mezzo della stampa o con altro mezzo di pubblicità, contratti assicurativi, bancari e finanziari, é tenuto preliminarmente a esperire il procedimento di mediazione."); *see also* Lorenzo Morelli, *Giovanni De Berti, Fondatore Dello Studio De Berti Jacchia Franchini Forlani, Racconta La Sua Carriera*, ITALIA OGGI (Italy), May 17, 2010, at 205 (quoting Giovanni De Berti who stated that Legislative Decree 28/2010 would require mediation in property disputes); *see also* Camera Arbitrale di Milano [CHAMBER OF ARBITRATION OF MILAN], *Mandatory Mediatio*n, Aug. 3, 2010 (listing leasing, insurance, banking and financial agreements as a few disputes that would require mediation under Legislative Decree 28/2010).

214. *See* Remo Caponi, *Italian Civil Justice Reform 2009* (Univ. of Florence, Working Paper Series, 2010), *available at* http://ssrn.com/abstract=1629245 (stating that during mediation, confidential communications are privileged); *see also Italy Introduces Mandatory Mediation for Insurance Disputes*, NORTON ROSE GROUP (Insurance Updater), Apr. 15 2010 (noting that an agreement reached between the parties as a consequence of mediation has the same validity as a contract and is therefore enforceable before a court); *see also The European Mediation Directive is Implemented*, ASHURST (Arbflash), May 2010, *available at* http://www.ashurst.com/publication-item.aspx?id_Content=5172 (explaining that Legislative Decree 28/2010 only applies to claims which can be freely disposed of by the relevant parties).

215. *See* Caponi, *supra* note 214 (arguing that Legislative Decree 28/2010 can spread awareness of alternative methods of dispute resolution); *see also* Carmen Laruccia, *Commento Al Decreto Legislativo Del 4 Marzo 2010 n. 28*, *available at* http://www.giuristiediritto.it/leggi/218-commento-al-decreto-legislativo-del-4-marzo-2010-n-28-.html (last visited Oct. 14, 2010) (commenting on the flexibility of Legislative Decree 28/2010 by emphasizing the equality granted to both oral and written contracts in mediation); *see also* European Mediation Directive, *supra* note 214 (asserting the avoidance of a formalistic procedure by granting plaintiffs the option to use either the procedure set out in Legislative Decree 28/2010 or alternative mediation procedures available).

216. *See* Decreto Legislativo, *supra* note 211 ("Il regolamento deve in ogni caso garantire la riservatezza del procedimento . . . nonché modalità di nomina del mediatore che ne assicurano l'imparzialità e l'idoneità al corretto e sollecito espletamento dell'incarico."); *see also* Caponi, *supra* note 214 (concluding that guarantees of confidentiality are an aspect covered by Legislative Decree 28/2010); *see also Italy Introduces Mandatory Mediation, supra* note 214 (commenting that the mediator is chosen by the parties to the dispute which promotes impartiality).

217. See Carmen Laruccia, *Commento Al Decreto Legislativo Del 4 Marzo 2010 n. 28*, *available at* http://www.giuristiediritto.it/leggi/218-commento-al-decreto-legislativo-del-4-marzo-2010-n-28-.html (last visited Oct. 14, 2010) (noting that if an agreement is not reached, the mediator will make a proposal to both parties in writing); *see also* Camera Arbitrale di Milano, *supra* note 213 (informing that the parties must first attempt to find an agreement through a mediation proceeding in any mandatory dispute); *see also European Mediation Directive is Implemented, supra* note 214 (asserting that the legal advisers are under obligation to attempt to resolve disputes by way of mediation).

the process more adaptable to individual disputes and continues to avoid the complexity that comes with civil action in court.[218]

Moreover, by guaranteeing confidentiality,[219] legislative directive 28/2010 encourages parties to divulge more information to both the mediator and each other, which could make them vulnerable in court proceedings but facilitate settlement in mediation.[220] Provisions that prohibit information that is collected during mediation from being used in litigation and that prevent mediators from being deposed[221] further increase the possibility that parties will freely and openly negotiate in good faith because they reduce any perceived drawbacks that could come with disclosure during a proceeding.[222]

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218. See Caponi, *supra* note 214 (concluding that the legislative decree 's flexible and efficient nature will attract more litigants to mediations, thereby reducing the courts' workload); *see also* Paola Guttadauro, *Decreto Legislativo 4 Marzo 2010 n. 28: Entra In Vigore Il 20 Marzo La Nuova Disciplina Della Mediazione Per Le Controversie Civil e Commerciali*, Mar. 5, 2010, *available at* http://www.mondoadr.it/cms/?p=2328 (last visited Oct. 14, 2010) (maintaining that Legislative Decree 28/2010 would diffuse the use of ADRs which may be more complex); *see also* Laruccia, *supra* note 217 (quoting the Minister for Economic Development as saying that two of the determining factors of Legislative Decree 28/2010 is reliability and efficiency).

219. *See* Decreto Legislativo, *supra* note 211 ("1. Chiunque presta la propria opera o il proprio servizio nell'organismo o comunque nell'ambito del procedimento di mediazione é tenuto all'obbligo di riservatezza rispetto alle dichiarazioni rese e alle informazioni acquisite durante il procedimento medesimo. 2. Rispetto alle dichiarazioni rese e alle informazioni acquisite nel corso delle sessioni separate e salvo consenso della parte dichiarante o dalla quale provengono le informazioni, il mediatore é altresì tenuto alla riservatezza nei confronti delle altre parti."); *see* Caponi, *supra* note 214 (finding that Legislative Decree 28/2010 incorporates guarantees of confidentiality into civil and commercial mediation proceedings); *see also* Laruccia, *supra* note 217 (remarking that there is an act of entrustment between the lawyer and the party).

220. *See* Valentina Zanelli, *La Nuova Disciplina Della Mediazione*, *available at* http://www.professioni-imprese24.ilsole24ore.com/content/professioni24/diritto/news/19_5_disciplina_mediazione_avv24.html (last visited Oct. 14, 2010) (recognizing the disclosure of information of the parties to promote settlement). *See generally Italy Introduces Mandatory Mediation, supra* note 214 (stating that the expectation of Legislative Decree 28/2010 is to facilitate settlement); *see generally European Mediation Directive, supra* note 214 (stating that Legislative decree 28/2010 is part of a European-wide initiative to promote and regulate the development of mediation).

221. *See* Decreto Legislativo 28/2010 of Mar. 4 2010, art. 9, 53 Gazz. Uff. (Italy) ("1. Le dichiarazioni rese o le informazioni acquisite nel corso del procedimento di mediazione non possono essere utilizzate nel giudizio avente il medesimo oggetto anche parziale, iniziato, riassunto o proseguito dopo l'insuccesso della mediazione, salvo consenso della parte dichiarante o dalla quale provengono le informazioni. Sul contenuto delle stesse dichiarazioni e informazioni non é ammessa prova testimoniale e non può essere deferito giuramento decisorio. 2. Il mediatore non puo' essere tenuto a deporre sul contenuto delle dichiarazioni rese e delle informazioni acquisite nel procedimento di mediazione, né davanti all'autorità giudiziaria né davanti ad altra autorità. Al mediatore si applicano le disposizioni dell'articolo 200 del codice di procedura penale e si estendono le garanzie previste per il difensore dalle disposizioni dell'articolo 103 del codice di procedura penale in quanto applicabili."); *see also* Caponi, *supra* note 214 (explaining that during mediation, confidential communications are privileged against compulsory production); *see also* Zanelli, *supra* note 220 (commenting that a mediator cannot be deposed on the content of the declarations).

222. *See* Caponi, *supra* note 214 (reporting that commentators observe that mediation is possible only if the parties examine the merits of their position in good faith). *See generally* Zanelli, *supra* note 220 (referring to the agreement between the two parties as a gentleman's agreement); *see generally* Guttadauro, *supra* note 218 (claiming that the provisions of the decree have a stated purpose of strengthening mediation between the parties).

The law also seeks to ensure the independence of mediators by requiring them to make a declaration of impartiality[223] and to disclose immediately anything that happens during the proceeding, which may lead to prejudice.[224] This provision protects the integrity of mediation and prevents this private form of justice from becoming an unfair procedure.[225] This disclosure requirement seems extremely important to the promotion of mediation because without it, people would view the process with skepticism and prefer to use litigation, in which the law guarantees the fairness and impartiality of judges.[226]

By making mediation settlements enforceable, the legislators undoubtedly have encouraged more people to use this method of ADR.[227] Legislative directive 28/2010 provides that a settlement agreement, which is signed by the parties and mediator as well as certified for legal-

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223. *See* Decreto Legislativo, *supra* note 221 ("2. Al mediatore é fatto, altresì, obbligo di: a) sottoscrivere, per ciascun affare per il quale é designato, una dichiarazione di imparzialità secondo le formule previste dal regolamento di procedura applicabile, nonché gli ulteriori impegni eventualmente previsti dal medesimo regolamento; b) informare immediatamente l'organismo e le parti delle ragioni di possibile pregiudizio all'imparzialità nello svolgimento della mediazione; c) formulare le proposte di conciliazione nel rispetto del limite dell'ordine pubblico e delle norme imperative."); *see also* Zanelli, *supra* note 220 (explaining how the appointment of the mediator promotes impartiality and independence of the mediators); *see also* Laruccia, *supra* note 217 (quoting the Minister for Economic Development as saying that one principal aspect of Legislative Decree 28/2010 is impartiality).

224. *See* Decreto Legislativo, *supra* note 221 ("Al mediatore e fatto, altresì, obbligo di: a) sottoscrivere . . . una dichiarazione di imparzialità . . . b) informare immediatamente l'organismo e le parti delle ragioni di possibili pregiudizio all'imparzialità nello svolgimento della mediazione."); *see also* Zanelli, *supra* note 220 (citing Legislative Decree 28/2010 as requiring mediators to disclose anything that may lead to prejudice). *See generally* Laruccia, *supra* note 217 (realizing that mediation disclosure requirements will prevent prejudice to any of the parties).

225. *See, e.g.*, Maureen A. Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEGOT. L. REV. 29, 44 (2003) (discussing a mediation confidentiality policy which seeks to avoid prejudice). *See generally* Carol J. King, *Are Justice and Harmony Mutually Exclusive? A Response to Professor Nader*, 10 OHIO ST. J. ON DISP. RESOL. 65, 78 (1994) (concluding that a mediator should take care to avoid prejudice); *see generally* Maureen E. Laflin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 479, 482 (2000) (stressing the need for ethical rules for mediators to preserve the integrity of mediation).

226. *See* Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 801 (1999) (informing that disclosure requirements for mediators are a prevailing feature in most mediation statutes). *But see* Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice*, 10 GEO. J. LEGAL ETHICS 631, 654 (1997) (reasoning that complete confidentiality is necessary to protect the purposes and integrity of mediation). *See generally* Bridget Genteman Hoy, Comment, *The Draft Uniform Mediation Act in Context: Can it Clear Up the Clutter?*, 44 ST. LOUIS U. L.J. 1121, 1135 (2000) (quoting the drafters of the Draft Act as stating that the disclosure requirement promotes a check on the quality among mediation clients).

227. *See* ADR CTR. EU, THE COST OF NON ADR: SURVEYING AND SHOWING THE ACTUAL COSTS OF INTRA-COMMUNITY COMMERCIAL LITIGATION 41 (2010) (declaring that the EU Mediation Directive can positively impact the current number of annual mediations in Italy); *see also* THE NEW EU DIRECTIVE ON MEDIATION: FIRST INSIGHTS 22 (Ass'n for Int'l Arb. ed., 2008) (claiming that the implementation of the EU Mediation Directive's provisions will encourage the use of mediation throughout the European community); *see also* Gordon Blanke, *The Mediation Directive: What Will it Mean for Us?*, 74 ARB. 441, 443 (2008) (positing that the enforceability provisions of the EU Mediation Directive would attract more mediation proceedings and would give rise to the establishment of Europe-wide lists of mediators).

ity by a judge, has the force of an executory judgment.[228] This enforceability makes mediation a more appealing alternative to litigation and arbitration because the effect of a settlement is the same as an award or judgment but can be obtained more quickly and cheaply.[229]

Like previous legislation that applied only to corporate mediation,[230] the recent law provides for evaluative mediation in the event that the facilitative process yields no settlement agreement.[231] If a party rejects the proposal of a mediator without just cause, a judge may later allocate the costs of litigation to it if the civil judgment matches the proposal.[232] This provision

228. *See* Legislative Decree, *supra* note 221 (stating: "Il verbale [sottoscritto delle parti e dal mediatore e omologato del presidente del tribunale] costituisce titolo esecutivo."); *see also* PABLO CORTES, ONLINE DISPUTE RESOLUTION FOR CONSUMERS IN THE EUROPEAN UNION 159, 160 (2010) (affirming that the EU Mediation Directive enables parties to obtain an agreement that will be recognized and enforced throughout the EU with similar status to that of a court judgment); *see also* Giuseppe De Palo & Leonardo D'Urso, *Explosion or Bust? Italy's New Mediation Model Targets Backlogs to 'Eliminate' One Million Disputes Annually*, 28 ALTERNATIVES TO HIGH COST LITIG. 93, 94 (2010) (explaining that a settlement agreement under the EU Mediation Directive has the force of an executory judgment).

229. *See* Giuseppi De Palo & Luigi Cominelli, *Mediation in Italy: Waiting for the Big Bang?*, *in* GLOBAL TRENDS OF MEDIATION 259, 265 (2nd ed. 2006) (noting that the quantitative advantages of mediation are the time and money saved by avoiding litigation); *see also* ARNO LODDER & JOHN ZELEZNIKOW, ENHANCED DISPUTE RESOLUTION THROUGH THE USE OF INFORMATION TECHNOLOGY 29 (2010) (describing how the binding effect of the EU Mediation Directive can bring a cost-effective and quick extrajudicial resolution to disputes through process tailored to the parties' needs); *see also* Hubert André-Dumont, *European Union: The New European Directive on Mediation—Its Impact on Construction Disputes*, 26 INT'L CONSTR. L. REV. 117, 123 (2009) (recognizing that the guarantee of enforceability of mediation agreements can offer valuable advantages over court litigation and arbitration, in terms of speed, costs, efficiency and creativity of resolving disputes).

230. *See* Legislative Decree, *supra* note 221 (stating procedures for mediation in Italian corporate matters); *see also* Francesca Rolla & Daniele La Cognata, *Italy, in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO LITIGATION & DISPUTE RESOLUTION 178, 183 (2010) (remarking that mediation on corporate matters has received an express recognition in Italy through the Legis. Decree 5/2003); *see also* Angelo Anglani, *Ughi e Nunziante,* in GETTING THE DEAL THROUGH, GLOBAL ARBITRATION REVIEW 159, 160 (2009) (informing that Italy's Legislative Decree 5/2003 contains special provisions designed for mediation in corporate matters).

231. *See* Decreto Legislativo 28/2010 of Mar. 4, 2010, art. 14, 53 Gazz. Uff. (Italy), Mar. 5, 2010 (stating: "Quando l'accordo non é raggiunto, il mediatore puo' formulare una proposta di conciliazione."). *See generally* Hubert André-Dumont, *European Union: The New European Directive on Mediation—Its Impact on Construction Disputes*, 26 INT'L CONSTR. L. REV. 117, 123 (2009) (defining, under the context of the EU Mediation Directive, that evaluative mediation is when the mediator is expected to make suggestions and recommendations). *See generally* Giovanni De Berti, *The Growth of Mediation*, INT'L LAW OFFICE NEWSL. (July 20, 2006) (acknowledging that before Legis. Decree 28/2010, Italian mediation took the form of facilitative as opposed to evaluation mediation).

232. *See* Decreto Legislativo, *supra* note 231, at art. 13 (stating: Quando il provvedimento che definisce il giudizio corrisponde interamente al contenuto della proposta, il giudice esclude la ripetizione delle spese sostenute dalla parte vincitrice che ha rifiutato la proposta."); *see also* De Palo & D'Urso, *supra* note 228, at 94–95 (informing that pursuant to Legis. Decree 28/2010, if the parties request the mediator to make a proposal, and if the subsequent civil judgment matches this proposal, the judge excludes the recovery of costs incurred by the winning party that declines the proposal); *see also La Novita Introdotte dal Dlgs 28/2010* (The Innovations Introduced by Legislative Decree No. 28/2010], QUOTIDIANOSANITA (Italy), May 13, 2010, *available at* http://www.quotidianosanita.it/lavoro-e-professioni/articolo.php?approfondimento_id=%20114&&articolo_id=391 (acknowledging that pursuant to Legis. Decree 28/2010 art. 13, when a party rejects the proposed settlement, a judge may exclude the costs of litigation to it if the later civil decision matches the proposal).

ensures that parties, which are forced to mediate, do not just go through mediation without exerting any effort, but rather attempt honestly and sincerely to reach a resolution.[233]

With the very recent approval and publication of the legislative directive 28/2010,[234] mediation in Italy seems on the eve of rapid change and expansion. Indeed, mediation usage will increase in the coming months and years as legislators continue to make it a more effective and secure means to resolve disputes. Although it has not arrived there yet, mediation does seem, with this new legislation, to be becoming more of an alternative and complement to traditional litigation, and its use can only be expected to grow.

Conclusion

Since the Italian civil justice system fails to offer relief to many of its citizens, who are involved in controversies,[235] Italy must accept and advance methods of ADR.[236] The growth of the ADR movement in Italy will benefit not only its civil justice system by reducing its caseload, preserving litigation for matters of superior importance to the state, and answering the calls of Italian citizens for justice,[237] but also its economy by easing the fears of foreign investors

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233. *See* UNION NAZIONALE GIOVANI DOTTORI COMMERCIALISTI, GUIDA COMMENTATA AL DECRETO LEGISLATIVO N.28 22–23 (2010) (discussing the aims of Legis. Decree 28/2010 art. 13, such as parties engaging in honest and sincere mediation); *see also* Andrea Buti, *D. lgs. 28/2010, Art. 13: Mediazione e Spese Legali. Avvocati o Matematici?* DIRITTOMODERNO (ITALY), Mar. 11, 2010, *available at* http://dirittodigitale.com/d-lgs-282010-art-13-mediazione-e-spese-legali-avvocati-o-matematici/ (positing that Legis. Decree 28/2010 art. 13 exposes parties that don't mediate successfully to complex mediation expenses). *See generally* NADJA MARIE ALEXANDER, INTENRATIONAL AND COMPARATIVE MEDIATION: LEGAL PERSPECTIVES 233 (2009) (defining good faith mediation as acting with integrity and honest intention in relation to settlement and its implementation).

234. *See* Decreto Legislativo, *supra* note 231, at art. 13 (implementing the requirements of the EU Mediation Directive, which mandates that Italy must promote mediation in all cross-border disputes involving civil and commercial matters).

235. *See* Giuseppe De Palo, Paola Bernadini & Luigi Cominelli, *Mediation in Italy: the Legislative Debate and the Future,* 6 ADR BULLETIN 51, 51 (2003) (establishing that Italy's slow and cumbersome justice system fails its citizens because litigants planning to appeal can only reasonably expect a final judgment after ten years). *See, e.g.,* Jeffrey Israely, *After a Court Ruling, Berlusconi's Legal Woes Resume*, TIME, Dec. 4, 2009, (reporting that the lawyers of Italian prime minister Silvio Berlusconi have exploited Italy's painfully slow justice system, in which many cases are dismissed because the statute of limitations has ended). *See, e.g., Slow Italian Justice Could Help Ex-Premier,* MSNBC, Mar. 22, 2007, (presenting that Italy's long, complex and inefficient procedures for both civil and penal cases could help Silvio Berlusconi avoid his corruption charges).

236. *See* De Palo, Bernadini & Cominelli, *supra* note 235, at 53 (asserting that education, regulation and practice must be in equilibrium in order to produce a sustainable ADR environment in Italy); *see also* Guiseppe De Palo & Penelope Harley, *Mediation in Italy: Exploring the Contradictions, in* HARV. NEGOT. J. 469, 478–79 (2005) (emphasizing that Italy should follow successful European countries and invest in educational efforts critical to promoting a real culture of mediation); *see also* Hubert André-Dumont, *European Union: The New European Directive on Mediation—Its Impact on Construction Disputes*, 26 INT'L CONSTR. L. REV. 117, 120 (2009) (indicating that pursuant to the EU Mediation Directive, Italy must implement new legislation regulating judicial and/or conventional mediation before May 21, 2011).

237. *See* Giuseppi De Palo & Luigi Cominelli, *Mediation in Italy: Waiting for the Big Bang?*, *in* GLOBAL TRENDS OF MEDIATION 259, 277 (2d. ed. 2006) (arguing that ADR is a valuable instrument to ease the litigation crisis affecting the Italian judicial system); *see also* AMERICAN BAR ASSOCIATION, INTERNATIONAL STOCK PURCHASE ACQUISITIONS 287 (2006) (explaining that ADR provides a quicker, more efficient, and more confidential alternative to ordinary court proceedings in Italy); *see also* De Palo & D'Urso, *supra* note 228, at 93 (informing that Legis. Decree 28/2010 aims to reduce backlogs of civil cases pending in Italy and to produce better, quicker resolutions).

who are currently reluctant to invest in Italy because of the inefficiency of the courts and a lack of protection.[238]

Over the last two decades, lawmakers have been instrumental in dramatically increasing the amount of arbitration and mediation proceedings that annually occur on the peninsula by promoting such practices in statutes.[239] These legislative initiatives have succeeded in spreading ADR practices because they have improved the integrity of such processes while leaving parties with relative freedom to determine their own rules for conducting proceedings.[240] Nonetheless, not all types of ADR have achieved the same level of success. While tens of thousands of mediations are performed annually,[241] less than a thousand arbitrations are conducted a year.[242] Although some of this discrepancy is due to the fact that almost all mediation is conducted for

238. *See* Silvia Pavoni, *Italy: Survival or Siesta?,* BANKER, Aug. 30, 2010, (remarking that the recent measures to speed up settlements of civil cases in Italy will reassure the many potential foreign investors who fear the country's uncertain legal system). *See, e.g.,* Brian McCarthy, *Imprevedibilitá!: An Analysis of Italy's Failure to Create or Maintain a Stable and Efficient Insolvency System,* 25 CONN. J. INT'L L. 153, 154 (2009) (reasoning that the ad hoc nature of recent bankruptcy reforms in Italy, particularly the Marzano Law, has resulted in some investors completely refusing to invest in Italian corporate debt). *See generally* Jo Winterbottom, *Planning a Bailout? Italy Shows the Way*, REUTERS, Sep. 12, 2008, *available at* http://www.reuters.com/article/idUSL348611820080912 (reporting that the international investing community generally did not approve of the recent Italian bankruptcy law and the suspension of antitrust rules).

239. *See* De Palo, Bernadini & Cominelli, *supra* note 235, at 51 (establishing that since 1991, Italian lawmakers have been increasing the amount of mediation proceedings that occur in Italy by implementing mediation laws); *see also* De Palo & Harley, *supra* note 236 (detailing the mediation laws that the Italian Parliament introduced since 1991 to promote mediation proceedings in the country). *See generally,* Charles N. Brower & Jeremy K Sharpe, *The Creeping Codification of Transnational Commercial Law: An Arbitrator's Perspective*, 45 VA. J. INT'L L. 199, 216–17 (2004) (discussing that Italian Code of Civil Procedure Art. 834 promotes arbitration proceedings consistent with international arbitration principles).

240. *See* AMERICAN BAR ASSOCIATION, INTERNATIONAL STOCK PURCHASE ACQUISITIONS 287 (2006) (recognizing that mediation and other ADR procedures have been strongly encouraged by Italian legislation); *see also* De Palo & Cominelli, *supra* note 237, at 277 (presenting that Italian legislation might be the fastest way to expose ADR users to the qualitative benefits of mediation); *see also* Nadja Alexander, *Mediation and the Art of Regulation,* 8 QUEENSLAND U. TECH. L. & JUST. J. 1, 11 (2008) (acknowledging that Italy permitted parties to develop their own self-regulatory schemes in mediation).

241. *See generally* Alvin L. Goodman, *Introduction: Comparative Overview of the Role of Third Party Intervention in Resolving Interests Disputes*, 10 COMP LAB. L. & POL'Y J. 271, 281 (1989) (acknowledging the strength of leveraged mediation in Italy); *see generally* Michelangelo Cicogna & Giovanni De Berti, *Arbitration and Mediation in Italy,* METROPOLITAN CORP. COUNSEL, Aug. 2002, at 26 (discussing the popularity of mediation in Italy); *see generally* Giuseppe De Palo & Leonardo D'Urso, *International ADR: Explosion or Bust? Italy's New Mediation Model Targets Backlogs to 'Eliminate' One Million Disputes, Annually,* 28 CPR INST. DISP. RESOL. 93, 93 (2010) (discussing Italy's reliance on mediations and its hope that they will replace about one million disputes annually).

242. *See generally* Tiziano Treu, *Special Issue: The Role of Neutrals in the Resolution of Shop Floor Disputes: Italy,* 9 COMP. LAB. L. & POL'Y J. 112, 122 (1987) (noting that arbitration is rarely used to solve labor disputes in Italy); *see generally* Renzo Morera, *Arbitration in Europe: Contemporary Issues and New Developments: New Trends of Arbitration in Italy,* 2 CROAT. ARB. Y.B. 47, 47 (1995) (explaining the slow development and problems of arbitration in Italy); *see generally* Shane Spelliscy, Comment, *Burning the Idols of Non-Arbitrability: Arbitrating Administrative Law Disputes with Foreign Investors*, 12 AM. REV. INT'L ARB. 95, 101 (2001) (indicating that arbitration in Italy is limited by its administrative court system).

free,[243] it results mainly from the obligatory nature of mediation for many types of disputes.[244] By making mediation a prerequisite to the pursuit of civil action in many matters, legislators have effectively promoted the use of this procedure.[245] Conversely, arbitration has remained voluntary[246] and the increase in its appeal is not attributable to its mandatory nature[247] but rather to its being a fairly cheap, flexible, rapid, and simple alternative to litigation.[248]

Despite its dramatic rise over the last two decades, the ADR movement has done very little to decrease the number of pending civil suits and has not slowed the commencement of new

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243. *See* Michael Pryles, *Assessing Dispute Resolution Procedures*, 7 AM. REV. INT'L ARB. 267, 279 (1996) (asserting that arbitration is more costly than mediation); *see also* David M. Kono, Comment, *One Trillion Dollars? An Analysis of Y2K Employment Implications for Attorneys*, 1999 BYU L. REV. 1529, 1561–62 (1999) (stating that mediation is inexpensive when compared with arbitration). *See generally* Kenneth P. Kelsey, *Mediation: The Sensible Means for Resolving Contract Disputes*, MEDIATE.COM, http://www.mediate.com/articles/kelsey.cfm (reporting on the nominal cost of mediation).

244. *See Legal Update: Mandatory Mediation—Working Together; With Italy Making Mediation Mandatory Before a Civil or Commercial Dispute Can go to Court, Michael Dawson Looks at Whether the UK will Follow Suit*, POST MAG., May 27, 2010, at 25 (indicating that mediation is mandatory in Italy before civil and commercial disputes may be heard in a court or by a judge); *see also* Sara Carmeli, *Enforcement of Mediation Agreements in Italy*, 3 MEDIATION COMMITTEE NEWSL. (Int'l Bar Ass'n Legal Practice Div.), Dec. 2007, at 23, 23 (discussing how the Italian Parliament sees mandatory mediation as a means to settle different types of disputes). *See generally* Giuseppe De Palo, *Project: Rule of Law: A Transatlantic "ADR Movement"—The Flow of Co-operation Between JAMS and ADR Center srl of Italy*, METROPOLITAN CORP. COUNSEL, Oct. 2000, at 32 (recognizing that growth of mediation in Italy is evidenced by proposed legislation that would make it mandatory).

245. *See Legal Update: Mandatory Mediation—Working Together, supra* note 244 (noting that Italy made it mandatory to mediate a civil dispute before it could go to court); *see also Intricate Work*, LEGAL WEEK, Nov. 5, 2009 (reporting that Italy tries to encourage the use of mediation through its consumer laws); *see also* Giuseppe De Palo, *supra* note 244 (recognizing new legislation that would make mediation mandatory as an attempt to promote mediation in Italy).

246. *See* Christos Ravanides, *Arbitration Clauses in Public Company Charters: An Expansion of the ADR Elysian Fields or a Descent into Hades?*, 18 AM. REV. INT'L ARB. 371, 449 (2007) (noting the voluntary nature of arbitration in Italy). *See generally* IBA Working Party, *Commentary on the New Rules of Evidence in International Commercial Arbitration*, 2 BUS. LAW INT'L 14 (2000), Dec. 2004 (describing international arbitration as an optional method for settling disputes); *see generally* Sergei I. Ruck, *Regional View (II): Developments in Central and Eastern Europe: Arbitration in Belarus*, 4 CROAT. ARB. Y.B. 73, 73 (1997) (recognizing that international arbitration is voluntary).

247. *See* Michelangelo Cicogna & Giovanni De Berti, *Arbitration and Mediation in Italy*, METROPOLITAN CORP. COUNSEL, Aug. 2002, at 26 (acknowledging the growing popularity of arbitration in Italy); *see also* Emanuella Agostinelli, *Italy: Modern Solution*, LEGAL WEEK, June 29, 2006 (discussing Italy's efforts to boost the appeal of arbitration by increasing its flexibility). *See generally* Richard Garnett, *International Arbitration Law: Progress Towards Harmonisation*, 3 MELB. J. INT'L LAW 400 (2002) (noting the growth of international arbitration and its influence on Italian arbitration laws).

248. *See* Erika Van Ausdall, *Confirmation of Arbitral Awards: The Confusion Surrounding Section 9 of the Federal Arbitration Act*, 49 DRAKE L. REV. 41, 41 (2000) (recognizing that the flexibility, cost efficiency, and speed of arbitration makes it an attractive alternative to litigation); *see also* Emanuella Agostinelli, *Italy: Modern Solution*, LEGAL WEEK, June 29, 2006 (asserting that arbitration is cheaper, faster, and more flexible than litigation in Italy); *see also* Andre Maniam, *Court of Appeal Affirms Judicial Philosophy of Minimal Interference*, IBA ARB. & ADR NEWSL., Oct. 2007, at 1 (reporting that arbitration is an efficient and inexpensive substitution for litigation).

ones.[249] Indeed, when compared to the amount of civil trials currently in progress, the number of ADR procedures seems minimal.[250] However, the future of ADR growth in Italy still looks promising and will hopefully eventually allow the civil justice system to function better.

An increased use of arbitration seems unlikely in the near future unless additional legislative reforms come that add confidentiality and disclosure requirements. Indeed, arbitration has appeared stagnant over the last few years with very little rise in activity.[251] Legislators must make proceedings more efficient and secure by making parties feel more comfortable to use arbitration in place of litigation if they wish for the practice to continue to grow.[252]

On the other hand, mediation is on the eve of a rapid expansion. Italian law 69/2009[253] will have a significant impact on the use of mediation by expanding the requirements of the EU Directive on Mediation (2008/52/EC)[254] to not just cross-border proceedings but domestic

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249. *See generally* Giuseppe De Palo, *supra* note 244 (stating that Italy's legal system is overcrowded by civil cases); *see generally* Alessandra Stanley, *Rome Journal; 3-Step Justice System: Conviction, Appeal, Escape*, N.Y. TIMES, May 23, 1998, at 4 (acknowledging the inefficiency of the Italian legal system and its heavy load of cases); *see generally* Tracy Wilkinson, *Court is Adjourned in Italy as Lawyers Go on Strike; The Labor Action, Called to Protest a Proposed Overhaul of Legal Fees, Causes Even More Delays to the Nation's Slow Judicial System*, L.A. TIMES, July 21, 2006, at 8 (reporting that 9 million cases awaited sentencing in 2004 to show the backlog of cases in Italy).

250. *See generally* Tullio Jappelli, Marco Pagano & Magda Bianco, *Courts and Banks: Effects of Judicial Enforcement on Credit Markets*, 37 J. MONEY, CREDIT & BANKING 223, 223 (2005) (indicating that the inefficiency of Italy's judicial system is evidenced by the number of pending civil suits); *see generally* Matthew Hirst, *Alternative Dispute Resolution; Leaning Towards ADR*, POST MAG., June 5, 2003, at 21 (noting that mediation is not a mainstream procedure and is met with resistance); *see generally* Tracy Wilkinson, *supra* note 249 (reporting on the Italian legal system's enormous caseload of 9 million pending cases and 100,000 before the Supreme Court in 2004).

251. *See generally* Leonardo D. Graffi, *Securing Harmonized Effects of Arbitration Agreements Under the New York Convention*, 28 HOUS. J. INT'L L. 107, 134–35 (2006) (asserting that Italian statutes could be problematic to the enforcement of arbitration agreements); *see generally* Edita Culinovic-Herc, *General Issue: Arbitrability of Unfair Competition Disputes*, 3 CROAT. ARB. YEARBOOK 57, 62 (1996) (noting that there is resistance to arbitration); *see generally* John Purcell, *Individual Disputes at the Workplace: Alternative Disputes Resolution*, EUROFOUND, Apr. 28, 2010, http://www.eurofound.europa.eu/eiro/studies/tn0910039s/tn0910039s_3.htm (reporting that arbitration is seen as a last resort in Italy and is rarely used).

252. *See generally* Shane Spelliscy, Comment, *Burning the Idols of Non-Arbitrability: Arbitrating Administrative Law Disputes with Foreign Investors*, 12 AM. REV. INT'L ARB. 95, 101 (2001) (referring to Italy as an example of a country with national laws that hinder the use of arbitration); *see generally* Emanuella Agostinelli, *Italy: Modern Solution*, LEGAL WEEK, June 29, 2006 (suggesting that reform to arbitration in Italy can make it more appealing and stronger); *see generally* Joe Hutnyan, *Hearing Inspires Familiar and Disparate Assessments of Securities Arbitration*, SECURITIES WEEK, Mar. 21, 2005, at 7 (reporting on the efficiency and cost-effectiveness of arbitration as opposed to litigation).

253. *See* CODICE DI PROCEDURA CIVILE, L. N. 69/2009 (2009) (Italy) (setting forth statutory mediation guidelines in accordance with the EU Mediation Directive (2008/52/EC) and promoting the use of ADR).

254. *See* Directive 2008/52/EC of the European Parliament and of the Council (2008) (establishing guidelines for cross-border and internal mediation processes of Member States).

ones as well.[255] Moreover, legislative directive 28/2010 will increase the appeal of mediation because it not only makes mediation mandatory for all civil and commercial matters but also contains provisions for flexible (non-formalistic) procedures, enforcement of settlement agreements, confidentiality of proceedings, impartiality of mediators, and evaluative processes when facilitative ones fail.[256] Provisions of this nature already applied to corporate mediation and were the principle reasons that use of corporate mediation had grown in recent years.[257] Undoubtedly, the application of similar provisions to all types of mediation will further facilitate the spread and use of these proceedings.

The new Italian mediation law[258] will also hopefully increase the number of international ADR proceedings that occur in Italy. Currently, only a handful of ADR centers conduct inter-

255. *See* Council Directive 2008/52/EC, 2008 O.J. (L136/3-8) 1 (EC), (declaring that "anyone" can access mediation for the settlement of civil and commercial litigation alleging rights under the provisions of the decree); *see also* ADR CENTER (ROME ITALY), THE COST OF NON-ADR-SURVEYING AND SHOWING THE ACTUAL COSTS OF INTRA-COMMUNITY COMMERCIAL LITIGATION 45 (2010) (describing the groundbreaking nature of the European Union directive and observing that many nations have not only adopted the principles of the directive but have also applied them domestically); *see also* John Sturrock, *The Role of Mediation in a Modern Civil Justice System*, MEDIATE.COM (Sept. 2010), http://www.mediate.com/articles/sturrockJ14.cfm (discussing the mandate in Italy that lawyers have to inform their clients about mediation and the mandatory mediation of commonly domestic issues such as labor disputes, divorces and various agricultural matters).

256. *See* Council Directive 2008/52/EC, 2008 O.J. (L136/3-8) 1, 4, 6, 7, 11 (EC) (mandating that mediation among member states must abide by rules of engagement, including procedural as well as substantive guidelines); *see also* Louise Crowley, *Collaborative Law: The Future Cornerstone of the Resolution Process*, 9 JUD. STUD. INST. J. 19, 26–28 (2009) (evaluating, in detail, the particular elements of the 2008/52/EC directive and emphasizing its focus on cross-border mediation and the advantages of negotiation-based approaches to dispute resolution); *see also* John Toulmin, *Cross-Border Mediation and Civil Proceedings in National Courts*, ACAD. EUR. L. F., 558–63 (2010) (analyzing the articles of Directive 2008/52/EC and proposing that rather than common law development of mediation in the United Kingdom, a short Act of Parliament should be set out to coincide with the Directive).

257. *See* David Lipsky & Ronald Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133, 138 (1998) (observing the popularity of ADR in American businesses and reasons for such popularity, including the ad hoc nature of corporate decisions, predictability of arbitration or mediation clauses in contracts, warranties, and other agreements, and finally, recent pushes by courts to order mediation or arbitration in lieu of lengthy litigation); *see also* DAVID LIPSKY & RONALD SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 15–19, (Cornell & P.E.R.C. Inst. Conflict Resol. 1998) (assessing the reasons that corporations like to use ADR in their dispute resolutions including cost-cutting, ease of use, and control of the negotiations process); *see also* ADR CENTER (ROME, ITALY), THE COST OF NON-ADR-SURVEYING AND SHOWING THE ACTUAL COSTS OF INTRA-COMMUNITY COMMERCIAL LITIGATION 39–40 (2010) (describing a survey of corporations on what they found attractive in the ADR process as well as some of the detractors to the process).

258. *See* Italian Parliament Act No. 69, Gazz. Uff., Legisl. Ital. II, Decree-Law, n. 69 (June 18, 2009), *available at* http://www.parlamento.it/parlam/leggi/09069l.htm (conferring power to the Government to issue legislative decrees in the field of mediation and resolution in civil and commercial matters and outlining several aspects of mediation).

national proceedings.[259] Of those centers, the Chamber of Arbitration of Milan is the only one to handle a significant number of cases annually.[260] The new law should increase the appeal to foreigners of Italy as a seat for mediation by adding more efficiency and integrity to the process.[261] Because of this increased attractiveness, the Chamber of Arbitration of Milan, in particular, should be able to attract more business from abroad and promote itself as an ideal place for conducting ADR proceedings involving parties of diverse nationalities from all over Europe, the Mediterranean, the Middle East, and North Africa.[262] Such parties would be further

259. *See* ADR CENTER (ROME ITALY), THE COST OF NON-ADR- SURVEYING AND SHOWING THE ACTUAL COSTS OF INTRA-COMMUNITY COMMERCIAL LITIGATION 56 (2010) (noting that ADR, mediation in particular, has been underutilized and misunderstood in the cross-border commercial context); *see also* Reinier Lock, *Alternative Dispute Resolution in Energy Disputes: A New Formula for a New Era?*, 20 ELEC. J. 78, 81 (2007) (observing that ADR is currently "grossly" underutilized in international energy industries and that its enormous benefits are not fully recognized). *See generally* Interview with Bronwyn Lincoln, Partner at Freehills, LAW. WEEKLY (Sept. 3, 2007), http://www.lawyersweekly.com.au/blogs/matters_briefs/archive/2007/09/03/freehills-partner-bronwyn-linco ln-speaks-on-the-record.aspx (asserting that mediation is generally under-used in cross-border disputes and notes that mediation will find greater use if issues of enforceability of settlement agreements are better addressed).

260. *See* CHAMBER OF ARBITRATION OF MILAN, VINCENZA BONSIGNORE, FIRST REPORT ON THE PREVALENCE OF ALTERNATIVE JUSTICE IN ITALY 1 (2008) (observing that the Chamber of Arbitration of Milan in Italy during 2005–6 fielded 34,603 applications and over 5,000 cases); *see also* Stefano Azzali, *The Mediation Service of the Milan Chamber of Arbitration*, 3 TIJDSHRIFT VOOR MEDIATION 1, 5 (Boom Juridische Uitgevers, July 17, 2003) (Neth.), *available at* http://www.camera-arbitrale.it/Documenti/azzali_caruso_03_mediation.pdf (illustrating the widespread use of ADR through the Milan Chamber of Arbitration via statistical data); *see also* Chamber of Arbitration of Milan, *2009 Arbitration Facts and Figures*, http://www.camera-arbitrale.it/Documenti/arbitration_stat_2009-en.pdf (illustrating the efficacy of the Chamber of Arbitration of Milan in resolving disputes through ADR).

261. *See* Nancy Rogers & Craig McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. DISP. RESOL. 831, 834–39 (1998) (discussing the attraction of ADR in terms of expediting settlement for earlier settlements, increased participation by the real parties interest in resolution, and encouragement to open channels for communication); *see also* Michael Hoellering, *Alternative Dispute Resolution and International Trade*, 14 N.Y.U. REV. L. & SOC. CHANGE 785, 785 (1986) (noting that because of the burgeoning complexity and volume of modern international trade and the opening of international dispute and litigation, ADR is essential to resolving international disputes and facilitating the growth of world trade); *see also* Craig McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. DISP. RESOL. 1, 12–13 (1998) (discussing the costs of litigation and the importance of finding the proper balance of ADR use and policy considerations).

262. *See* Nancy Rogers & Craig McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. DISP. RESOL. 831, 834–39 (1998) (discussing how ADR can increase efficiency to the dispute resolution process and the availability of unrelated mediators for potentially gray issues); *see also* Michael Hoellering, *Alternative Dispute Resolution and International Trade*, 14 N.Y.U. REV. L. & SOC. CHANGE 785, 785 (1986) (asserting that ADR mechanisms will aid in the spread of world trade by creating a mode of dispute resolution that facilitates international accord and communication); *see also* Chamber of Arbitration of Milan, *International Projects*, http://www.camera-arbitrale.it/consulta.php?sez_id=18&lng_id=14 (describing the products that the Chamber of Arbitration of Milan develops to address the needs of international economic operators in Italy, namely in relation to the Mediterranean and China).

attracted to Milan because it is central to these locations and thus, travel to and from proceedings would not greatly burden one party over the other.[263]

However, the future has not yet arrived and despite the progress of the ADR movement in Italy, neither arbitration nor mediation has yet become a true alternative to traditional litigation. In order to increase the use of ADR to a level that will compete with traditional justice and make the latter more efficient, lawmakers will have to make many more legislative reforms. Moreover, the attitudes of Italian judges, attorneys, and people about ADR must change. Judges must acknowledge that ADR does not minimize their role in the traditional justice system because alternative justice practices only have force when courts certify them.[264] Attorneys must realize that ADR does not marginalize them either, but instead gives them more efficient ways to provide relief to their clients and solve their problems.[265] Lastly, the Italian populace must learn more about ADR methods so that they feel more secure about the reliability of such processes and view litigation as only a last resort when these fail.[266] These attitudes are chang-

263. *See* Susan Exon, *New Shoe is Needed to Walk Through Cyberspace Jurisdiction*, 11 ALB. L. J. SCI. & TECH. 1, 53 (2000) (assessing the inconvenience of filing papers through long distances and the benefits of easing such burden via modes of communication through online ADR means). *See generally* Emil Petrossian, *Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England*, 40 LOY. L.A. L. REV. 1257, 1258 (2007) (noting the effects of globalization and the proliferation of technological advances on international dispute resolution and the need to "forum shop" to ease the burden of transactional litigation); *see generally* Map of Mediterranean, http://www.worldatlas.com/aatlas/infopage/medsea.htm (portraying the centrality of Italy in relation to the Mediterranean Region, Middle East, North Africa, and the rest of Europe).

264. *See* Sara Carmeli, *Enforcement of Mediation Agreements in Italy*, 3 MEDIATION COMMITTEE NEWSL. (Int'l Bar Ass'n Legal Practice Div.), Dec. 2007, at 23, 23 (describing the Italian Code of Civil Procedures and noting that if mediation has a positive result, the justice of the peace has to write a *process verbal* that contains the agreement of the parties in order for it to carry authority). *See generally* Robert Peckman, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 270 (1984) (describing the necessity for judges, in an arbitration context, to act as a case manager, facilitating, and sometimes pushing greater expediency and communication); *see generally* Patrick Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators*, 73 NEB. L. REV. 712, 734, 744–45 (discussing, in the American legal system context, the importance of the Magistrate in an ADR context and assessing the characteristics that make them valuable in the process).

265. *See* Jethro Lieberman & James Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 437–39 (1986) (asserting that the use of ADR can be a lot more expedient and efficient than adjudication by courts especially in the multi-party setting such as mass tort claims); *see also* Robert Patterson, *Dispute Resolution in a World of Alternatives*, 37 CATH. U. L. REV. 591, 599–601 (1987) (focusing on the process of ADR and contrasting it with the less expedient process of traditional litigation); *see also* Craig McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. DISP. RESOL. 1, 12–13 (1998) (assessing the benefits of ADR and the greater efficiency and attractiveness of earlier settlements rather than drawn-out litigation).

266. *See* Thomas Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD., 843, 854–56 (2004) (surveying judges and lawyers and concluding that judges generally believe that ADR has been effective); *see also* Antony Dutton, *Mediation as a Cost-Containment Device in the English Courts: Litigation Becomes the 'Last Resort' in Dispute Resolution*, 2 MEDIATION COMMITTEE NEWSL. (Int'l Bar Ass'n Legal Practice Div.), Sept. 2006, at 32, 32 (discussing a 2006 revision of England's Civil Procedure Rules that outlines certain steps that parties should take pre-action, and that if such protocol is not followed, the court must regard such conduct when determining costs); *see also* Joe Tirado & Amanda Greenwood, *Litigation as Last Resort: Enforcing Mediated Settlement Agreements in England—Where to From Here?*, 3 MEDIATION COMMITTEE NEWSL. (Int'l Bar Ass'n Legal Practice Div.), Dec. 2007, at 18, 18 (discussing England's Civil Procedure Rules, which portray judicial support for ADR and the concept of litigation as a "last resort" through the publication of nine pre-action protocols aimed at encouraging early settlement before court proceedings).

ing[267] but not at a fast enough pace to know when arbitration and mediation will have a significant effect on making the traditional justice system more efficient.

In conclusion, the future of the ADR movement looks very promising mainly because of the expanded use of mediation that will come now that the Italian Council of Ministers has approved legislative directive 28/2010[268] but more still has to be done to promote arbitration and make ADR methods true substitutes for traditional litigation. While, mediation can be expected to prosper over the coming years, arbitration will likely remain stagnant, unless legislators institute further reforms that make it a more appealing and effective procedure.

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267. *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1366–67 (1985) (describing how ADR has broad judicial support and is well-suited for certain kinds of disputes, including those with multi-party litigants and actions among those with long-standing relationships); *see also* Thomas Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. EMPIRICAL LEGAL STUD., 843, 845–50 (2004) (observing the spread of ADR centers throughout the United States, namely the burgeoning ADR regimes in Florida and Illinois); *see also* Peter Roorda, *The Internationalization of the Practice of Law*, 28 WAKE FOREST L. REV. 141, 158–59 (1993) (noting that international arbitration, along with complex international litigation, are growing practice areas in the world).

268. *See* Council Directive 2008/52/EC, 2008 O.J. (L136/3-8) 1, 4, 6, 7, 11 (EC) (binding member nations of the European Union to abide by standard rules of engagement in mediation contexts).

Thailand's Ineffectual Intellectual Property Regime: A Trial and Error Approach to Encouraging Foreign Direct Investment Technology Spillover

Nan Sze Ling*

Introduction

Many studies have explored the effectiveness of intellectual property (IP) laws on economic development.[1] While none have stated confidently that there is a direct correlation between the two factors, they have concluded that such an analysis is complex and involves the consideration of multiple factors.[2]

1. *See* Nagesh Kumar, *Intellectual Property Rights, Technology and Economic Development: Experiences of Asian Countries*, 38 ECON. POLITICAL WEEKLY 209, 210–12 (2003) (analyzing the effect of intellectual property protection promulgated by the TRIPS Agreement and the resultant deleterious, stifling impact on technological activity in developing countries); *see also* Ning Lizhi, *Law-Economics Analysis for the Restriction of Intellectual Property Rights*, 2 CAN. SOC. SCI. 1, 5–8 (2006) (assessing the need to apply intellectual property law to economic analysis and the further importance of applying intrinsic and extrinsic balancing mechanisms as well as economic theories in order to guarantee effective liquidity of information resources); *see also* Chenxi Jiao, *Note: The Negative Effect of Pharmaceutical Patents on South African Industry*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 655, 669–83 (2007) (arguing that although intellectual property protections, especially in locations such as Africa, may ostensibly lead to industrial growth, such protections vastly favor developed economies and often effectively choke the growth of industrial regimes in developing countries in their "formative years").

2. *See* Keith E. Maskus, *Intellectual Property Rights and Economic Development*, 32 CASE W. RES. J. INT'L L. 471, 472–76 (describing the complexities of analyzing the overall impact of intellectual property rights on economic growth and the need for analysis to begin with particularized observation of each subject economy). *See generally* Calestous Juma, *Intellectual Property Rights and Globalization: Implications for Developing Countries; Technology and Innovation Discussion*, Paper No. 4, CTR. INT'L DEV., Harv. Univ., at 5–13, *available at* http://www.cid.harvard.edu/archive/biotech/papers/discuss4.pdf (illustrating the complexities of applying intellectual property rights laws to developing countries contrasted with the capabilities of developed countries to incorporate such laws and addressing national implementation of the TRIPS agreement, technological development and other issues).

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However, as developed countries' competitive advantage in the international forum has gradually shifted to the high technology sector,[3] the importance of IP enforcement has definitively climbed up the foreign investors' list of priorities in their decision to invest in a developing country.[4] The international community's symbolic establishment of the TRIPS Agreement[5] and the Special 301 Watchlist is evidence of the increased awareness of the importance of IP laws in economic development.[6] These actions in the international forum were created to show

3. *See* Cortney M. Arnold, *Protecting Intellectual Property in the Developing World: Next Stop—Thailand*, 2006 DUKE L. & TECH. REV. 10, ¶ 4 (2006) (observing that developed countries found a comparative advantage in world economics in high-tech goods in light of the global equalizing of the manufactured goods market); *see also* Meghnad Desai et al., *Measuring the Technology Achievement of Nations and the Capacity to Participate in the Network Age*, 3 J. HUMAN DEV. 95, 112–14 (assessing the Technological Achievement Index (TAI), a composite measure of technological progress which ranks countries on a comparative global scale, and observing the global patterns toward high technological development in many developed countries including Brazil, Mexico, and India); *see also* Rao P.M., *Sustaining Competitive Advantage in a High-Technology Environment: A Strategic Marketing Perspective*, ADVANCES IN COMPETITIVENESS RESEARCH, Jan. 1, 2005, at 1–2 (exploring the recent trend toward a new economy of intangible capital and the importance of adaptability and management of new trends in maintaining competition, especially in the field of information and communication technology).

4. *See* Arnold, *supra* note 3, ¶ 4 (observing that developed countries have an interest in strict Intellectual Property Rights (IPR) regulation to prevent piracy and to protect global high-technological competition); *see also* GLOBAL ECONOMIC PROSPECTS: TECHNOLOGY DIFFUSION IN THE DEVELOPING WORLD, WORLD BANK PUBL'N 115–16 (2008) (discussing the recent dramatic increase in Foreign Direct Investments (FDIs) into developing countries and observing that while countries that have relatively well-educated populations and strong institutional infrastructures reap the greatest benefits, those low-income countries with weak infrastructures tend to benefit least from such arrangements). *See generally* Abenaa A. Oti-Prempeh, U.S. Foreign Direct Investment in Developing Countries: A Case Study of Malaysia, Mexico and South Africa 2–4 (2003) (unpublished L.L.M. thesis, University of Georgia School of Law), *available at* http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1039&context=stu_llm (observing the upsurge in FDIs in developing countries, such as South Africa, Malaysia and Mexico and critically analyzing the potential risks for developing countries such as manipulation or abuse by the investing nations).

5. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 1197 (1994) (binding the signatories to an agreement to enforce Intellectual Property Rights and ensuring members, including developing nations, the protection of public health, nutrition, and socio-economic and technological development).

6. *See* Carolyn Deere, THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES, 9–10 (2009) (analyzing the purpose of TRIPS, to strengthen IP standards by establishing a universal, comprehensive and legally binding set of standards, in the context of its variegated implementation); *see also* Robert M. Sherwood, *The TRIPS Agreement: Implications for Developing Countries*, 37 INTELL. PROP. L. REV. 491, 493–95 (1997) (arguing that aside from the strong push toward private investment in high level technology might be a major characteristic of TRIPS, the effect of TRIPS actually benefits developing countries in stimulating particular kinds of economic growth and development); *see also* Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, *in* INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPING IN A TRIPS PLUS ERA 173, 183–85 (2007) (examining the relationship between intellectual property rights and economic development through a case study that observed the intricacies of Chinese development in the wake of Chinese expansion of intellectual property protections).

developing countries the importance of instituting a working IP regime that caters to foreign investors.[7]

As a result of these international efforts, many questions have arisen with regard to how developing countries have fared in their efforts to conform to international standards. Like many other developing countries, Thailand has a history of creating an atmosphere that condones piracy and counterfeiting.[8] Thailand should be of particular interest to many resource-scarce, small, developing countries seeking to gain a competitive edge in the international market because it is at the cusp of economic development[9] and is in a position to see the effects of recent legal reform favorable toward foreign investors.[10] Therefore, it would serve as an important model to those countries trying to alter their infrastructure from one that is reliant on foreign investment to one that is self-sustaining by way of foreign technology spillover.[11]

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7. *See* Arnold, *supra* note 3, ¶¶ 6–8 (observing the United States' IPR regime through "Special 301" and its effect on pushing developing countries to enter into "bilateral" IPR agreements); *See also* J.H. Reichman & David Lange, *Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions*, 9 DUKE J. COMP. & INT'L L. 11, 13–14 (1999) (observing the zeal with which developed countries have enlisted into the TRIPS Agreement with hopes that developing countries would fall in line); *see also* Emmanuel Hassan et al., *Intellectual Property and Developing Countries: A Review of the Literature*, RAND Europe 2010, at 5–9 (analyzing the effects of stronger IPR regimes through the TRIPS agreement and the greater potential for FDIs they afford).

8. *See* Arnold, *supra* note 3, ¶ 2 (naming Thailand as a source of pirated and counterfeit goods); *see also* S. Marlee Rust, *US-Thai Relations During the 1980s: The Issue of Intellectual Property Rights*, 3 U.S. A.F.A. J. LEG. STUD. 161, 161, 163 (1992) (recognizing piracy and counterfeiting in Thailand as creating fear in businesses and being reflective of failing protections of intellectual property). *See generally* Diego Valderrama, *Can International Patent Protection Help a Developing Country Grow?*, FRBSF Economic Letter (Fed. Reserve Bank of S.F., San Francisco, C.A.), May 14, 2004, at 1(3) (discussing the protection of intellectual property rights internationally as an area of concern and how developing countries have supported such protection).

9. *See* J. Davidson Frame, *National Commitment to Intellectual Property Protection: An Empirical Investigation*, 2 J. L. & TECH. 212–15 (1987) (showing that Thailand is a country progressing economically). *See generally* Arthur J. Gemmell, *Contemporary Issues on Public International and Comparative Law: Essays in Honor of Professor Dr. Christian Nwachukwu Okeke*, 15 ANN. SURV. INT'L & COMP. L. 153, 163 (2009) (book review) (discussing what is necessary for the continued development of Thailand's economy); *see generally Global Survey Finds Little Optimism in Thai Firms*, NATION (Thailand), Aug. 16, 2006 (recognizing that Thailand's economy is developing).

10. *See* Arnold, *supra* note 3, ¶¶ 14, 35 (describing how reform and enforcement of laws regulating intellectual property rights will be appealing to foreign investors); *see also* Jiwamol Kanoksilp, *Law Changes Stressed amid Globalisation*, EMERGING MARKETS DATAFILE, Mar. 5, 1999 (noting that foreign investors will be drawn to Thailand if it continues toward legal reform); s*ee also* Andrea D. Roller, Note, *Thailand's Banking Crisis and Subsequent Reform: Could Thailand Benefit from an International Standard?*, 24 SUFFOLK TRANSNAT'L L.REV. 411, 431–32 (2001) (discussing Thailand's efforts to attract foreign investors through legal reform in relation to their ability to own majority positions in Thai finance companies and commercial banks).

11. *See* Peter Brimble & Richard F. Doner, *University-Industry Linkages and Economic Development: The Case of Thailand*, 35 WORLD DEV. 6, 1021, 1035 (2007).

I. Thailand: Target for Foreign Direct Investment

Thailand, which has been well on its way to becoming a newly industrialized country,[12] has undergone a series of structural and economic changes which became statistically evident in the early 1980s.[13] Thailand has experienced consistent economic success, with its annual gross domestic product (GDP) growth averaging at a rate of 8% per capita from 1960 to 1996.[14] Its economic success even continued through the mid-1980s worldwide recession.[15] This initial rapid growth and development was largely owed to the country's transition from a primarily agrarian society that was based on import substitution policies to an industrial export-oriented economy.[16] Foreign direct investment (FDI) has played a key role in driving this economic shift

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12. *See* Howard A. Kwon, *Patent Protection and Technology Transfer in the Developing World: The Thailand Experience*, 28 GEO. WASH. J. INT'L L. & ECON. 567, 577 (1995) (indicating that Thailand is close to becoming a newly industrialized country); *see also* Ben Barber, *Thailand Looking to Become Asia's 5th Tiger*, GLOBE AND MAIL (Canada), Jan. 3, 1989 (asserting that Thailand is likely to become a newly industrialized country as evidenced by the number of factories opening each year). *See generally* Robin Wright, *Global Changes Affecting Children; U.N. Report Says Progress Tempers Grim Outlook in Many Nations*, DALLAS MORNING NEWS, Jan. 13, 1994, at 31A (recognizing Thailand's efforts to become a newly industrialized country).

13. *See* Mingsarn Kaosa-ard, *Economic Development and Institutional Failures in Thailand*, 13 TDRI QUARTERLY REVIEW 3 (1998), *available at* http://www.tdri.or.th/library/quarterly/text/m98_1.htm.

14. *See* Peter Brimble, *Foreign Direct Investment: Performance and Attraction*, BROOKER GROUP PLC. 1, 7 (2002) (indicating that from 1960 to 1996 Thailand had a successful economic growth rate of about 8% per year); *see also* Katharine West, *Britain in the Commonwealth*, EUROPE INTELLIGENCE WIRE, Dec. 1, 1995 (forecasting Thailand will maintain its economic progress and development). *See generally Foresters Urged to Be Creative During Asian Downturn*, DOMINION (Wellington), Feb. 10, 1998, at 16 (showing that from 1980 to 1996 Thailand had a gross domestic product growth average of close to 8%).

15. *See* Brimble, *supra* note 14, at 7 (describing how the economy grew at "double-digit rates" between 1988 and 1990 and over 8% from 1991 to 1995 despite an overall declining global atmosphere); *see also* Peter Janssen, *Asia Pacific Report: Thailand Becoming an Economic Dynamo*, GLOBE AND MAIL (Canada), Sept. 18, 1987 (acknowledging that Thailand's economic success followed a recession from 1983 to 1985). *See generally* Bruce Ledewitz, *The Promise of Democracy: "The Future of Freedom: Illiberal Democracy at Home and Abroad," by Fareed Zakaria (book review),* 32 CAP. U. L. REV. 407, 431 (2003) (naming Thailand as a country that escaped poverty from 1980 to 2000); *see generally* Julian M. Weiss, *Barriers Hinder Asean Growth*, JOURNAL OF COMMERCE, Nov. 5, 1987, at 8A (reporting on Thailand's success while the 1980s recession severely impacted the global economy); *see generally* Bill Barnes, *Thailand's Road to Conflict*, SOUTH CHINA MORNING POST, May 23, 1993, at 6 (stating that some of the largest economic growth in the 1980s was experienced by Thailand).

16. *See* Pasuk Phongpaichit & Chris Baker, *Chao Sua, Chao Pho, Chao Thi: Lords of Thailand's Transition*, *in* MONEY & POWER IN PROVINCIAL THAILAND 30, 30 (Ruth McVey ed., 2000) (claiming that in a span of 20 years, Thailand transitioned from a rural to an industrial economy); *see also* Kwon, *supra* note 12, at 577 (positing that Thailand's impressive record of economic growth is due to the vitality of its manufacturing and service sectors); *see also* Scott R. Christensen & Ammar Siamwalla, *Muddling Toward a Miracle: Thailand and East Asian Growth,* 9 TRDI Q. REV. 13, 18 (1994), *available at* http://www.tdri.or.th/library/quarterly/text/eastasia.htm (noting that at the core of Thailand's economy are commercial banks that have facilitated industrial investments).

by importing not only capital, but also technology to enhance production capabilities.[17] In short, FDI is the "flow of people, capital, and technology from one source country to a destination country."[18]

Several political and economic factors have contributed to the changing landscape of Thailand's economy. Political pressure to strengthen infrastructure at the close of the Second World War[19] and popular demand to close the income gap between the urban and agrarian regions jump-started the effort to develop the economy.[20] As a result, the National Economic and Social Development Board created the National Economic and Social Development Plans (NESD Plans) to express and implement its goals of "long-range public investment and devel-

17. *See* Peter Brimble, *Foreign Direct Investment, Technology and Competitiveness in Thailand, in* COMPETITIVENESS, FDI AND TECHNOLOGICAL ACTIVITY IN EAST ASIA 334, 334 (Sanjaya Lall & Shujiro Urata eds., 2003) (exploring the links between foreign direct investment and technological development within Thailand); *see also* ARCHANUN KOHPAIBOON, MULTINATIONAL ENTERPRISES AND INDUSTRIAL TRANSFORMATION: EVIDENCE FROM THAILAND 129 (2006) (examining the foreign-direct-investment-growth nexus in the Thai manufacturing sector and presenting key inferences and policy implications); *see also* JIANG XIAJUAN, FDI IN CHINA: CONTRIBUTIONS TO GROWTH, RESTRUCTURING AND COMPETITIVENESS IN CHINA IN THE 21ST CENTURY 52 (2004) (noting that the flow of talented people between foreign-invested enterprises and Thai enterprises is a major channel for the diffusion of technology from transnational corporations); *see also* Keith E. Maskus, *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer*, 9 DUKE J. COMP. & INT'L L. 109, 117, 146 (1998) (positing that FDI inflows to Thailand brought technology that spurred productivity and the economy).

18. *See* Robert Bird & Daniel R. Cahoy, *The Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargaining Approach*, 45 AM. BUS. L.J. 283, 295 (2008).

19. *See* Thamrong Prempridi et al., *Thailand*, *in* TECHNOLOGICAL INDEPENDENCE: THE ASIAN EXPERIENCE ch. 2 (Saneh Chamarik & Susantha Goonatilake eds., 1994), *available at* http://www.unu.edu/unupress/unupbooks/uu04te/uu04te0h.htm#4.thailand (claiming how political pressure after World War II influenced the National Economic and Social Development Plans); *see also* THAI CAPITAL AFTER THE 1997 CRISIS 2–3 (Pasuk Phongpaichit & Chris Baker eds., 2008) (presenting a general sketch of Thai corporate history from the Second World War through the 1997 crisis to the recovery), *available at* http://pioneer.netserv.chula.ac.th/~ppasuk; *see also* Somchai Jitsuchon, *Sources and Pro-Poorness of Thailand's Economic Growth*, 24 THAMMASAT ECON. J. 75, 76–77 (2006) (describing the political pressure from Thailand's military government and the World Bank after World War II that contributed to Thailand's economic growth). *See generally* PETER G. WARR & BHANUPONG NIDHIPRABHA, THAILAND'S MACROECONOMIC MIRACLE: STABLE ADJUSTMENT AND SUSTAINED GROWTH 13 (1996) (noting the influence of a World Bank advisory mission in 1959 on Thailand's conservative military-controlled government to change the economic policy).

20. *See* Prempridi et al., *supra* note 19, at ch. 2 (explaining how the demand for elimination of income inequality between urban and rural Thai people influenced the National Economic and Social Development Plans); *see also* DAVID M. POTTER, JAPAN'S FOREIGN AID TO THAILAND AND THE PHILIPPINES 42 (1996) (noting that in 1960, Thailand's government desired economic decentralization to develop its provinces). *See generally* HAROLD E. SMITH, GAYLA S. NIEMINEN & MAY KYI WIN, HISTORICAL DICTIONARY OF THAILAND 110 (2d. ed., 2005) (defining the mission and vision of Thailand's National Economic and Social Development Five-Year Plans to improve infrastructure and social conditions).

opment strategies."[21] The first four NESD Plans, which were issued between 1961 and 1981,[22] set the path for economic growth by emphasizing the need to improve the quality, efficiency, and productivity of their industries.[23] The plans also resulted in an improved transportation system and an increased number of educated citizens.[24]

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21. *See* MATTHEW CLARKE & SARDAR M.N. ISLAM, ECONOMIC GROWTH & SOCIAL WELFARE: OPERATIONALIZING NORMATIVE SOCIAL CHOICE THEORY 221 (2004) (recognizing the responsibilities and initiatives of Thailand's National Economic and Social Development Board); *see also* CHRIS DIXON, THE THAI ECONOMY: UNEVEN DEVELOPMENT AND INTERNATIONALISATION 79 (1999) (discussing the National Economic and Social Development Board's role in establishing economic development in Thailand); *see also* TIMOTHY D. HOARE, THAILAND: A GLOBAL STUDIES HANDBOOK 66–67 (2004) (noting the World Bank's influence in creating the National Economic and Social Development Board to draw up plans for Thailand's development into a global economy).

22. *See* WILLIAM A. CALLAHAN, CULTURAL GOVERNANCE AND RESISTANCE IN PACIFIC ASIA 57 (2006) (noting that since 1961, the National Economic and Social Development Plans dramatically changed Thailand's global political-economy); *see also* Amornsak Kitthananan, *Developmental States and Global Neoliberalism*, *in* GOVERNANCE, GLOBALIZATION AND PUBLIC POLICY 77, 91 (Patricia Kennett ed., 2008) (claiming that the first four National Economic and Social Development Plans presented Thailand's import-substitution strategy from 1961 to 1981); *see also* Harmen Vebruggen, *Gains from Export-Oriented Industrialization—With Special Reference to South-East Asia*, *in* EXPORT-ORIENTED INDUSTRIALIZATION IN DEVELOPING COUNTRIES 179, 297–98 (Hans Linnemann ed., 1987) (differentiating the economic strategies of the First and Second National Economic and Social Development Plans from the Third and Fourth National Economic and Social Development Plans).

23. *See* JASON P. ABBOTT, DEVELOPMENT AND DEPENDENCY IN SOUTHEAST ASIA: THE CASE OF THE AUTOMOTIVE INDUSTRY 105 (2003) (discussing Thailand's aims to stimulate industrialization through the National Economic and Social Development Plans); *see also* Jonathan E. Leightner & Ila M. Semnick Alam, *Financial Crisis Hypotheses and the Productivity of Thailand's Financial Institutions*, *in* PRODUCTIVITY AND ECONOMIC PERFORMANCE IN THE ASIA-PACIFIC REGION 410, 410–28 (Tsu-Tan Fu, Cliff J. Huang & C.A. Knox Lovell eds., 2002) (describing how Thailand's industrialization policy appeared in the National Economic and Social Development Plans); *see also* Ukrist Pathmanand, *The Resurgence of US Government Influence on Thailand's Economy and Southeast Asia Policy*, *in* AFTER THE CRISIS: HEGEMONY, TECHNOCRACY AND GOVERNANCE IN SOUTHEAST ASIA 69, 72 (Takashi Shiraishi & Patricio N. Abinales eds., 2005) (noting that a long-term target of Thailand's National Economic and Social Development Plans is protecting local industries and facilitating basic infrastructure); *see also* Kwon, *supra* note 12, at 578 (positing that the National Economic and Social Development Plans from 1985 to 1995 focused on the improvement of quality, efficiency, and productivity of Thailand's industries).

24. *See Financing Higher Education in Thailand*, *in* FINANCING HIGHER EDUCATION IN A GLOBAL MARKET 301, 309 (Steve O. Michael & Mark A. Kretovic eds., 2005) (acknowledging that the National Economic and Social Development Plans helped develop higher education in Thailand); *see also* Kwanchewan Buadaeng, *Ethnic Identities of the Karen Peoples in Burma and Thailand*, *in* IDENTITY MATTERS: ETHNIC AND SECTARIAN CONFLICT 73, 83 (James L. Peacock, Patricia M. Thornton & Patrick B. Inman eds., 2007) (recognizing that the first National Economic and Social Development Plan built infrastructure that improved transportation in Thailand); *see also* U.N. Educ. Sci. & Cultural Org. [UNESCO], Bangkok: UNESCO Principal Regional Office for Asia and the Pacific, *Planning and Sector Analysis Unit: Girls' and Women's Education: Policies and Implementation Mechanisms; Synthesis of Five Case Studies: India, Indonesia, Laos, Nepal, Thailand*, at 3 (1998) (*prepared by* Linda Pennells) (noting that the National Economic and Social Development Plans helped reform the education system in Thailand).

A. Progress Under the NESD Plans: Really a Success?

Although there seemed to be a positive correlation between economic development, education and technology,[25] these results revealed only a surface understanding of the country's progress.[26] For example, the social and human aspects of progress, a less tangible result, are not easily quantifiable.[27] During the initial national development phase, between 1961 and 1986, the Thai government focused on meeting the international demand for agricultural commodities that was guided by an import substitution industry.[28] Therefore, a large sector of the population remained in rural areas.[29] The government played a large part in providing the necessary resources for infrastructure development.[30] Even when private parties were encouraged to par-

25. *See* Frederick M. Abbott, *TRIPS in Seattle: The Not-So-Surprising Failure and the Future of the TRIPS Agenda*, 18 BERKELEY J. INT'L L. 165, 179 (2000) (stressing the need to make technology and information available in developing countries); *see also* Wendy N. Duong, *Partnerships with Monarchs: Two Case Studies*, 26 U. PA. J. INT'L ECON. L. 69, 98 n.355 (2005) (proclaiming that an educated workforce with access to technology is the key to economic development); *see also* Steven Radelet, *Supporting Sustained Economic Development*, 26 MICH. J. INT'L L. 1203, 1203–4 (2005) (listing education as a key element in the development strategy pursued by most successful developing countries).

26. *See* Prempridi et al., *supra* note 19 (claiming quantified information does not fully reveal a country's progress); *see also* Christina T. Holder, Note, *A Feminist Human Rights Law Approach for Engendering the Millennium Development Goals*, 14 CARDOZO J.L. & GENDER 125, 128 (2007) (discussing how measurable indicators are useful when concerning quantifying progress, but this system has been criticized as arbitrary and underinclusive). *See generally* Maya Raghu, Note, *Sex Trafficking of Thai Women and the United States Asylum Response*, 12 GEO. IMMIGR. L.J. 145, 145–46 (1997) (admitting that while Thailand has seen amazing rates of economic growth, these development policies have dislocated large segments of the Thai society).

27. *See* Prempridi et al., *supra* note 19 (noting that social and human aspects of economic progress are not quantifiable); *see also* Arthur R. Pinto, *Globalization and the Study of Comparative Corporate Governance*, 23 WIS. INT'L L.J. 477, 496 n.66 (2005) (commenting on how cultural attributes are difficult to quantify because they may not be easily calculated numerically); *see also* Roy A. Rappaport, *Valuation and Risk: Risk and the Human Environment*, 545 ANNALS 64, 65 (1996) (explaining how a social element is not a quantifiable element considered in economic development).

28. *See* Prempridi et al., *supra* note 19 (recognizing that import substitution was highlighted during Thailand's first National Economic Development Plan); *see also* Kwon, *supra* note 12, at 577 (informing that Thailand's economic growth was guided by import substitution policies); *see also* Terence J. Lau, *Distinguishing Fiction from Reality: The ASEAN Free Trade Area and Implications for the Global Auto Industry*, 31 DAYTON L. REV. 453, 461 (2006) (explaining that Thailand's industry emerged through import substitution).

29. *See* Prempridi et al., *supra* note 19 (noting that in 1985, a majority of Thailand's population was still living in rural areas); *see also* Barbara Crossette, *Coup Attempt Sparks Fighting in Thai Capital*, N.Y. TIMES, Sept. 9, 1985, at A1 (declaring that more than 85% of Thailand's population lives in rural areas); *see also* Keith B. Richburg, *Thailand, After Two Decades of Growth, Poised to Be the Next "Little Tiger" of Asia*, WASH. POST, Oct. 9, 1988, at H2 (reporting that while Thailand has made economic strides, two-thirds of Thailand's population lives in the rural countryside).

30. *See* Prempridi et al., *supra* note 19 (acknowledging that the Thai government introduced science and technology by sending students abroad and purchasing technological goods); *see also* Steven Erlanger, *Economic Scene: Thai Stock Boom Grinds to a Halt*, N.Y. TIMES, Aug. 31, 1990, at D2 (quoting Thai economist who stated that the Thai Government could put money into needed infrastructure projects); *see also* Carolyn Leitch, *Congestion Threat to Thai Prosperity*, GLOBE AND MAIL (Canada), Dec. 19, 1989 (reporting that the Thai government has poured $20 billion into basic infrastructure over the past few years).

ticipate in the development process, it was still under close government guidance.[31] Furthermore, despite the constant inflow of information and technology from foreign firms, Thailand still failed to integrate foreign technology inflows into their domestic infrastructure.[32] Initially, the government introduced technology and science to society in two ways: by sending students abroad[33] and purchasing technology from other countries.[34] However, instead of promoting the intended self-reliance, these mechanisms led to undesirable phenomena: a higher emigration rate, greater socioeconomic disparities between the urban and rural populations, higher production costs, and increased pollution from manufacturing by-products.[35]

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31. *See* Michael Borrus, *America Owes Asia for Its High-Tech Rebound*, L.A. TIMES, July 27, 1995, at D2 (finding that Thailand's economic growth was driven by local private investment and strongly supported by government policies); *see also International*, GLOBE AND MAIL (Canada), May 13, 2002, at B8 (reporting that the Thai government would investigate alleged mismanagement of private investment contracts). *See generally* Laura A. Malinasky, Comment, *Rebuilding with Broken Tools: Build-Operate-Transfer Law in Vietnam*, 14 BERKELEY J. INT'L L. 438, 444 (1996) (claiming that a private investor sold his interest in a private investment because of a dispute over toll rates with the Thai government).

32. *See* Prempridi et al., *supra* note 19 (concluding that Thailand's continuous import of foreign technologies led to a serious trade deficit and reliance on foreign support for industrial development); *see also* Kwon, *supra* note 12, at 581 (explaining that while technology imports into Thailand have increased, the quality of the technology transferred to local industry has been low); *see also* Raghu, *supra* note 26, at 150 (claiming that while foreign investment in Thailand is increasing, the Thai economy is still hampered with several infrastructure defects).

33. *See* Evers Hans-Dieter, *The Formation of a Social Class Structure: Urbanization, Bureaucratization and Social Mobility in Thailand,* 31 AM. SOC. REV. 480, 485 (1966) (stressing the noticeable increase of students studying abroad under the supervision of the Thai government post–World War I through 1963); *see also* Jasper J. Valenti, *Current Problems and Developments in Thai Education,* 20 INT'L REV. EDU. 71, 75 (1974) (proposing a new educational system that avoids the costly process of sending students abroad). *See generally* Richard Kraus, William Maxwell & Reeve Vanneman, *The Interests of Bureaucrats: Implications of the Asian Experience for Recent Theories of Development*, 85 AM. J. SOC. 135, 142, 145 (1979) (indicating the historical prestige associated with studying abroad in a powerful country, and the government's continued role in supervising its students in the context of industrialization).

34. *See* Jasper Goss & David Burch, *From Agriculture Modernization to Agri-Food Globalization: The Waning of National Development in Thailand*, 22 THIRD WORLD Q. 969, 975 (2001) (indicating that the NESDB plan had its greatest impact within the industrial sector as a result of the importation of foreign technology and machinery); *see also* Kwon, *supra* note 12, at 581 (asserting that a rise in the amount of imported foreign technology and expertise occurred during the 1980s). *See generally* Patarapong Intarakumnerd, Pun-arj Chairatana & Tipawan Tangchipiboon, *National Innovation System in Less Successful Developing Countries: The Case of Thailand*, 31 RES. POL'Y 1445, 1447 (2002) (referring to the large percentage of imported technological goods that outweighs Thailand's own technological innovations).

35. *See* Chris Dixon*, The Developmental Implications of the Pacific Asian Crisis: The Thai Experience,* 20 THIRD WORLD Q. 439, 441–42, (1999) (describing Thailand sustainability issues leading into the 1990s including increased land, labor and production costs, uneven income distribution, and congestion); *see also* Jim Glassman & Chris Sneddon, *Chiang Mai and Khon Kaen as Growth Poles, Regional Industrial Development in Thailand and Its Implications for Urban Sustainability,* 590 ANNALS AM. ACAD. POL. & SOC. SCI. 93, 96–103 (2003) (outlining the economic sustainability problems in Bangkok and Chiang Mai, including increased pollution and urban/rural socioeconomic disparities that resulted from the government's efforts to industrialize). *See generally* Antonia Hussey, *Rapid Industrialization in Thailand, 1986–1991*, 83 GEOGRAPHICAL REV. 14, 21, 23–27 (1993) (analyzing the urban industrialization's negative effects on Thailand's pollution, the poor, and the rural towns outside Bangkok).

Sending students abroad and providing educational opportunities to the urban sector that were not easily accessible to the rural population created a social gap.[36] Moreover, educated citizens gravitated toward positions in economic sectors where innovation was unlikely, such as industrial management and product control,[37] and very little attention was given to controlling the foreign technology that was already in the country.[38]

The importation of technology, particularly iron-based materials, did not transform Thailand's economy to one of self-sustainment.[39] The reason for this failed transformation was due to the fact that imported items were used for agricultural purposes. Further, the majority of local farmers still utilized "indigenous technologies," and most of the manpower training that was instituted revolved around machine operation and maintenance.[40] Additionally, there was

36. *See* U.N. Conf. Trade & Dev. [UNCTAD], Comm'n on Sci. and Tech. for Dev., *Investment and Technology Policies for Competitiveness: Review of Successful Country Experiences*, at 56 UNCTAD/ITE/IPC/2003/2 (2003) (*prepared by* Sanjaya Lall) (stating the poor quality of education and the uneven levels of access to education throughout the nation); *see also* Hussey, *supra* note 35, at 27 (highlighting the overall disparities in development and education between the urban and rural regions of Thailand). *See generally* Joshua Hawley, *Changing Returns to Education in Times of Prosperity and Crisis: Thailand, 1985–1998*, 23 ECON. EDU. REV. 273, 278 (2002) (acknowledging a long term trend of higher college enrollment rates in urban areas versus rural ones).

37. *See* Intarakumnerd, Chairatana & Tangchipiboon, *supra* note 34, at 1448–51 (explaining that the low level training and skill requirements limited to the operational level in firms has in part contributed to the country's inability to sustain itself); *see also* Fredric William Swierczek & Cary Nourie, *Technology Development in Thailand: A Private Sector View*, 12 TECHNOVATION, 145, 147–54 (1992) (indicating a lack of innovation among the many of the managerial positions in firms); *see also* Yongyuth Yuthavong et al., *Key Problems in Science and Technology in Thailand*, 227 SCIENCE, 1007, 1010 (1985) (stating that the few highly qualified personnel were most often drawn into consulting and management).

38. *See* UNCTAD, *supra* note 36, at 56 (discussing Thailand's inability to master and improve upon imported technology, a necessity to survive in the competitive market); *see also* Swierczek & Nourie, *supra* note 37, at 147, 155 (indicating sluggish development in technology was due in part to the failure to effectively use and adapt the foreign, imported technologies).

39. *See* UNCTAD, *supra* note 36, at 25 (indicating that Thailand's skills fell dangerously short of the norm in a competitive market); *see also* Pasuk Phongpaichit, *The Open Economy and Its Friends: The "Development" of Thailand*, 53 PAC. AFF. 440, 448–54 (1980) (tracing the rapid economic growth that resulted, in part, from extensive imports, and the soon-to-follow economic crisis). *See generally* Intarakumnerd, Chairatana & Tangchipiboon, *supra* note 34, at 1450–51 (arguing that the lack of research, specialization and incentive has prevented Thailand from advancing technologically on their own).

40. *See* Boulouane Douangngeune, Yujiro Hayami & Yoshihisa Godo, *Education and Natural Resources in Economic Development: Thailand Compared with Japan and Korea*, 16 J. ASIAN ECON.179, 186–88 (2005) (emphasizing that Thailand's agricultural production relied heavily on old, traditional technology, resulting in less incentive to innovate and develop); *see also* Somporni Svilanonda, Alia Ahmad & Mahabub Hossain, *Recent Changes in Thailand's Rural Economy: Evidence from Six Villages*, 35 ECON. & POL. WKLY. 4644, 4646 (2000) (giving examples of imported technologies used for agricultural purposes); *see also* Swierczek & Nourie, *supra* note 37, at 150 (quoting a Thailand Development Research Institute commentary on the lack of skilled people to provide technological advancements).

no concrete policy system devoted to screening and utilizing foreign technology on a self-reliant basis.[41] A combination of the export of educated individuals and the absence of an interest to harness foreign technology contributed to a trade deficit and detrimental reliance on foreign firms.[42] Therefore, although Thailand's basic infrastructure was developing and industrial production was rising at a constant rate, its economy was still far from self-reliant.[43]

B. Transition from Import Substitution to Export-Oriented Economy: An Historical Account of the Late 1980s and Early 1990s

By the late 1970s, Thailand, realizing the importance of attracting foreign investors to enhance its competitive presence in the international market, shifted its focus to an export-oriented economy.[44] This realization was reflected in the government's subsequent policy-

41. *See* Kwon, *supra* note 12, at 581–82 (illustrating most technology coming into Thailand is controlled by foreign countries, which limit Thailand's improvement and control to limited purposes); *see also* Nicholas A. Robinson, *The 1991 Bellagio Conference on the U.S.-U.S.S.R Environmental Protection Institution: International Trends in Environmental Impact Assessment*, 19 B.C. ENVTL. AFF. L. REV. 591, 597 (1992) (identifying Thailand as a country that has not fully incorporated the Environmental Impact Assistance's public disclosure requirement, rendering it incomplete as a policy implementation). *See generally* Douglas L. Tookey, *Southeast Asian Environmentalism at Its Crossroads: Learning Lessons from Thailand's Eclectic Approach to Environmental Law and Policy*, 11 GEO. INT'L ENVTL. L. REV. 307, 332–34 (1999) (emphasizing the dire economic situation Thailand faces and predicts that unless Thailand reevaluates its overreliance on foreign subsidies, it will face greater consequences).

42. *See* Chantal Thomas, *Comparing the "1990s-Style" and "1980s-Style" Debt Crises,* 93 AM. SOC'Y INT'L L. PROC. 135, 135 (1999) (blaming foreign and domestic investment glut in Thailand's overextended banks and increased importation of capital goods for trade deficit); *see also* Julie S. Park, *Pharmaceutical Patents in the Global Arena: Thailand's Struggle Between Progress and Protectionism*, 13 B.C. THIRD WORLD L.J. 121, 139–40 (1993) (citing Thailand as a country heavily dependent upon foreign technology); *see also* Frank Emmert, *Labor, Environmental Standards and World Trade Law* 10 U.C. DAVIS J. INT'L L. & POL'Y 75, 166 (2003) (stating that in order to prevent student emigration, contracts with universities should be entered into by students forcing tuition payment if he or she should leave Thailand). *See generally* Michael L. Shain, Comment, *Thailand's Board of Investment: Towards a More Appropriate and Effective Rural Investment Promotion Policy*, 3 PAC. RIM L. & POL'Y J. 141, 181–82 (1994) (examining Thailand's investment promotion to move from import substitution to export promotion and discusses a new approach targeting rural areas).

43. *See* Michael R. Curran, *On Common Ground: Using Cultural Bias Factors to Deconstruct Asia-Pacific Labor Law,* 30 GEO. WASH. J. INT'L L. & ECON. 349, 365–67 (1997) (recognizing Thailand's economic improvement, but noting examples of financial missteps leading to a visible economic decline); *see also* Barbara Crossette, *Chilly Reception Awaits Regan in Bali*, N.Y. TIMES, April 26, 1986, at 1 (featuring Thai university students frustrated with the country's dependence upon America). *See generally Thaksin Boosts Economic Growth Forecast to Over 6%*, BUS. DAY (THAILAND) Sept. 5, 2003 (quoting the prime minister's confidence that the country's gross domestic product will expand).

44. *See* Arnold, *supra* note 3, ¶ 33 (concluding that Thailand stands to gain financial power by utilizing the United States; the United States is Thailand's largest export market); *see also* Seth Mydans, *It's Wasps vs. Mealybugs as Thais Fight Infection*, N.Y. TIMES, July 19, 2010, at A10 (illustrating Thailand's current export power as the third largest producer of cassava, used in popular foods like noodles, chemicals such as monosodium glutamate, and products like toothpaste). *See generally Banyan: Afloat on a Chinese Tide*, ECONOMIST, Sept. 4, 2010, at 950 (identifying Thailand as a rapid export-oriented country stalled by the East Asian financial crash of the late 1990s).

making behavior. The Fifth and Sixth NESD Plans recognized the importance of the roles science and technology play in economic development.[45] The Seventh Plan enumerated six sectors of the economy as important to Thailand's economic future: "agro-industry, electronics, iron and steel, metal working, petrochemicals, and textiles and garments."[46] The 1977 Promotion of Investment Act[47] marked an important starting point in Thailand's economic reform efforts.[48] It created and charged the Board of Investment (BOI) with the responsibility of setting policies that greatly impacted subsequent investment patterns in Thailand.[49]

Because Thailand's natural resources are scarce,[50] a "demand pull" strategy, where the demand for goods and services exceeds supply, and an export-focused economy are better suited to promote a self-sustaining Thai economy. Therefore, investments should be screened in such way to ensure that resources do not go to a low-priority sector of the economy.[51] However, policy makers in Thailand also realized that high trade protections lead to inefficiencies.[52] In response, in the late 1980s and 1990s the government started to promote an open competition market for foreign investors.[53] The BOI developed special benefit and privilege incentives to direct foreign investors to strategic sectors of the economy.[54] It was also authorized to protect

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45. *See* Arnold, *supra* note 3, ¶ 31 (stating that Thai law has not kept up with evolving technology, but FTA provisions will aid this area); *see also* Thienchay Kiranandana & Kraisid Tontisirin, *Eradicating Child Malnutrition: Thailand's Health, Nutrition and Poverty Alleviation Policy in the 1980s*, INNOCENTI OCCASIONAL PAPERS ECONOMIC POLICY SERIES NO. 23, at 27 (1992) (outlining political economy of policy changes from the fifth NESD plan targeting less wealthy rural districts).

46. *See* Kwon, *supra* note 12, at 578 (identifying the seventh NESD plan as one that encourages development of: "agro-industry, electronics, iron and steel, metal working, petrochemicals, and textiles and garments"); *see also* Wayne Arnold, *World Business Briefing Asia: Southeast Asian Debt Upgraded*, N.Y TIMES, Oct. 9, 2003, at W1 (citing improving economic indicators and government finances as reason that ratings agency Standard and Poor's raised credit ratings for three countries including Thailand).

47. *See* CIVIL AND COMMERCIAL CODE (C.C.C.). Promotion of Investment Act, B.E. 2520 (1977) (Thai) (detailing the statute creating and identifying the powers of the Board of Investment overseeing with the goal of attracting investors and helping the Thai economy).

48. *See* Shain, *supra* note 42, at 144 (stating that the 1977 Promotion of Investment Act was a response to the country's developing economy); *see also* ROBERT HALVORSON, FISCAL INCENTIVES FOR INVESTMENT AND INNOVATION 403 (Anwar Shah ed., 1995) (illustrating how the 1977 Board of Investment Act increased the economic power of Thailand by providing information to potential investors and eases the process of establishing a business within the country). *See generally* J.M. Migai Akech*, The African Growth and Opportunity Act: Implications for Kenya's Trade and Development*, 33 N.Y.U. J. INT'L L. & POL. 651, 700 (evidencing the loss of Thailand's 1993–1996 private investment resulting in economic instability in support of the proposition that auxiliary control of one country's assets produces negative long term economic results).

49. *See* Howard A. Kwon, *Patent Protection and Technology Transfer in the Developing World: The Thailand Experience*, 28 GEO. WASH. J. INT'L L. & ECON. 567, 579 (1995).

50. *See* Mingsarn Kaosa-ard, *Economic Development and Institutional Failures in Thailand*, 13 TDRI QUARTERLY REVIEW 3 (1998), *available at* http://www.tdri.or.th/library/quarterly/text/m98_1.htm.

51. *See* SANEH CHAMARIK & SUSANTHA GOONATALIKE, TECHNOLOGICAL INDEPENDENCE—THE ASIAN EXPERIENCE, (Saneh Chamarik & Susantha Goonatilake eds., United Nations University Press (1994) (1994), *also available* at http://www.unu.edu/unupress/unupbooks/.

52. *See* Peter Brimble, *Foreign Direct Investment: Performance and Attraction*, BROOKER GROUP PLC. 1, 7 (2002).

53. *See id*.

54. *See* Kwon, *supra* note 49.

certain industries by imposing special fees or banning altogether competing imported products.[55]

Thailand's efforts in the 1970s to 1990s to attract foreign investors resulted in an enormous influx of FDI.[56] Total FDI increased from US$270 million annually between 1980 and 1985 to $2 billion in the early 1990s.[57] More recently, net inflows of foreign investment increased to US$9.83 billion in 2008. The United States, Japan, members of the European Union and Korea were some of the key investors of Thailand in the early 1990s[58]and continue to be important investors in 2010.[59]

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55. *See id.*

56. *See* Kaosa-ard, *supra* note 50.

57. *See* Abdur Chowdhury & George Mavrotas, *FDI and Growth: What Causes What?*, 29 WORLD ECON. 9, 11 (2006) (comparing Thailand's success in increasing FDI with other major FDI recipients)*; see also* Kwon, *supra* note 49, at 580 (describing the impact Thailand's efforts had on foreign direct investment); *see also* Benjamin J. Richardson, *Is East Asia Industrializing Too Quickly? Environmental Regulation in Its Special Economic Zones*, 22 UCLA PAC. BASIN L.J. 150, 166–69 (2004) (emphasizing the Board of Investment's impact on the increase of FDI in Thailand).

58. *See* Brimble, *supra* note 52, at 12 (analyzing the increase of FDI in Thailand from approximately US $0.9 billion in 1986 to US$2 billion in 1990); *see also* Kwon, *supra* note 49, at 580 (stating the increase in U.S. dollars in total foreign direct investment in Thailand between 1980 and 1990); *see also* Eric D. Ramstetter, *Thailand: International Trade, Multinational Firms, and Regional Integration*, *in* MULTINATIONALS AND EAST ASIAN INTEGRATION 107, 109 (Wendy Dobson & Siow Yue Chia eds., 1997) (noting the rapid increase in FDI to GDP ratio from 1980 to 1985).

59. *See* Yen Kyun Wang, *Overview of ASEAN-South Korea Economic Relations*, *in* ASEAN AND KOREA: EMERGING ISSUES IN TRADE AND INVESTMENT RELATIONS 1, 16 (Daljit Singh & Reza Y. Siregar eds.,1995) (illustrating that Korea was a major contributor in Thailand); *see also* Siow Yue Chia, *ASEAN in a New Asia: Challenges and Opportunities*, *in* ASEAN IN THE NEW ASIA: ISSUES & TRENDS 1, 8 (Siow Yue Chia & Marcello Pacini eds., 1997) (establishing Japan as a major investor in Thailand); *see also* Shin-Yi Peng, Comment, *Economic Relations between Taiwan and Southeast Asia: A Review of Taiwan's "Go South" Policy*, 16 WIS. INT'L L.J. 639, 653 (identifying Japan, Hong Kong, the United States and Taiwan as Thailand's largest investors in 1995).

Throughout the 1990s, increased access to foreign investors raised the quality and diversity of goods that were domestically manufactured,[60] and sped up the country's transition to an export-oriented economy.[61] The country was not only exporting simple finished products,[62] but also technology-intensive intermediary products such as metals, chemicals, and other refined materials.[63] This elevated Thailand's competitiveness as an exporter in the international market.[64] Although the resulting surge of FDI did contribute to short-term economic success and has proved to be influential to Thailand's technological advancement,[65] Thailand still

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60. *See* ORG. FOR ECON. CO-OPERATION & DEV. [OECD], FOREIGN DIRECT INVESTMENT AND RECOVERY IN SOUTHEAST ASIA 250 (1999) (remarking on foreign direct investment and its role in transforming, improving, and diversifying the Thai economy); *see also* Brimble, *supra* note 52, at 12 (stressing the role of foreign direct investment beyond the evident benefit of creating new job opportunities; FDI also strengthened the economy by improving technology and increasing competition). *See generally,* Chowdhury & Mavrotas, *supra* note 57, at 11 (commenting on the role of FDI in the enhancement of job opportunities, technology and domestic goods among host countries).

61. *See* OECD, *supra* note 60, at 250 (remarking on the role of Thailand's export promotion policies and positive exchange rates in creating a more export oriented economy); *see also* Lau, *supra* note 28, at 460–63 (emphasizing Thailand as an export oriented economy that has aimed at increasing foreign direct investment in order to improve industry standards); *see also* Richardson, *supra* note 57, at 152–57 (acknowledging Thailand's goal of shifting from import to export oriented investment and its achievement of that goal as a result of foreign direct investment).

62. *See* Narongchai Akrasanee & Somsak Tambunlertchai, *Transition from Import Substitution to Export Expansion: The Thai Experience*, *in* ECONOMIC DEVELOPMENT IN EAST AND SOUTHEAST ASIA: ESSAYS IN HONOR OF PROFESSOR SHINICHI ICHIMURA 102, 119 (Seiji Naya & Akira Takayama eds., 1990) (affirming Thailand as an exporter of manufactured and labor-intensive products that have done well among competitors in the world market); *see also* Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CALIF. L. REV. 401, 438–39 (2002) (comparing Thailand to other developing countries who are no longer exporting simple raw materials as a result of exposing themselves to foreign direct investment and increasing trade); *see also Global Trade Negotiations Home Page*, CTR. FOR INT'L DEV. AT HARVARD UNIV., Sept. 14, 2010, at 1, *available at* http://www.cid.harvard. edu/cidtrade/gov/thailandgov.html (establishing that Thailand has entered the global economy with more diversified and advanced products).

63. *See* Chalongphob Sussangkarn & Yongyuth Chalamwong, *Thailand: Development Strategies and Their Impact on Labour Markets and Migration*, *in* DEVELOPMENT STRATEGY: EMPLOYMENT AND MIGRATION, COUNTRY EXPERIENCES 91, 119 (David O'Connor & Leila Farsakh eds., 1995) (commenting on Thailand's economic potential as it manufactures more sophisticated products and has the ability to compete against countries that are more wealthy); *see also* Tookey, *supra* note 41, at 309 (listing major exports in Thailand during a time of economic development and increased competition); *see also* Ramstetter, *supra* note 58, at 109 (stating that metals and machinery were major Thai exports).

64. *See* David Robinson et al., *Thailand: Adjusting to Success—Current Policy Issues* at 36 (Occasional Paper No. 185, 1991) (showing the impact that foreign direct investment has had on Thailand, specifically, on Thailand's overall growth as an export-oriented force in the world economy); *see also* Kwon, *supra* note 49, at 578 (attributing Thailand's growth in the market and its ability to compete with other countries to its successful maintenance of foreign direct investment). *See generally* Cao, *supra* note 62, at 429–30 (realizing the greater ease for a country to attract foreign direct investment, which in turn will affect their ability to become competitive in national markets).

65. *See* Kwon, *supra* note 49, at 568 (explaining the importance of obtaining foreign capital through foreign direct investment in order for Thailand to advance technologically); *see also* Supunnabul Suwannakij, *Marubeni to Hold Projects Due to Float*, NATION (Thailand), July 22, 1997 (stating that the economic success was short-lived as the Japanese investors were uneasy about investing in Thailand as a result of the unstable economy). *See generally* Archanun Kohpaiboon, *Foreign Direct Investment and Technology Spillover: A Cross-Industry Analysis of Thai Manufacturing*, 34 WORLD DEV. 541, 541 (2006) (demonstrating through an analysis of Thai manufacturing and foreign investment the resulting technological advancements).

remained shortsighted in their development approach until the late 1990s.[66] A 1999 study indicated that the selection of investors was made on an "ad hoc" basis, focused on remedying industrial weaknesses based on short-term assessments.[67] In fact, the liberalization of the Thai market combined with the lack of FDI screening eventually degraded the country's competitiveness.[68] As funds gravitated toward unproductive and less competitive sectors, demand for resources increased and costs of production increased.[69] Export earnings declined while the

66. *See* Kwon, *supra* note 49, at 576 (indicating that prior to the economic crisis in 1997, Thailand believed that it was on its way to earning the status of an industrialized country by the end of the 20th century); *see also* David Dollar & Mary Hallward-Driemeier, *Crisis, Adjustment, and Reform in Thailand's Industrial Firms*, 15 WORLD BANK RES. OBSERVER 1, 1–5, 13 (2000) (noting that although neither Thai firms nor banks were experienced in dealing with large sums of money, there was minimal supervision; suggesting the possibility of future problems of economic instability within the country); *see also* Carl Felsenfeld and Genci Bilali, *The Role of the Bank for International Settlements in Shaping the World Financial System*, 25 U. PA. J. INT'L ECON. L. 945, 1033–36 (2004) (asserting that the markets were blindsided by the crisis).

67. *See* Duong, *supra* note 25, at 1213 (analyzing the process through which a foreign investor is selected and determining that it is the responsibility of an ad hoc agency to select those who are permitted to invest in the local market); *see also* Wendy N. Duong, *Ghetto'ing Workers with Hi-Tech: Exploring Regulatory Solutions for the Effect of Artificial Intelligence on "Third World" Foreign Direct Investment*, 22 TEMP. INT'L & COMP. L.J. 63, 110–13 (2008) (describing the role of the ad hoc body with regards to circumstances surrounding foreign investment). *See generally* Jim Glassman, *Economic Crisis in Asia: The Ease of Thailand*, 77 ECON. GEO. 122, 122, 132 (2001) (analyzing various industrial weaknesses in Thailand such as the low wage, labor-intensive textile and garment industries).

68. *See* Kohpaiboon, *supra* note 65, at 541 (detailing that liberalizing the foreign investment regime must occur with liberalizing the trade policy in order for the country to be successful); *see also* Dollar & Hallward-Driemeier, *supra* note 66, at 1–5, 13 (revealing that due to the Bank of Thailand's commitment to the rate of exchange, there was a loss of international competitiveness); *see also* Richardson, *supra* note 57, at 158, 159 (noting that Thailand's liberalization of international trade and investment essentially degraded the country's competitiveness and was one of the factors leading up to the economic crisis).

69. *See* Suwannakij, *supra* note 65 (suggesting that manufacturers need to cut costs, improve production, and adopt better technology in order to become more competitive). *See generally* Laurids S. Lauridsen, *Foreign Direct Investment, Linkage Formation and Supplier Development in Thailand During the 1990s: The Role of State Governance*, 16 EUR. J. OF DEV. RES. 561, 582 (2004) (analyzing the cost of production including aspects such as quality and speed and applying it to the economic problems in Thailand); *see generally* Elisabeth Cappuyns, Note, *Linking Labor Standards and Trade Sanctions: An Analysis of Their Current Relationship*, 36 COLUM. J. TRANSNAT'L L. 659, 671 (1998) (proclaiming that an increased cost of production would lead to the production of uncompetitive goods).

country grappled with short-term debts and non-performing loans.[70] The central bank lost a significant amount of its country's international reserves.[71] In July 1997, Thailand suffered a devastating economic recession.[72]

The role of FDI, while important in the past, was crucial to Thailand during its post-recession period.[73] During the economic downturn, the government scrambled to recover by repeating the same strategy of "short-run financial restructuring and short-run financial restructuring of large distressed firms."[74] Eventually, the Thai government came to realize that such a trend of inefficient economic and policy decision making has proved inadequate to transform Thailand into a self-sustaining economy.[75]

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70. *See* V.V. Bhanoji Rao, *East Asian Economies: The Crisis of 1997–98*, 33 ECON. & POL. WEEKLY 1397, 1398, 1407 (1998) (detailing that there has been a decline in money received from exports and that over $30 billion in short-term debt must be paid back during 1997 and 1998 during the midst of the financial crisis); *see also* Bradley Belt, Malcolm Binks & Dominick Salvatore, *What's New in the Financial Services Industry: New Crises in Asia*, 3 FORDHAM FIN. SEC. & TAX L. F. 1, 17–18 (1998) (addressing the problems associated with Thailand's 50% ratio of total debt to GDP and the 21% ratio of short-term debt to GDP); *see also* Dollar & Hallward-Driemeier, *supra* note 66, at 3 (discussing the significance of the loans and the debts of the country in relation to the imminent crisis).

71. *See* Keith B. Richburg, *Malaysia Joins Unhappy Club of Nations in Crisis; 6 Months of Negative Growth Plunge Country into Recession*, WASH. POST, August 28, 1998, at A16 (stressing that debt in Thailand became extensive upon collapse of the value of their currency in relation to the U.S. dollar); *see also* Rao, *supra* note 70, at 1399, 1407 (noting that the outstanding debt owed by Thailand was $23.4 billion while only $30.4 billion was in reserves). *See generally* Belt, Binks & Salvatore, *supra* note 70, at 18–19 (indicating that a year prior to the crisis, Thailand had sufficient reserves to finance five months' worth of imports).

72. *See* JEFF MADURA, INTERNATIONAL FINANCIAL MANAGEMENT 180 (Alex von Rosenberg ed., Thomson South-Western 2008) (expressing that on July 2, 1997, Thailand floated the baht and allowed the currency to fall causing a region-wide recession); *see also* PATIT PABAN MISHRA, THE HISTORY OF THAILAND 146 (Greenwood ed., 2010) (proclaiming that the local economic crisis that began in Thailand on July 2, 1997 developed into a worldwide economic crisis); *see also Thais Mull Plan to Free Telecom*, AUSTRALIAN, Sept. 16, 1997, at 30 (projecting that the economic recession would last two to three years).

73. *See* Brimble, *supra* note 52, at 12 (explaining that the rise in FDI in Thailand post-1997 was characterized by a dramatic increase in mergers and acquisitions as well as a boost in both baht and U.S. dollar terms, with a $1.5 million increase from 1997 to 1998); *see also* U.N. Conf. on Trade & Dev. [UNCTAD], *World Investment Report 2000: Cross-Border Mergers and Acquisitions and Development*, 51, U.N. Doc. UNCTAD/WIR/2000 (July 2000) (*prepared by* Karl P. Sauvant) (regarding Thailand as one of the top 20 countries in Asia and the Pacific receiving FDI flows as a percentage of gross capital formation); *see also* Richard J. Hunter, Jr., *Property Risks in International Business*, 15 CURRENTS INT'L TRADE L.J. 23, 26 (2006) (explaining that at beginning of 2000, Thailand was one of the major recipients of FDI among developing countries).

74. *See* Brimble, *supra* mote 52, at 9 (asserting that the government was forced to find a quick fix, so to speak, to aid Thailand's crippling economy); *see also* Timothy Lane et al., *IMF-Supported Programs in Indonesia, Korea and Thailand: A Preliminary Assessment* 9 (IMF Occasional Paper No. 178, 1999) (noting that the economic crisis in Thailand was rooted in deep structural weaknesses within the corporate world and the banking system); *see also* Shean Hagan, *Sovereign Debtors, Private Creditors, and the IMF*, 8 LAW & BUS. REV. AM. 49, 61 n.25 (2002) (maintaining that the economic reform programs implemented by Thailand involved comprehensive corporate restructuring strategies, calling for reforms in the insolvency systems and establishment of out-of-court restructuring plans).

75. *See* Brimble, *supra* note 52, at 9 (explaining that, in light of Thailand's economic crisis, the government sought to develop its financial system through a number of initiatives, including the Ninth Economic and Social Development Plan); *see also* Lane et al., *supra* note 74, at 18 (positing that, during the Thailand economic crisis, there was inadequate regulation and supervision by the government); *see also* Hagan, *supra* note 74, at 61 (2002) (declaring certain governmental initiatives implemented in light of the recession necessary, emphasizing those initiatives that would ensure that the debt would be restructured).

The Ninth and Tenth Economic and Social Development Plans, implemented in 2002 and 2007 respectively,[76] reflect the government's recognition to focus on long-term issues.[77] By the late 1990s, Thailand had lost its competitive edge because the Thai baht remained strong and wages increased.[78] Faced with intense competition by other Asian competitors in the international market, Thailand was forced to reexamine its past stratagems and determine the best course of action for the future.[79] The government discovered that part of its problem was that its development was grounded in low-technology industries that depended on cheap and effi-

76. *See The First Half of the Current Ninth National Development Plan*, The Thailand Government Public Relations Department (July 21, 2004), *available at* http://thailand.prd.go.th/view_inside.php?id=135 (noting that the Ninth Economic Social Development Plan was implemented in 2002 and concluded its reign in 2006); *see also Merrill Lynch: Thailand Must Raise Growth to 5.5%*, BUSINESS DAY (THAI), January 16, 2001 (acknowledging the Ninth Economic and Social Development Plan's beginning in 2002 and ending in 2006); *see also A Green and Happy Society*, 8 THAIL. INV. REV. 1, 5 (2006), *available at* http://www.boi.go.th/english/services/boi_investment_review.asp (reporting that the Tenth Economic and Social Development Plan commenced in 2007 and will last until 2011).

77. *See Green*, *supra* note 76, at 5 (illustrating five objectives of the Tenth Economic and Social Development Plan: enhance quality of life through improved health care, morals, ethics and overall safety of individuals and property; develop community and reduce poverty; improve production methods to increase global economic competitiveness; create a greener environment, and strengthen the national government); *see also* Office of the National Economic and Social Development Board, *Thailand's Sustainable Development Plan of Implementation* (2005), *available at* www.nesdb.go.th/Portals/0/tasks /endure/05.doc (describing Thailand's new management philosophy as a means of balancing the state of people, society, economy and environment); see also Krik-krai Jirapaet, *The Tenth National and Social Development Economic Plan*, 2007 INT'L INST. FOR TRADE & DEV. ¶ 7, *available at* http://www.itd.or.th/en/node/256 (outlining NESDB's brainstorming session for the Tenth Economic and Social Development Plan, which focused on three main elements of the plan: a sufficient economy, sustainable development, and a long-term plan spanning 20 years to raise Thailand's competitiveness in the market).

78. *See* Brimble, *supra* note 14, at 10 (declaring that Thailand lost out on many of its labor-intensive exports because of a strong baht and rapid wage increases); *see also* Satya Sivaraman, *Unions Feel the Squeeze as Economy Slows*, ASIA TIMES, May 2, 1997, at 12 (reporting that Thailand's labor unions mandated a 20 baht (US$0.77) minimum wage increase in 1997, making wages considerably higher than those of its competitors); *see also No Further Minimum Wage Increase*, BANGKOK POST, Dec. 18, 1997, at 4 (claiming that the National Wage Committee decided to increase the minimum wage only modestly beginning in 1998 in light of every sector of the Thai economy facing investment and employment problems).

79. *See* Brimble, *supra* note 52, at 10 (declaring that competitiveness became a "critical area of policy focus" in the search for what went wrong in the late 1990s). *See generally* Joseph J. Norton, *The Modern Genre of Intrastructural Law Reform: The Legal and Practical Realities—The Case of Banking Reform in Thailand*, 555 SMU L. REV. 235, 240 (explaining that, to be successful, reform in Thailand must encompass various social, political, and cultural issues); *see generally* John W. Head, *Lessons from the Asian Financial Crisis: The Role of IMF and the United States*, 7 KAN. J. L. & PUB. POL'Y 70, 71–72 (enumerating the ways in which the International Monetary Fund helped devise a plan to revitalize Thailand's economy, including reducing deficits, maintaining a reserve fund, limiting inflation, and restructuring the financial sector).

cient labor.[80] As a result, FDI gravitated toward Asian countries rich in resources and cheaper labor such as China, India, Indonesia and the Philippines.[81]

C. Revelations from the 1997 Financial Crisis: A Continuing Historical Perspective

The 1997 financial crisis revealed that increased FDI and production alone were not going to lead to long-term economic growth.[82] In response, Thai policy makers shifted their attention to developing technology and human resources in such a way that FDI could be utilized more favorably toward economic self-sustainment.[83] They found that part of the problem stemmed from the country's inability to promote technology spillover despite attracting increasing numbers of foreign investors.[84]

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80. *See Thai Paradise Turns to Jungle for Small Companies; Financial Turmoil, Economic Slowdown Hit Japanese Concerns*, NIKKEI WEEKLY (JAPAN), Sept. 1, 1997, at 20 (reporting that, in the late 1980s and early 1990s, Thailand had a reputation among its competitors for its cheap labor); *see also* W. Gary Vause et al., *Thailand's Labor and Employment Law: Balancing the Demands of a Newly Industrializing State*, 13 NW. J. INT'L L. & BUS. 398, 400 (1992) (explaining that what attracted FDI to Thailand in the early 1990s was its "industrious" and "inexpensive" workforce); *see also* Sinfah Tunsarawuth, *Bangkok Plan to Retrain Workers Who Lose Jobs*, STRAITS TIMES (SINGAPORE), June 19, 1997, at 27 (claiming Thai labor skills are low and that "workers cannot adjust to the modern technology").

81. *See* Brimble, *supra* note 52, at 10 (explaining that Thailand gradually lost its competitive position in labor-intense exports due to inflation and rapid wage increases); *see also* Ron Corben, *Foreign Funds Flow into Asia Despite Turmoil*, J. COMMERCE, Nov. 12, 1998, at 2A (noting that India led Southeast Asia in foreign direct investment with 37% of the $44 billion invested in the region); *see also Oxford Analytica: Indonesia Losing Foreign Ventures*, GLOBE & MAIL (Canada), Oct. 4, 1996, at B7 (indicating that Indonesia was the largest recipient of foreign direct investment in 1995 with $39.9 billion, in part due to low labor costs); *see also More Top Execs Consider Investments in Asia*, STRAIT TIMES (Singapore), June 30, 1999, at 3 (highlighting survey findings that the Philippines became one of the top 25 foreign direct investment destinations in the world).

82. *See* Brimble, *supra* note 52, at 10 (suggesting that despite vast amounts of foreign direct investment, Thailand failed to undertake necessary measures to sustain growth); *see also* Alan M. Field, *Still Leading the Parade: America's Emerging Nations Continue to Outpace Europe, North America*, J. COMMERCE, July 28, 2008 at 42 (noting that economists today attribute the region's long-term growth trend to improvements in productivity, innovation, quality control, education and skills); *see also* Seth Mydans, *An "Asian Miracle" Now Seems Like a Mirage*, N.Y. TIMES, Oct. 22, 1997, at A1 (commenting that the flood of foreign investment was not enough to prevent the financial crisis and that the money was inefficiently used).

83. *See* Brimble, *supra* note 52, at 11 (noting that Thai policy makers recognized the importance of technology and human resource development in the wake of the Asian financial crisis); *see also Plenty of Action But Few Gains Yet —Post Roundtable: Businessmen and Academics Chide Slow Pace of Tangible Economic Reforms*, BANGKOK POST, Sept. 10, 2001 (pointing to agreement among business leaders and academics that government policy and reforms should focus on labor force training and creating incentives for research and development). *See generally* U.N. CONFERENCE ON TRADE & DEV., TRANSFER OF TECHNOLOGY FOR SUCCESSFUL INTEGRATION INTO THE GLOBAL ECONOMY: A CASE STUDY OF THE ELECTRONICS INDUSTRY IN THAILAND at 6–8, UNCTAD/ITE/IPC/2005/6 (2005) (discussing national development policies that supported the growth of the electronics industry in Thailand, including investment promotion, technological and human development and science and technology).

84. *See* Kohpaiboon, *supra* note 65, at 541 (finding that difficulty in promoting technology spillover in Thailand manufacturing is linked to the retention of restrictive trade policies); *see also* Takashi Kitazume, *Japan Can Help ASEAN Integration*, JAPAN TIMES, Dec. 13, 2006 (emphasizing limited impact of foreign direct investment, particularly spillover effects, in Thailand and other Southeast Asian countries); *see also* Kwon, *supra* note 49, at 600 (acknowledging limited technology-transfer efficacy in Thailand as a barrier to reaching higher levels of technological capability).

Technology transfer is more than the simple importation of technology; it is a phenomenon where a host country, such as Thailand, benefits from FDI-introduced technology by independently harnessing and mastering it.[85] Technology spillover occurs when foreign technology benefits not only FDI-affiliated firms but also local independent firms.[86] Although FDI creates the foundation for these processes to occur, investments in research and development (R & D) and sophisticated training are the key stepping stones to self-reliance.[87] The host country has to incur the costs of promoting technology integration so that it can be self-sustainable in the long run and remain competitive in the international arena.[88] To do this, Thai policy makers would have had to break from their short-term, result-oriented objectives and work toward improvements for the long run.[89]

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85. *See* Kwon, *supra* note 49, at 581 (asserting that meaningful technology transfer requires the recipient to accumulate the knowledge necessary to master the technology); *see also* Maskus, *supra* note 17, at 146–47 (pointing to diffusion of benefits within the host country including training of workers and increased adoption of new techniques and innovations among local firms). *See generally* U.N. Econ. & Soc. Comm'n for Asia and Pac., *Building Capacity for Technology Transfer for Small and Medium Enterprises in Least Developed Countries*, ¶ 46, ST/ESCAP/2306 (Nov. 12–13, 2003) (emphasizing that the recipient in a technology transfer must play an active role in understanding, adopting and mastering the technology).

86. *See* Kohpaiboon, *supra* note 65, at 541 (clarifying that "technology spillover" is when foreign direct investment benefits spread within a host country to local, non-affiliated firms); *see also* Y Wei & X Liu, *Productivity Spillovers from R & D, Exports and FDI in China's Manufacturing Sector*, 37 J. INT'L BUS. STUD. 544, 546–47 (2006) (noting that spillover effects may extend from neighboring local firms to more distant firms within the host country through the mobility of workers, transfer to local suppliers and increased competition). *See generally* U.N. CONFERENCE ON TRADE AND DEV. [UNCTAD], WORLD INVESTMENT REPORT 1999: FOREIGN DIRECT INVESTMENT AND THE CHALLENGE OF DEVELOPMENT at 210–14, U.N. Sales No. E.99.II.D.3 (1999) (explaining that the larger benefit of technology transfer is the diffusion of technology and skills within the host economy, including competing firms).

87. *See* Brimble, *supra* note 52, at 11 (asserting that the financial crises revealed Thailand's deficiencies in R & D, science, technology and education); *see also* Dixon, *supra* note 35, at 442 (attributing Thailand's competitive weakness to lack of long-term investment in education, training infrastructure and R & D); *see also* Maskus, *supra* note 17, at 151 (highlighting the importance of increasing indigenous technological capacity by promoting human capital, investing in education and training and developing national innovation systems that support R & D).

88. *See Turmoil Depresses Thailand's World Ranking*, NATION (Thailand), Sept. 10, 2010 (noting that according to the World Economic Forum, Thailand needs to boost its innovation potential by encouraging wider adoption of new technologies for productivity enhancements in order to remain competitive); *see also* U.N. CONFERENCE ON TRADE AND DEV., TRANSFER OF TECHNOLOGY FOR SUCCESSFUL INTEGRATION INTO THE GLOBAL ECONOMY: A CASE STUDY OF THE ELECTRONICS INDUSTRY IN THAILAND at 20–22, UNCTAD/ITE/IPC/2005/6 (2005) (indicating that comparatively low levels of R & D investment and limited technology integration in more advanced areas may be stifling Thailand's electronics industry); *see also* UNCTAD, *supra* note 86, at 313–15 (suggesting that in a global economy, countries looking to sustain growth and remain competitive must harness new technologies efficiently and maintain the requisite skills to create new, higher value-added activities).

89. *See* Maskus, *supra* note 17, at 149–50 (asserting that countries with stronger intellectual property rights and protections generally experience benefits in long-term growth especially when accompanied by complementary policies); *see also* Srividhya Ragvan, *Can't We All Get Along? The Case for a Workable Patent Model,* 35 ARIZ. ST. L.J. 117, 150–51 (2003) (finding that the TRIPS agreement may not benefit developing countries in the short run but will introduce policies that lead to an increase in foreign investment associated with Intellectual Property); *see also* David Hindman, Note, *The Effect of Intellectual Property Regimes on Foreign Investment in Developing Economies,* 23 ARIZ. J. INT'L & COMP. L. 467, 479 (2006) (recognizing that developing countries may gain benefits in the short term but ultimately fail in the long run for a variety of reasons).

The Thai government had to understand the importance of FDI spillover benefits and set forth policies designed to encourage foreign investors to take higher risks by locating its more technology-intensive projects in Thailand.[90] This way, the benefits derived from such projects would spread to the locals rather than flow out of the country to offshore sites.[91] The Thai government needed to create an interface between investors, local firms and academic institutions so that Thais can gain access to foreign technology.[92]

In 2007, Thailand's BOI issued a Country Note on Trade and Investment Policy Coordination which revealed its understanding of the need to reform its policy and legal system to strengthen the country's investment climate. Part of this reformation process would include the promotion of "regulatory transparency and consistency, monetary policy, [and] political environment." Part of the reorganization agenda to improve the Thai economic atmosphere involved opening up more avenues to foreign trade and investment. Thailand's recent participation "in bilateral, regional and multilateral economic" agreements reflects its willingness to conform to international standards so that it can be an active player in the world economy.

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90. *See* KEITH EUGENE MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 11 (2000) (examining how spillover benefits from increased investment can lead to increased economic growth); *see also* Daniel J. Gervais, *Panel III: Information Technology and International Trade: Intellectual Property, Trade & Development: The State of Play,* 74 FORDHAM L. REV. 505, 520 (acknowledging that FDI spillover effects may benefit areas such as education and research and development). *See generally* R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 1009 (2003) (evaluating how spillovers can provide productivity growth coinciding with an increase in investments for research and development).

91. *See* Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective,* 23 N.C.J. INT'L L. & COM. REG. 229, 279–80 (1998) (portraying how IP protection regimes can aid locals; one example of this is in shielding native culture by recovering cultural works); *see also* Shanker A. Singham, *Third Annual Latin American Competition and Trade Round Table: Competition and Patent Protection in the Pharmaceutical Industry,* 26 BROOK. J. INT'L L. 363, 376–78 (2000) (detailing how spillover effects will lead to a pro-invention cultural and a better business climate, technology & service); *see also* Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century,* 50 AM. U. L. REV. 131, 207–8 (2000) (describing the need to develop a local IP industry to benefit local rather than foreign interests and contribute to economic growth of country).

92. *See* Paul J. Heald, *Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game,* 88 MINN. L. REV. 249, 310–11 (2003) (illustrating how a developing country can create a cycle where firms make mutually beneficial deals with government offices and schools around the country); *see also* Barbara Stallings, *Section Three: Regionalization and the Foray on Primary Goods: The Globalization of Capital Flows: Who Benefits?*, 610 ANNALS 202, 206 (2007) (explaining that private investors can help provide access to foreign technology). *See generally* Keith E. Maskus, *Intellectual Property Challenges in the Next Century: Intellectual Property Challenges for Developing Countries: An Economic Perspective,* 2001 U. ILL. L. REV. 457, 472 (2001) (assessing how investments in primary and secondary education promote access to technology through innovation and technology adoption).

D. Legal Reform in the Patents Arena: Importance in Promoting Foreign Technology Spillover

Legal reform is necessary to create an environment where foreign investors view technology transfer as less as an unnecessary risk and more as a benefit.[93] In 1979, a weak patent regime was the key source of investors' apprehension to engage in technology transfer in Thailand.[94] Apprehension was seen mostly in investments that involve technology-intensive, knowledge-based projects where considerable funds are devoted to research and development.[95] There, the risks and costs of patent infringement far outweighed the benefits of investing in a developing country.[96] Further, those that did engage in FDI engaged in "turnkey" projects where foreign experts strictly controlled technology brought into the host country for a limited

93. *See* Lee G. Branstetter, *Do Stronger Patents Induce More Local Innovation?*, 7 J. INT'L ECON. L. 359, 368–69 (2004) (reporting that legal changes strengthening reform led to an increased level and growth rate of foreign patenting); *see also* Keith E. Maskus, *Taking Stock: The Law and Economics of Intellectual Property Rights: Lessons from Studying the International Economics of Intellectual Property Rights,* 53 VAND. L. REV. 2219, 2232 (2000) (assessing how countries that strengthen their IP regimes attract higher volumes of high-technology goods leading to a beneficial growth impact). *See generally* Rumu Sarkar, *The Legal Implications of Financial Sector Reform in Emerging Capital Markets,* 13 AM. U. INT'L L. REV. 705, 720 (1998) (defining legal reforms as those imperative to the creation and sustenance of emerging markets in order to attract foreign investments).

94. *See* Richard J. Ansson, Jr., *International Intellectual Property Rights, the United States, and the People's Republic of China,* 13 TEMP. INT'L & COMP. L.J. 1, 3 (1999) (noting Thailand's position on an original priority list where the country was targeted as offering inadequate protection for intellectual property rights); *see also* Stephanie M. Greene, *Protecting Well-Known Marks in China: Challenges for Foreign Mark Holders*, 45 AM. BUS. L.J. 371, 372–73 (2008) (explaining that despite China's progress on improving IP protection, infringement issues still place them on national watch lists for not offering adequate protection); *see also* Shanker A. Singham, *Competition Policy and the Stimulation of Innovation: TRIPS and the Interface Between Competition and Patent Protection in the Pharmaceutical Industry,* 26 BROOK. J. INT'L L. 363, 377–78 (2000) (alleging that a stronger intellectual property regime signals a more favorable general business climate to investors).

95. *See* David Hindman, *The Effect of Intellectual Property Regimes on Foreign Investment in Developing Economies*, 23 ARIZ J. INT'L & COMP. L. 467, 474–75 (2006) (finding that the level of IP protection influences the quality of transferred technologies); *see also* Jean Raymond Homere, *Intellectual Property Rights Can Help Stimulate the Economic Development of Least Developed Countries*, 27 COLUM. J.L. & ARTS 277, 287 (2004) (citing a study where research and development of new technology was shown to be associated with higher financial risks than any other investments). *See generally* Stefan Kirchanski, *Protection of U.S. Patent Rights in Developing Countries: U.S. Efforts to Enforce Pharmaceutical Patents in Thailand*, 16 LOY. L.A. INT'L & COMP. L. REV. 569, 572 (1994) (commenting that investors are more willing to invest where patent protection exists to encourage development of technology).

96. *See* Robert Bejesky, *Investing in the Dragon: Managing the Patent versus Trade Secret Protection Decision for the Multinational Corporation in China*, 11 TULSA J. COMP. & INT'L L. 437, 466–67 (2004) (suggesting that frequency of patent infringement is higher where uncertainty exists in protection of intellectual property); *see also* Hans-Peter Brack, *Utility Models and Their Comparison with Patents and Implications for the US Intellectual Property Law System*, 2009 B.C. INTELL. PROP & TECH. F. 102701 (2009) (detailing that countries with weaker protection & enforcement have fostered development of companies that rapidly bring imitation products into the marketplace). *See generally* Kwon, *supra* note 49, at 575 (explaining how cautious investment procedures, practiced by international companies, arose due to a fear of piracy).

amount of time.[97] This type of monitored environment gave locals very limited or no access to outside technology.[98]

Legal protection is vital for creating an incentive for innovation and technological development.[99] The other main objective for instituting IP rights is to promote a marketplace of exchange for ideas and inventions.[100] An investor or innovator would prefer a stronger mode of protection where he can maximize profits received from patent rents.[101] Alternatively, from a social standpoint, wide dissemination of information and easy access to technological tools is immensely important to developing nations.[102] At first, these dual goals appear paradoxical,

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97. *See* U.N. Ctr. on Transnational Corp. [UNCTC], *Features and Issues in Turnkey Contracts in Developing Countries* (July 1981), 10, *available at* http://unctc.unctad.org/aspx/otherYear.aspx (explaining that while turnkey projects in industrialized nations usually only cover construction, projects in developing nations also tend to include post-construction training and supervision); *see also* Amir H. Khoury, *"Measuring the Immeasurable"—The Effects of Trademark Regimes: a Case Study of Arab Countries,* 26 J.L. & COM. 11, 13 (2008) (explaining that "turnkey" projects do not involve a significant transfer of expertise or technology); *see also* Kwon, *supra* note 13, at 582 (noting that transnational corporations often limit local access when importing technology to Thailand).

98. *See, e.g.,* Kwon, *supra* note 49, at 582 (defining "turnkey" projects as those that limit local access to technology); *see, e.g.,* UNCTC, *supra* note 97, at 43, 44 (warning purchasers of "turnkey" contracts in developing countries should be mindful that foreign licensees have an incentive to resist the transfer of technology). *Cf.* Khoury, *supra* note 97, at 13 (explaining the difference of opinion whether more substantive intellectual property protection or more substantive technology transfer in developing countries will lead to "turnkey" projects).

99. *See* Eugene Kheng-Boon Tan, *Law and Values in Governance: The Singapore Way,* 30 H.K. L. J., 91, 112 (2000) (describing how Singapore's continuous efforts to keep pace with international standards of law have successfully supported and developed a high-technology, knowledge-based economy); *see also* Maskus, *supra* note 92, at 458 (explaining that stronger patent laws can help increase economic growth); *see also* Sherwood, *supra* note 6, at 495 (recognizing that stronger intellectual property protection encourages high technological advancement in developing countries).

100. *See* Arnold, *supra* note 3, ¶ 33 (concluding that stronger intellectual property laws helped to strengthen trade between Thailand and the United States); *see also* Raymond T. Nimmer, *Licensing on the Global Information Infrastructure: Disharmony in Cyberspace*,16 NW. J. INT'L L. & BUS. 224, 225 (1995) (claiming that predictable intellectual property law can help contribute to a thriving international information system). *See generally* Rahul Rajkumar, *The Central American Free Trade Agreement: An End Run Around the Doha Declaration on TRIPS and Public Health*, 15 ALB. L.J. SCI. & TECH. 433, 440 (2005) (asserting that developing countries are given greater access to markets when they have stronger intellectual property protections).

101. *See* Peter Drahos, *The Future of International Intellectual Property: The International Relations of Intellectual Property Law: Securing the Future of Intellectual Property: Intellectual Property Owners and Their Nodally Coordinated Enforcement Pyramid*, 36 CASE W. RES. J. INT'L L. 53, 53 (2004); *see also* Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 277 (1991) (stating that investors need adequate protection in order to recover their cost in research and development); *see also* R. Michael Gadbaw, *Intellectual Property and International Trade: Merger or Marriage of Convenience?*, 22 VAND. J. TRANSNAT'L L. 223, 227 (1989) (stating that American companies have tried to protect their intellectual property rights by directly negotiating with the host government).

102. *See* Maskus, *supra* note 17, at 149–50 (noting that stronger intellectual property laws can help developing countries with their long term economic growth and strengthen their access to new technologies); *see also* Carlos Alberto Primo Braga, *The Economics of Intellectual Property Rights and the GATT: A View from the South*, 22 VAND. J. TRANSNAT'L L. 243, 261 (1989) (detailing the benefits of strong intellectual property regimes for developing countries); *see also* Robert W. Kastenmeier, *International Trade and Intellectual Property: Promise, Risks, and Reality,* 22 VAND. J. TRANSNAT'L L. 285, 303 (1989) (explaining that developed states can use trade incentives to spur developing states to pass intellectual property legislation).

but the resolution lies in compromise and policy balance. If a host country is unwilling to create an environment where foreign firms would be willing to allow for locals to access their technology, then it cannot reach a point where it can master it.[103]

E. IP Protection Inextricably Tied with Culture and Perception: Enforcement

There is no set formula for creating an intellectual property regime conducive to successful economic growth, and therefore a universal scheme would be impractical.[104] Various patent regimes operate differently depending on the market conditions.[105] However, before patents can be established as a "protected market advantage," where a host country can benefit from a return of technical knowledge, it must reach a threshold of wealth and sophistication.[106] In the past four decades, Thailand has been consistently successful in attracting FDI[107]—the potential for reaping the benefits of technology transfer has existed for some time—yet a history of narrow cultural perceptions of intellectual property and a past trend of utilizing strategies geared

103. *See* Paul Edward Geller, *From Patchwork to Network: Strategies for International Intellectual Property in Flux*, 31 VAND. J. TRANSNAT'L L. 553, 567 (1998) (describing conflicts between national law and the dynamic international marketplace); *see also* Reichman & Lange, *supra* note 7, at 39 (emphasizing that guarantees of protection by developing states to investors would be beneficial to both parties); *see also* Robert M. Sherwood, *Intellectual Property Systems and Investment Stimulation: The Rating of Systems in Eighteen Developing Countries*, 37 IDEA 261, 268 (1997) (emphasizing that better intellectual property protections can lead to greater national development).

104. *See* Cortney M. Arnold, *Protecting Intellectual Property in the Developing World: Next Stop—Thailand*, 2006 DUKE L. & TECH. REV., 10, ¶ 5 (2006) (discussing the evolution of Intellectual Property Rights and various approaches taken by the United States to protect developing nations); *see also* Maureen A. O'Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177, 1249–50 (2000) (arguing that because countries vary in their state of development and policy interests a uniform intellectual property system is undesirable); *see also* Wei Shi, *Globalization and Indigenization: Legal Transplant of a Universal TRIPS Regime in a Multicultural World*, 47 AM. BUS. L.J. 455, ¶¶ 16–17 (2010) (noting the impracticality of a one-size-fits-all approach to intellectual property law).

105. *See* Timothy R. Holbrook, *Territoriality Waning? Patent Infringement for Offering in the United States to Sell an Invention Abroad*, 37 U.C. DAVIS L. REV. 701, 705–6 (2004) (noting the need to alter domestic patent laws along with changing market conditions); *see also* Maskus, *supra* note 2, at 473–74 (asserting the necessity of balancing market conditions with a policy that is conducive to growth).

106. *See* Kirchanski, *supra* note 95, at 596–99 (noting that developing countries adopt comprehensive systems of intellectual property only after reaching an adequate stage of development); *see also* J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT'L L. 441, 450–56 (2000) (analyzing the negative effects of patent law protection on developing nations with both weak economies and technological infrastructure). *See generally* Maskus, *supra* note 2, at 489–94 (discussing reluctance of developing nations to strengthen intellectual property regimes due to the associated high costs).

107. *See* KOHPAIBOON, *supra* note 17, at 107 (noting the increase of FDI in Thailand); *see also* THE WORLD BANK, GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES 97 (2000) (discussing the trends of FDI in Thailand). *See generally* Richard J. Hunter et al., *Legal Considerations in Foreign Direct Investment*, 28 OKLA. CITY U. L. REV. 851, 852 (2003) (discussing the success models in attracting FDI).

toward short-term benefits have hindered Thailand from creating a technological foundation for self-sustainment.[108]

The impact that IP protection has on technology spillover is a multifactored evaluation.[109] As Jeong-Yeon Lee and Edwin Mansfield noted in their empirical study of the relationship between IP protection and FDI, "[A] country's system of IP protection is inextricably bound up with its entire legal and social system and its attitudes toward private property."[110] The mere passage of law is not enough to gain the confidence of foreign investors.[111]

Multinational Enterprises' (MNEs) and other smaller foreign investors' willingness to invest more equity in overseas ventures is positively correlated with the level of environmental certainty in a host country.[112] The possibility of uncertainty translates into increased transaction costs that deter MNEs and other foreign investors from engaging in investment activities in a host country.[113] Studies have shown that investors with "high level uncertainty avoidance"

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108. *See* Liz Robinson, *Music on the Internet: An International Copyright Dilemma*, 23 U. HAW. L. REV. 183, 196 (2000) (highlighting differences between developing and developed countries); *See also* Myles Getlan, Comment, *TRIPS and the Future of Section 301: A Comparative Study in Trade Dispute Resolution*, 34 COLUM. J. TRANSNAT'L L. 173, 196–200 (1995) (examining Thailand's IP law inadequacies); *see also* James Hookway & Nicholas Zaminska, *Harsh Medicine: Thai Showdown Spotlights Threat to Drug Patents*, WALL ST. J., Apr. 24, 2007, at A1 (detailing Thailand's imposition of patent compulsory licenses to undercut high medication costs for its citizens).

109. *See* Q. Todd Dickinson, *E-commerce, Business Method Patents, and the USPTO: An Old Debate for a New Economy,* 19 CARDOZO ARTS & ENT. L.J. 389, 396 (2001) (stating that numerous studies have shown IP rights are positively correlated with economic upturns); *see also* Simon Helm, *Intellectual Property in Transition Economies: Assessing the Latvian Experience*, 14 FORDHAM INTELL. PROP. MEDIA, &, ENT. L.J. 119, 130–32 (2003) (admitting the evaluation of IP's impact on nations is a complex one); *see also* Michael W. Nicholson, *Intellectual Property Rights and International Technology Diffusion,* "Responding to Globalization" Conference, Federal Trade Commission (Mar. 22, 2002) at A15 (positing that although increased IP rights has a positive effect on FDI, it has varied effects elsewhere).

110. *See* Jeong-Yeon Lee & Edwin Mansfield, *Intellectual Property Protection and U.S. Foreign Direct Investment*, 78 REV. ECON. & STAT., 181, 185 (1996) (detailing the positive relationship between IP on U.S. foreign investment); *see also* Heald, *supra* note 92, at 249 (outlining power and resource imbalances between developed and developing countries).

111. *See* Lee & Mansfield, *supra* note 110, at 185 (detailing the positive relationship between IP on U.S. foreign investment); *see also* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 630, 656–60 (1998) (asserting foreign investors cannot rely solely on domestic laws for economic protection); *see also* Keshia B. Haskins, *Special 301 in China and Mexico: A Policy Which Fails to Consider How Politics, Economics, and Culture Affect Legal Change Under Civil Law Systems of Developing Countries*, 9 FORDHAM INTELL. PROP. MEDIA, &, ENT. L.J. 1125, 1159 (1999) (explaining how Mexican investors are skeptical of new laws to protect them).

112. *See* Amanda Perry, *An Ideal System for Attracting Foreign Direct Investment? Some Theory and Reality*, 15 AM. U. INT'L L. REV. 1627, 1627–30 (2000) (indicating a positive relationship between foreign investment and legal systems such that investors are attracted to predictability and efficiency); *see also* Malika Richard & Yi Yang, *Determinants of Foreign Ownership in International R & D Joint Ventures: Transaction Costs and National Culture*, J. INT'L MGMT. 110, 112 (2007) (illustrating the characteristics or financiers that lead to foreign direct investment); *see also* Martin Petty, *Industrial Spat Creates Investment Risk for Thailand*, REUTERS NEWS, Oct. 19, 2009, at A1 (implying the Thai government's instability negatively affects investment).

113. *See* Cheryl W. Gray & William W. Jarosz, *Law and the Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe*, 33 COLUM. J. TRANSNAT'L L. 1, 1 (1995) (presenting factors affecting FDI); *see also* Richard & Yang, *supra* note 112, at 112 (illustrating the characteristics or financiers that lead to foreign direct investment); *see also* Manisha M. Sheth, *Formulating Antitrust Policy in Emerging Economies*, 86 GEO. L.J. 451, 462 (1997) (recognizing that uncertainty dissuades foreign investors).

would tend to "underestimate benefits and overestimate control costs associated with high risk actions."[114] Developing countries will not make progress if they enact laws but are unable to convince MNEs and foreign firms that the laws will be "fairly and effectively enforced."[115]

If Lee and Mansfield's study is accurate, then the explicit inequitable restrictions that Thailand has placed on foreign patent holders in the 1980s were rooted, in part, in local cultural and social attitudes toward IP rights.[116] Studies have shown that cultural factors such as education, religion and language contribute to a country's perception of IP rights,[117] and many developing countries have displayed a lack of respect for IP rights.[118] Several theories have been

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114. *See* John Barkai, *Cultural Dimension Interests, the Dance of Negotiation, and Weather Forecasting: A Perspective on Cross-Cultural Negotiation and Dispute Resolution*, 8 PEPP. DISP. RESOL. L.J. 403, 414 (2008) (suggesting high uncertainty avoidance corresponds to foregoing risky investments); *see also* Ilyung Lee, *In re Culture: The Cross-Cultural Negotiations Course in the Law School Curriculum*, 20 OHIO ST. J. ON DISP. RESOL. 375, 410–11 (2005) (noting the risk averse nature of those with high uncertainty avoidance qualities); *see also* Richard & Yang, *supra* note 112, at 114 (illustrating the characteristics or financiers that lead to foreign direct investment).

115. *See* Alison Peck, *Leveling the Playing Field in GMO Risk Assessment: Importers, Exporters and the Limits of Science*, 28 B.U. INT'L L.J. 241, 267 (2010) (recognizing that investment is more likely where IP provides greater incentives for technological advancements); *see also* Chenxia Shi, *Protecting Investors in China Through Multiple Regulatory Mechanisms and Effective Enforcement*, 24 ARIZ. J. INT'L & COMP. L. 451, 485 (2007) (claiming a host country's laws must be effectively enforced to protect investor confidence); *see also* Okezie Chukwumerije, *Peer Review and the Promotion of Good Governance in Africa*, 32 N.C. J. INT'L L. & COM. REG. 49, 67 (2006) (hypothesizing that Africa's poor governance pushes investors away).

116. *See* Park, *supra* note 42, at 121–22 (asserting that developing nations like Thailand institute protectionist policies and support domestic "copy cat" companies for the purpose of promoting a social welfare and not a purely economic perspective and this is evidenced in their Patent Act of 1979). *See generally* Kwon, *supra* note 49, at 583 (demonstrating that the 1979 Patent act placed a number of restrictions on patent holders from other countries).

117. *See* Chun-Hsien Chen, *Explaining Different Enforcement Rates of Intellectual Property Protection in the United States, Taiwan and the People's Republic of China*, 10 TUL. J. TECH. & INTELL. PROP. 211, 221 (2007) (stating that the level of education is an important factor in determining how much protection intellectual property will receive and lacking basic education might prevent one from understanding intellectual property rights). *See, e.g.*, John Carroll, *Intellectual Property Rights in the Middle East: A Cultural Perspective*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 555, 557 (2001) (discussing how Islamic countries resist the commercialism of the West and this affects their view of intellectual property); *see, e.g.*, Wei Shi, *Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?*, 32 N.C. J. INT'L L. & COM. REG. 1, 7–8 (2006) (explaining that Confucian ethics places a low value on things in term of individuals and profit, but it does place value on communal property and this effects intellectual property in China).

118. *See* Rafael A. Declet, *Protecting American Intellectual Property in China: The Persistent Problem of Software Piracy,* 10 N.Y. INT'L L. REV. 57, 58–59 (1997) (discussing how China, as a developing nation, has an explosion of intellectual property piracy developed in the West and that the Chinese government has done nothing to remedy the problem); *see also* EDGARDO BUSCAGLIA & WILLIAM RATLIFF, LAW AND ECONOMICS IN DEVELOPING COUNTRIES 20 (2000) (explaining how in Latin America intellectual property is not regarded as an asset to be held privately but as one to be shared with humanity). *See generally* Michael Smith, *Bringing Developing Countries' Intellectual Property Laws to TRIPs Standards: Hurdles and Pitfalls Facing Vietnam's Efforts to Normalize an Intellectual Property Regime*, 31 CASE W. RES. J. INT'L L. 211, 231 (1999) (examining how in Singapore foreigners have no place to register copyrights, punishments for violating them are too small to deter, and they are deemed to be part of conducting business).

put forward to explain the existence of weak IP regimes.[119] These theories range from the belief that information and technology belong to the community as a whole,[120] to the implicit understanding that pirating, counterfeiting and patent infringement are advantageous to domestic companies as a whole, to the paranoid presumption that instituting patent rights to MNEs and foreign firms is a way for developed countries to control developing nations.[121]

Furthermore, numerous theoretical and empirical studies have explored the impact of education on IP perceptions and have revealed that countries with low education levels tend to have high piracy rates,[122] while those with high education levels tend to emphasize the importance of IP protection.[123] By the late 1990s, 91% of Thailand's population had a primary edu-

119. *See* Andrew Y. Piatnicia, *An Evaluation of the World Intellectual Property Organization's Draft Harmonization Treaty with Respect to Direct Infringement*, 26 N.Y.U. J. INT'L & POL. 375, 382 (1994) (examining how some argue that at an early stage of development, granting little protection to patents of foreign technology can be beneficial in developing a country's own industries); *see also* Margaret Chon, *Distributive Justice and Intellectual Property: Intellectual Property "From Below": Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 817 (2007) (discussing how intellectual property laws have narrowed the available options for those in developing nations and how the relatively powerless should receive some relief); *see also* May L. Harris, *TRIPS: Historical Overview and Basic Principles*, 12 J. CONTEMP. LEGAL ISSUES 454, 457 (2001) (stating that the lesser developed and the developing world find a moral foundation in their weak intellectual property laws).

120. *See* BUSCAGLIA & RATLIFF, *supra* note 118, at 20 (discussing how in parts of the developing world, Latin America here, intellectual property is to be shared as a benefit to humanity); *see also* Nabila Ansari, *International Patent Rights in a Post Doha World*, 11 CURRENTS: INT'L TRADE L.J. 57, 58 (2002) (explaining that high levels of intellectual property regulation could lead to an increase in the price of medicine, making it inaccessible to less developed and developing countries). *See generally* Harris, *supra* note 114, at 457 (stating that the lesser developed and developing world find moral foundation in weak intellectual property laws that supply them with essential goods and medicine for sustenance and future development).

121. *See* Amy E. Carroll, *Not Always the Best Medicine: Biotechnology and the Global Impact of U.S. Patent Law*, 44 AM. U. L. REV. 2433, 2467 (1995) (stating that developing nations see transfers of technology as a foundation for the development of their own industry in the future); *see also* Ansari, *supra* note 120, at 59 (discussing how some feel the imposition of international intellectual property law is a "polite form of economic imperialism" diminishing the right of a sovereign state to determine its own intellectual property regulations). *See generally* Harris, *supra* note 119, at 457 (asserting how intellectual property agreements between the developed world and the lesser developed and developing word are viewed by some as an example of Western imperialism).

122. *See* Chen, *supra* note 117, at 221 (stating that the level of formal education in a population is an important factor in determining how much protection intellectual property will receive in that country). But see Antonio Rodriguez Andres, *Software Piracy and Income Equality*, 13 APPLIED ECONOMICS LETTERS, 101, 104 (2006) (asserting that there is no significant association was found between income, education and piracy rates); see Donald B. Marron & David G. Steel, *Which Countries Protect Intellectual Property? The Case of Software Piracy*, 38 ECONOMIC INQUIRY 159, 172 (2000) (explaining that countries with high levels of education and high research and development intensity also have low piracy rates but the relationship is weak, at best).

123. *See* Nuno Crespo & Maria P. Fontoura, *Determinate Factors of FDI Spillovers—What Do We Really Know?,* WORLD DEV., 410, 417 (2007) (discussing the link between education and enforcement of intellectual property laws); *see also* Chon, *supra* note 119, at 818–21 (arguing that the need to improve enforcement of intellectual property law in developing countries must include reforming education). *See generally* Andrew Jaynes, *Why Intellectual Property Rights Infringement Remains Entrenched in the Philippines*, 21 PACE INT'L L. REV. 55, 57–59 (2009) (explaining the lack of education which exists in the Philippines and its effects on adherence to intellectual property laws).

cation, 8% a secondary education, and only 1% of the population had completed a university or vocational education.[124] In 2008, around 89% of the population had been enrolled in primary school, around 69% to 75% in secondary school and 45% in university-level education.

Additionally, Thailand has a weak university-industry linkage (UIL) systems.[125] UILs are modes through which domestic Thai producers can integrate new technology into the country's infrastructure.[126] Universities serve as hubs through which foreign investors can develop R & D at host countries, like Thailand, and are important to build a country's "national innovation system."[127] Some 2005 studies have demonstrated that Thai industries have shown very little interest in R & D and very little improvement in promoting productivity and competitiveness.[128] This is partly owed to the recent political state of affairs in Thailand, which has been characterized by factionalism and instability and the country's reliance on cheap labor, natural resources, and low-technology industries like textiles.[129] Although Thailand has emerged from the 1997 crisis fairly unscathed,[130] it has to improve its "knowledge-centered capabilities" in order to promote and sustain long-term growth.[131]

Despite the increased percentage of nationals attending university-level education institutions in the past few years, a 2005 World Bank Report indicated that Thailand was producing fewer secondary graduates than other countries of similar developmental levels and is also producing secondary graduates with inferior skills and capabilities.[132] It was also reported that domestic firms could not perform to their capacity due to the lack of skilled workers available in the labor force.[133] A 2007 World Bank Report recommended that Thailand has to shift its focus toward developing a strong service industry and "knowledge-based economy" in order to remain competitive with other similarly situated countries that have "world class universities."[134]

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124. *See* Mun C. Tsang & Somsri Kidchanapanshi, *Private Resources and the Quality of Primary Education in Thailand*, 17 INT'L J. EDUC. RES. 179, 182 (1992) (surveying the amount of resources allocated to primary education in Thailand); *see also* Futoshi Yamauchi, *Why Do Schooling Returns Differ? Screening, Private Schools, and Labor Markets in the Philippines and Thailand*, 53 ECON. DEV. AND CULTURAL CHANGE 959, 960 (2006) (examining the education levels achieved by persons in Thailand and the Philippines). *See generally* Nattavud Pimpa, *A Family Affair: The Effect of Family on Thai Students' Choices of International Education*, 49 HIGHER EDUC. 431, 433–37 (2005) (analyzing the cultural factors Thai students consider when making the decision to partake in international study).

125. *See* Peter Brimble & Richard F. Doner, *University-Industry Linkages and Economic Development: The Case of Thailand*, 35 WORLD DEV. 6, 1021, 1021 (2007).

126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.*

130. *SeeThailand, Bouncing Briefly Back: The Country Is Roaring Back After Its Political Impasse, But for How Long?*, ECONOMIST, Sept. 16, 2010, *available* at http://www.economist.com/node/17049141.

131. *See* Brimble, *supra* note 125, at 1022.

132. *See* Thai Economic Monitor, World Bank Report, November 2005 at 7. Source: siteresources.worldbank.org/INTTHAILAND/.../2005nov-econ-full-report.pdf.

133. *See id.*

134. *See id.* at 37.

The previously discussed reports on Thailand's poor-quality higher education when compared with competitor countries indicate that a lack of interest in the areas of innovation and R & D contribute to a host country's lack of regard for strong intellectual property rights. While Thailand has made some leeway toward amending and enforcing its laws, especially in the area of biotechnology patents,[135] in order to see positive, long-term economic effects, it must invest in improving R & D centers that can serve as sources for technology dissemination and integration.[136]

Furthermore, the perpetuation of piracy and copyright infringement in Thailand is grounded in the cultural perception that such activity is beneficial to society at large.[137] While these activities may render short-term benefits, the ramifications in the long run are generally detrimental to the economy and overall development.[138] Consequently, it is also imperative that Thailand's government strips its people of this false sense of security provided by short-term benefits from infringement and piracy, and stresses the importance of a strong IP system.

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135. *See* Alex Fayette, *Biotech in Thailand: How Patents Can Change A Developing Nation*, in BIOTECH, IP IN THE DIGITAL AGE, April 12, 2010.

136. *See* Brimble, *supra* note 125, at 1022.

137. *See* Arnold, *supra* note 104, ¶ 15 (discussing the cultural norm of piracy in Thailand); *see also* Supanat Chuchimprakarn, *Consumption of Counterfeit Goods in Thailand: Who Are the Patrons?*, 6 EUR. ADVANCES IN CONSUMER RES. 48, 50–53 (2003) (examining the cultural factors and social norms surrounding counterfeiting in Thailand). *See generally* Bryan W. Husted, *The Impact of National Culture on Software Piracy*, 26 J. BUS. ETHICS 197 (2000) (assessing the cultural norms in Thailand which perpetuate the culture of piracy within the country).

138. *See* CARLOS M. CORREA, INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS, 5–6 (2000) (addressing the dependency on counterfeiting and piracy in developing countries). *See generally* Ranjan B. Kini, *Shaping of Moral Intensity Regarding Software Piracy: A Comparison Between Thailand and U.S. Students*, 49 J. BUS. ETHICS 91, 97 (2004) (comparing the perception of Thailand students and U.S. students toward counterfeit goods).

G. Problems Faced with Thailand's Intellectual Property Regime: A Chronology

Throughout the last 30 years, Thai patent law has changed a great deal. The original Patent Act was passed in 1979 and faced many criticisms. This resulted in the 1992 amendment, which strengthened the patent regime but still retained a number of flaws. More recently, the laws were once again changed in 1999 as a further effort to conform to international standards.

1. The Original 1979 Patent Act

Throughout the 1970s and 1980s, foreign investors had a legitimate reason to be overprotective of their technology in Thailand. The formative 1979 Patent Act,[139] which was established as the legal framework for Thailand's patent system,[140] has been criticized as an insufficient mode of protection for many reasons.[141] One of the main contentions of the Act was that it was used as a "vehicle for economic growth rather than as a *source of legal rights*" (emphasis added).[142] The 1979 Patent Act represented a tool that the government used to control "social

139. *See* Patent Act, §14(1)(2) B.E. 2522 (1979) (Thai)

140. *See* Dhiraphol Suwanprateep, *Anti-Counterfeit in Thailand*, 3 CURRENTS INT'L TRADE L.J. 48, 48 (1994) (noting that though it had legislation governing trademarks, Thailand had no patent law prior to the Patent Act of 1979); *see also* Thomas W. Moon, *New Patent and Copyright Laws of the Kingdom and Thailand* 8 INT'L BUS. LAW. 237, 237 (1980) (reporting that previous to the Patent Act of 1979 Thailand had no patent law). *See generally* Thomas N. O'Neill III, *Intellectual Property Protection in Thailand: Asia's Young Tiger and America's "Growing" Concern,* 11 U. PA. J. INT'L BUS. L. 603, 609 (1990) (listing Thailand's laws protecting intellectual property).

141. *See* O'Neill, *supra* note 140, at 609 (noting that U.S. sources believe the Patent Act is weak because of its compulsory licensing and cancellation provisions); *see also* Suwanprateep, *supra* note 140, at 48 (explaining that enforcement under the Patent Act of 1979 was lax). *See also* Andrea Morgan, Comment, *TRIPS to Thailand: The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court,* 23 FORDHAM INT'L L.J. 795, 802 (2000) (noting that the Patent Act of 1979 did not protect pharmaceuticals).

142. *See* Saad Nusrullah, Developing Countries and Intellectual Property Rights 16 (July 2005) (Unpublished paper for World Intellectual Property Organization Summer School on Intellectual Property), *available at* http://www.scribd.com/doc/5364069/Developing-Countries-and-Intellectual-Property-Rights-by-Saad-2005 (arguing that the Patent Act was clearly a vehicle for economic growth rather than a source of legal rights because it effectively excluded pharmaceuticals from patent protection); *see also* Kwon, *supra* note 49, at 583 (observing the high level of governmental control exercised over patents); *see also* O'Neill, *supra* note 140, at 609 (noting that weak patent protection in Thailand contributes to widespread piracy and counterfeiting).

and development" costs related to a strong patent regime.[143] While this approach may initially be viewed as beneficial for a developing country as a protective measure against monopolistic behavior,[144] it was problematic because it deterred foreign investors from transferring the prerequisite technology and expertise needed to promote long-term development.[145]

Thailand had to reform several aspects of its 1979 patent system before it could reach the level of sophistication necessary to create a platform for technology transfer. For example, the original 1979 Patent Act was fraught with restrictions on patent holders' rights.[146] First, the scope of protection was too narrow to accommodate foreigners even by international standards.[147] Legal patent rights were extended only to Thai nationals and nationals of other countries that offered reciprocity.[148] It granted only a 15-year term of protection from the date of

143. *See* A. Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?* 1987 DUKE L.J. 831, 848 (1987) (warning that in developing countries, the social benefit of granting patents to foreigners is often outweighed by the social cost); *see also* Arnold, *supra* note 104, ¶ 19 (noting that the Thai drug regulatory office often delays approval of drugs); *see also* Park, *supra* note 42, at 123 (arguing that Thailand resisted allowing patents for pharmaceuticals because rural Thai society was dependant on inexpensive copycat drugs).

144. *See* Park, *supra* note 42, at 122 (claiming that Thailand resisted awarding patents for pharmaceuticals because it feared that multinational corporations would create monopolies). *Cf.* Oddi, *supra* note 143, at 853 (warning that a foreign investor with an import monopoly may have little incentive to transfer technology)*; cf.* Arnold, *supra* note 3, ¶¶ 14–15 (noting that enforcement of IP law needs improvement).

145. *See* Christian H. Nguyen, *A Unitary ASEAN Patent Law in the Aftermath of TRIPS*, 8 PAC. RIM. L. & POL'Y J. 453, 478 (1999) (demonstrating that the Thai government recognized a national interest in protecting intellectual property rights); *see also* J.H. Reichman, *The TRIPS Component of the GATT Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 171, 190 (1993) (claiming that developing countries have traditionally resisted the international patent system at the expense of their development); *see also* Getlan, *supra* note 108, at 196–99 (detailing the problems associated with Thailand's weak intellectual property laws).

146. *See* Morgan, *supra* note 141, at 802–3 (detailing some of the changes made by the 1992 Patent Act to remedy issues created by the 1979 Patent Act); *see also* Theodore H. Davis, Jr., *Combating Piracy of Intellectual Property in International Markets: A Proposed Modification of the Special 301 Action*, 24 VAND. J. TRANSNAT'L L. 505, 525–26 (1991) (showing that Thailand's weak enforcement of intellectual property law has led to problems with American companies). *See generally* Ted L. McDorman, *U.S.-Thailand Trade Disputes: Applying Section 301 to Cigarettes and Intellectual Property*, 14 MICH. J. INT'L L. 90, 111–12 (1992) (outlining some of the problems associated with the 1979 Patent Act in relation to pharmaceutical companies).

147. *See* Davis, *supra* note 146, at 525–26 (explaining that Thailand's problems with American companies resulted from its weak intellectual property law); *see also* Camellia Ngo, *Foreign Investment Promotion: Thailand as a Model for Economic Development in Vietnam*, 16 HASTINGS INT'L & COMP. L. REV. 67, 88 (1992) (showing that the legal system in Thailand has strict guidelines concerning the type of investors that can establish themselves in the country). *See generally* Preeti Sinha, *Special 301: An Effective Tool against Thailand's Intellectual Property Violations*, 1 PAC. RIM. L. & POL'Y J. 281, 289–90 (1992) (stating that actions have been taken against Thailand in the past for serious intellectual property violations).

148. *See* Patent Act, §14(1)(2) B.E. 2522 (1979) (Thai) (stating that a person who applies for a patent must be a Thai national or a national of a country to a party of the convention or agreement on patent protection that Thailand is also a party to); *see also* Kwon, *supra* note 49, at 584 (citing that the act granted patent protection only to "Thai nationals or nationals of a country that extended reciprocal right"). *See generally* Marie Wilson, *TRIPS Agreement Implication for ASEAN Protection of Computer Technology*, 4 ANN. SURV. INT'L & COMP. L. 18, 31 n.81 (1997) (suggesting that reciprocal treatment of the patents of non nationals are allowed when national protection is granted in a foreign country).

application,[149] which was deemed severely insufficient due to delayed application processes.[150] The government reserved for itself exclusive authority over issuing licenses.[151] Furthermore, parties were not allowed to stipulate to any "conditions, restrictions or remuneration that the government determined would damage or obstruct industrial, manufacturing, agricultural, or commercial development."[152]

Moreover, pursuant to the 1979 Act, if the parties did not reach an agreement on the licensing terms, then the government had the right to superimpose its own terms that it considered appropriate.[153] But the most contentious part of the statute was the "abuse provisions" that were designed to prevent behavior that the government determined would not contribute toward Thailand's development.[154] Under these provisions, patent holders were not allowed to sit idle on their rights, because a developing country has little to gain from granting exclusive patent rights if investors are not actually utilizing the technology.[155] This "use of the invention" standard for patent right viability went beyond the American requirement of "disclosure to the

149. *See* Kirchanski, *supra* note 95, at 574 (stating that the U.S. owners believed that fifteen years was not a sufficient amount of time for a patent term); *see also* McDorman, *supra* note 146, at 112 (arguing that pharmaceutical companies considered the 15-year patent term to be short); *see also* Park, *supra* note 42, at 129 (suggesting that the newly amended Thai Patent Act extended the patent term from 15 years to 20 years).

150. *See* Kirchanski, *supra* note 95, at 574 (affirming that the 15-year period to retain the patent was "insufficient" protection); *see also* McDorman, *supra* note 146, at 113 (stating that US based companies suffered millions of dollars in losses because patent protection in Thailand was inadequate). *See generally* O'Neill, *supra* note 100, at 609 (arguing that the United States believed the Thai Patent Act of 1979 to be "weak").

151. *See* O'Neill, *supra* note 140, at 609 (discussing the government's ability to intervene in the patent process by issuing compulsory licenses); *see also* Rosemary Sweeney, *The U.S. Push for Worldwide Patent Protection for Drugs meets the Aids Crisis in Thailand: A Devastating Collision*, 9 PAC. RIM L. & POL'Y 445, 453 (2000) (addressing the notion that the amendments made to the Thai Patent Act of 1979 have "narrowed" the government's power); *see also* Andrea Morgan, *supra* note 141, at 802 (suggesting that the government amended the Patent Act in 1992 in an attempt to be less restrictive).

152. *See* Kwon, *supra* note 49, at 584 (citing that "the parties were prohibited from stipulating to any conditions, restrictions, or remuneration that the government determined would damage or obstruct industrial, manufacturing, agricultural, or commercial development"); *see also* O'Neill, *supra* note 140, at 609 (suggesting that the government sought to inhibit licenses that affected the well-being of the nation). *See generally* Patent Act, B.E. 2522 (1979) (Thai) (expressing the government's right to control the remuneration of patent holders).

153. *See* Patent Act, B.E. 2522 (1979) (Thai) (describing the government's ability to intervene in patent holder's rights); *see also* Stephanie Skees, Note, *Thai-ing Up the Trips Agreement: Are Compulsory Licenses the Answer to Thailand's Aids Epidemic?*, 19 PACE INT'L L. REV. 233, 269 (affirming that under Section 51 of the Thai Patent Act the government had the ability to intervene with rights of a patent holder). *See generally* Cynthia M. Ho, *Patent Breaking or Balancing?: Separating Strands of Fact from Fiction Under TRIPS*, 34 N.C.J. INT'L L. & COM. REG. 371, 412 (2009) (discussing the government's involvement with patent owners).

154. *See* Stefan Kirchanski, *Protection of U.S. Patent Rights in Developing Countries: U.S. Efforts to Enforce Pharmaceutical Patents in Thailand*, 16 LOY. L.A. INT'L & COMP. L. REV. 569, 573 (1995) (noting that patents needed to be "worked" or else the patent would be revoked); *see also* Grace K. Avedissian, Comment, *Global Implications of a Potential U.S. Policy Shift Toward Compulsory Licensing of Medical Inventions in New Era of "Super-Terrorism*, 18 AM. U. INT'L L. REV. 237, 248 n. 55 (2002) (describing Thailand's use of compulsory licenses as a means of curtailing products that are not demanded); *see also* Skees, *supra* note 153, at 269 (discussing the policy that the patent holder must use the invention in the country).

155. *See* Ho, *supra* note 153, at 412 (discussing the government's use of compulsory licenses to increase its gain by protecting public health); *see also* Sweeney, *supra* note 116, at 452 (stating that the 1999 amendment to the Thai Patent Act was a departure from compulsory licensing); *see also* Skees, *supra* note 153, at 269 (discussing the policy that the patent holder must use the invention in the country).

public."[156] Furthermore, after a six-year period from the date of issuance, a patent was in danger of cancellation or revocation if (1) the patented product was not being used in the host country; or (2) it was not being sold, or being sold at an "unreasonably high price or in a quantity insufficient to meet public demand."[157] In light of these restrictions, the patent holder did not truly have the power to make, use or sell his technology or invention. Placing the importance of the country's short-term development interests ahead of the legal rights of the patent holder resulted in stunting Thailand's growth at the low-tech transfer level.[158] Ultimately, at the time, this also had the effect of stifling long-term development.[159]

H. Events Leading Up to the 1992 Patent Act: The Commencement of International Sanctions for IP Violations

1. Unilateral U.S. Pressure on Thailand for Legal Reform Prior to 1992

While there were perceptual difficulties in realizing the intangible long-term detriments of a weak IP regime,[160] by the late 1980s and the early 1990s, Thailand had no problem under-

156. *See* 35 U.S.C. § 112 (2010) (defining the American standard of "disclosure to the public"); *see also* Jesse S. Chui, *To What Extent Can Congress Change the Patent Right Without Effecting a Taking?*, 34 HASTINGS CONST. L.Q. 447, 463 (2007) (discussing the public disclosure standard as the trade-off of the patent system); *see also* Lauren M. Dunne, *"Come Let Us Return to Reason": Association of Molecular Pathology v. Uspto*, 20 DEPAUL J. ART, TECH. & INTELL. PROP. L. 473, 501–2 (2010) (noting the public disclosure requirement of the Patent Act).

157. *See* Patent Act § 46 B.E. 2522 A.D. (1979) (Thai) (setting forth the abuse provisions under the Patent Act); *see also* Kirchanski, *supra* note 154, at 573 n.27 (listing the abuse provisions of section 46 of the 1979 Patent Act); *see also* Theresa Beeby Lewis, *Patent Protection for the Pharmaceutical Industry: A Survey of the Patent Laws of Various Countries*, 30 INT'L LAW. 835, 863–64 (1996) (noting the penalty to patent holders for selling a patent product at "unreasonably high prices").

158. *See* Mark Dodgson, *Policies for Science, Technology, and Innovation in Asian Newly Industrializing Economies*, *in* TECHNOLOGY, LEARNING & INNOVATION: EXPERIENCES OF NEWLY INDUSTRIALIZING ECONOMIES 229, 245–47 (Linsu Kim & Richard R. Nelson eds., 2000) (recognizing Thailand as a developing nation with weak intellectual property laws resulting in growth of low-tech transfer); *see also* Kwon, *supra* note 49, at 583–85 (noting the negative effect of the Act's restrictions on the patent holder's rights). *See generally* Kirchanski, *supra* note 154, at 592–94 (discussing U.S. disagreement with provisions of the Patent Act restricting the rights of patent holders and with the subsequent changes that have been made).

159. *See* Kwon, *supra* note 49, at 586 (noting the stifling effect of insufficient patent law on long-term economic development); *see also* Arnold, *supra* note 104, ¶ 14 (discussing Thailand's inability to meet market demands resulting from weak laws). *See generally* LOREN YAGER, INTELLECTUAL PROPERTY: ENHANCED PLANNING BY U.S. PERSONNEL OVERSEAS COULD STRENGTHEN EFFORTS 12–32 (2009) (discussing attempts by the United States to help strengthen IP laws overseas and the damaging long term effects that have resulted from them).

160. *See* Chuchimprakarn, *supra* note 137, at 50–53 (examining the cultural factors and social norms surrounding counterfeiting in Thailand); *see also* Kini, *supra* note 138, at 97 (evaluating the perception of Thailand students toward counterfeit goods). *See generally* CORREA, *supra* note 138, at 5–6 (addressing the cultural dependency on counterfeiting and piracy in developing countries).

standing the negative consequences of retaliatory sanctions by the United States.[161] Thailand took threats of retaliatory action against them by the United States very seriously because it was its largest export market throughout the 1980s and 1990s and currently remains its largest export market through 2009. In 1988, the United States passed the Omnibus Trade and Competitiveness Act to pressure Thailand to amend its patent laws to protect drugs. This was a reaction to the fact that the 1979 Patent Act simply did not provide any patent protection for drugs. The United States demands of developing countries to adopt more stringent IP systems through two legal instruments—the Generalized System of Preferences (GSP) and Section 301 of the Omnibus Trade and Competitiveness Act (Section 301).

The GSP operates as a reward system for developing countries that cooperate with the United States on IP protection issues; rewards under this system included substantial trade benefits and duty-free treatment. Under this act, the president had the discretion to reward countries that he believed "provid[ed] adequate and effective means under its laws for foreign nationals to secure, to exercise, and to enforce exclusive rights in intellectual property." The sunset clause terminated the effects of the GSP on June 30, 1999.

Alternatively, where the GSP provided incentives for developing countries to cooperate with the U.S. on IP issues, Section 301 punished countries that failed to "'provide adequate and effective protection of intellectual property rights or denie[d] 'fair and equitable market access to United States persons who rely upon intellectual property protection.'" To enforce the GSP, the United States Trade Representative (USTR) was created to list and then investigate suspect countries. Suspect countries are listed on a sliding scale from (1) "priority foreign countries" (the most egregious non-complying countries), (2) "priority watch list countries" (PWC) (for "lax protection" of IP) to (3) "watch list countries" (for "minor violations").

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161. *See* Cortny Arnold, *Protecting Intellectual Property in the Developing World: Next Stop—Thailand,* 2006 DUKE L. & TECH. REV. 10, ¶ 6, 16 (2006) (arguing that placement on the priority watch list will force Thailand to undergo bilateral negotiations with the United States in regard to IP protection, where Thailand will be the weaker state and will most likely have to acquiesce to U.S. demands); *see also* Chris Store, *The Thai Copyright Case and Possible Limitations of Extraterritorial Jurisdiction in Actions Taken Under Section 301 of the Trade Act of 1974*, 23 L. & POL'Y INT'L BUS. 725, 729 (1992) (noting that the Thai government was faced with the dilemma of protecting its manufacturing industry and being faced with U.S. sanctions that would have a serious effect on the country's export market). *See generally* Michael Begg, *How the East Was Won: A Critique of U.S. Tactics in Negotiating Patent Protection for Pharmaceuticals in Thailand*, 1 PAC. RIM. L. & POL'Y J. 299, 300 (1992) (noting that the United States specifically targeted Thailand in the threats it made to countries that did not comply with the increased demand for patent protection by the American government).

In 1989, the USTR named Thailand as a PWC.[162] As a result, Thailand became the subject of "continued monitoring and review by the USTR."[163] These investigations were meant to encourage negotiations between the Thailand and the United States.

On January 30, 1991, the Pharmaceutical Manufacturers Association (PhRMA) "filed a petition to the USTR alleging that Thailand had engaged in unfair trade practices" due to inadequate and ineffective protection of patent rights.[164] It requested that action be taken against Thailand pursuant to Section 301 of the Trade Act unless it remedied the deficiencies of its patent regime through amendments.[165]

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162. *See* Kwon, *supra* note 49, at 586 (noting that Thailand was cited by the United States in 1989 for its failure to provide adequate protection of intellectual property rights, especially patent and copyright laws); *see also* Kirchanski, *supra* note 154, at 588 (discussing the USTR publication of the priority watch list of countries in 1989, which included Thailand). *See generally* Timothy C. Bickham, *Protecting U.S. Intellectual Property Rights Abroad With Special 301*, 23 AIPLA Q.J. 195, 200 (1995) (explaining how the USTR uses non-statutory categories to determine the statuses of countries found to have denied adequate protection of U.S. intellectual property).

163. *See* Kwon, *supra* note 49, at 586–87 (indicating that although USTR monitored Thailand after it was placed on the priority watch list because of its lack of adequate IP protection, Thailand was not in immediate danger of retaliatory action); *see also* Sinha, *supra* note 112, at 289 (noting that Thailand was being closely watched by the United States in 1989 to see if its intellectual property protection practices met those set by the 1988 Trade Act; shortly after monitoring began, the USTR took action under the Act). *See generally* Kim Newby, *The Effectiveness of Special 301 in Creating Long Term Copyright Protection for U.S. Companies Overseas*, 21 SYRACUSE J. INT'L L. & COM. 29, 30 (1995) (arguing that since advances in technology make replication of intellectual property quick and inexpensive, the U.S. is less willing to overlook the theft of copyrighted property overseas).

164. *See* Sinha, *supra* note 147, at 291 (discussing PMA's petition, alleging Thailand lacked product patent protection, its patents were too short in duration and the country had poor licensing provisions); *see also* Store, *supra* note 161, at 727 (noting that the PMA petitioned the USTR to investigate Thailand's lack of patent protection due to an estimated sales loss in 1988 of $16–24 million); see *e.g.,* Newby, *supra* note 163, at 31 (stating a 1991 estimate that U.S. copyright holders accumulated $85 million in lost sales as a result of ineffective protection measures and piracy in Thailand).

165. *See* Begg, *supra* note 161, at 300 (1992) (indicating that the U.S. attempted to bring drugs under Thailand's patent law in four ways, (1) unilaterally forced demands, (2) bilateral trade negotiations, (3) multilateral trade negotiations, and (4) negotiations within the World Intellectual Property Organization; ultimately the United States chose aggressive unilateral demands); *see also* Dylan MacLeod, *US Trade Pressure and the Developing Intellectual Property Law of Thailand, Malaysia and Indonesia*, 26 U. BRIT. COLUM. L. REV. 343, 347 (1992) (stating that the effect of the USTR's retaliatory powers is to pressure a foreign country under investigation to take corrective action). *See generally* Stefan Kirchanski, *Protection of U.S. Patent Rights in Developing Countries: U.S. Efforts to Enforce Pharmaceutical Patents in Thailand*, 16 LOY. L.A. INT'L COMP. L.J. 569, 576 (1993) (arguing that although faced with increased U.S. demands, Thailand had a disincentive to adapt its IP laws, because an increase in patent protection would require the country to pay increased royalties).

The USTR did in fact heed PhRMA's request and engaged in an investigation of Thailand's alleged unfair trade practices, pursuant to section 302(a) of the Trade Act,[166] less than two months after PhRMA filed its petition.[167] The USTR confirmed findings of unfair trade practices and placed Thailand on the PFC (most egregious) list.[168] As an additional measure, the USTR created an "interagency task force" charged to explore possible retaliatory actions against Thailand.[169] Because of pressure from the USTR and PhRMA to amend its IP laws and looming economic retaliation and trade sanctions, Thailand made an announcement in 1991 that it was going to make efforts to assuage U.S. pressure. This resulted in the 1992 Patent Act, which was passed on February 27, 1992.

Throughout the 1990s, the USTR has moved Thailand from one list to the other. However, in 2009, Thailand still remained on the PWC *due to continuing concerns of infringement and piracy.*

2. TRIPS: An International Standard

Around the mid-1990s, the international community was reacting to weak intellectual property regimes as a whole and sought to set minimum standards for protection.[170] A series of multilateral negotiations conducted at the Uruguay Round of Multilateral Trade Negotiations,

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166. *See* Trade Act of 1974, Pub. L. No. 93-618 § 135(a), 88 Stat. 1978 (1975), *amended by* Pub. L. No. 100-418, 302(a), 102 Stat. 1168 (1988) (codified at 19 U.S.C. § 2412(a) (1994)) (section 302(a) provided the USTR with the framework with which to begin its investigation of Thailand's alleged unfair trade practices).

167. *See* MacLeod, *supra* note 165, at 348 (describing that the Trade Act, specifically Special 301, provides for an expedited process for intellectual property matters allowing for significantly shorter investigation); *see also* Store, *supra* note 161, at 730 (noting that the USTR put Thailand on the Special 301 priority list under the Special 301 Amendments to the Act). *See generally* McDorman, *supra* note 146, at 111–12 (detailing the PMA complaint and petition, and the subsequent action taken by the USTR).

168. *See* Arnold, *supra* note 104, ¶ 6 (demonstrating the different lists a country can make depending on its level of deficient intellectual property protection, one of which being the "priority foreign country" list); *see also* Newby, *supra* note 163, at 35 (explaining the three factor process by which a foreign country is determined to be on the PFC list). *See generally* Kirchanski, *supra* note 154, at 569 (discussing the USTR's citation of Thailand in 1991 for their failure to protect U.S. copyrights, which was the first designation of priority foreign countries under Special 301).

169. *See* Press Release, Office of the U.S. Trade Representative, USTR Announces Three Decisions: Title VII, Japan Supercomputer Review, Special 301 at 4 (Apr. 30, 1993), *available at* http://keionline.org/sites/ default/files/ ustr_special301_1993.pdf (declaring that an interagency task force will be sent to Thailand to explore retaliatory options while the Administration was meeting with Thai officials); *see also* Howard A. Kwon, *Patent Protection and Technology Transfer in the Developing World: The Thailand Experience*, 28 GEO. WASH. J. INT'L L. & ECON. 567, 587 (1995) (explaining that Thailand was subjected to the interagency task force because of previous intellectual property violations); *see also* Getlan, *supra* note 105, at 198–99 (discussing the impact of elections in Thailand on the USTR's implementation of retaliatory measures in regard to Section 301 violations).

170. *See* Getlan, *supra* note 108, at 199–200 (explaining that the Uruguay Round were negotiations where many nations considered an international agreement on intellectual property protection); *see also* Jessica Haber, Note, *Motion Picture Piracy in China: Rated Arrrgh!*, 32 BROOKLYN J. INT'L L. 205, 208–10 (2006) (discussing the effect that TRIPs's minimum standards on intellectual property rights protection have on international trade); *see also* Jennifer Suzanne Bresson Bisk, Comment, *Book Search Is Beautiful?: An Analysis of Whether Google Book Search Violates International Copyright Law*, 17 ALB. L.J. SCI. & TECH. 271, 301–2 (2007) (establishing that TRIPs sets minimum standards of protection for intellectual property in international trade).

which began in 1982 and was led under the General Agreement of Tariffs and Trade (GATT)[171] resulted in the Trade-Related Aspects of Intellectual Property Rights (TRIPS),[172] a comprehensive plan for international IP protection.[173] TRIPS was signed on April 15, 1994. It is essentially a default model that signatory host countries, like Thailand, can utilize to reform their IP laws in order to meet international standards. The TRIPS agreement and its intended harmonizing effects are symbols of the importance of assimilation and adherence to a universal standard of doing business in a global economy.

I. 1992 Patent Amendment: Initial Political Response to International Pressure

In the face of the threat of international sanctions and pressure to strengthen IP laws, Thai policy makers and government officials scrambled to create amendments that would regain FDI confidence and eliminate the hesitance that foreign investors have had in conducting "major technological development undertakings."[174] Thailand ventured to re-work its IP legal framework by bringing its outdated laws in line with international standards.[175] It showed a

171. *See* General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1125 [*hereinafter* TRIPS] (setting forth all of the provisions of GATT, including but not limited to TRIPS); *see also* Robert M. Sherwood, *Human Creativity for Economic Development: Patents Propel Technology*, 33 AKRON L. REV. 351, 362 (2000) (analyzing difficulties in the trade linkage resulting from the GATT trade negotiations and TRIPs Agreement); *see also* Ned Milenkovich, Note, *Deleting the Bolar Amendment to the Hatch-Waxman Act: Harmonizing Pharmaceutical Patent Protection in a Global Village*, 32 J. MARSHALL L. REV. 751, 757–59 (1999) (explaining that GATT began in 1947 and culminated in 1994 as a result of the Uruguay Round).

172. *See* TRIPS, *supra* note 171, at 1197 (enumerating the TRIPS provisions agreed upon at the Uruguay Round); *see also* Robert Bird & Daniel R. Cahoy, *The Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargaining Approach*, 45 AM. BUS. L.J. 283, 292 (2008) (discussing how compulsory licensing is addressed by TRIPS as part of the Uruguay Round of trade discussions); *see also* Remigius N. Nwabuez, *What Can Genomics and Health Biotechnology Do for Developing Countries?*, 15 ALB. L.J. SCI. & TECH. 369, 396–97 (2005) (comparing the objective of the minimum standards set forth by TRIPS to the negative effects those standards have on developing countries).

173. *See* Alain J. Lapter, *The WTO's Dispute Resolution Mechanism: Does the United States Take It Seriously? A TRIPs Analysis*, 4 CHI.-KENT J. INTELL. PROP. 217, 221–22 (2005) (explaining that the Uruguay Round resulted in TRIPS, which sets minimum standards for the protection of intellectual property); *see also* J. Benjamin Bai, *Sustainable Development in Latin American Rainforests and the Role of Law: Commentary: Protecting Plant Varieties under TRIPS and NAFTA: Should Utility Patents Be Available for Plants?*, 32 TEX. INT'L L.J. 139, 140 (1997) (recognizing TRIPS, as part of the Uruguay Round of the GATT, and NAFTA as accomplishments to harmonize worldwide patent laws); *see also* Divya Murthy, Note, *The Future of Compulsory Licensing: Deciphering the Doha Declaration on the TRIPs Agreement and Public Health*, 17 AM. U. INT'L L. REV. 1299, 1303–4 (2002) (crediting TRIPs as the most comprehensive international agreement regarding intellectual property).

174. *See* Andrea M. Curti, Note, *The WTO Dispute Settlement Understanding: An Unlikely Weapon in the Fight Against AIDS*, 27 AM. J. L. & MED. 469, 476 (2001) (describing American pressure on Thailand using Section 301 of the Trade Act of 1974 that led to the enactment of the 1992 amendments); *see also* Peng Jiang, *Fighting the AIDS Epidemic: China's Options Under the WTO TRIPS Agreement*, 13 ALB. L.J. SCI. & TECH. 223, 239–40 (2002) (crediting the United States for putting the pressure on Thailand that resulted in amendments to its Patent Act in 1992); *see also* Srividhya Ragavan, *Can't We All Get Along? The Case for a Workable Patent Model*, 35 ARIZ. ST. L.J. 117, 174 (2003) (describing how the United States used its priority watch list to influence Thailand's patent law).

175. *See* Sweeney, *supra* note 151, at 449 (comparing the degree of patent protection in the original Patent Act to the 1992 and 1999 amendments as those provisions relate to TRIPs); *see also* Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89, 136 (1993) (criticizing aspects of the 1992 amendments that were deficient according to the USTR). *See generally* Skees, *supra* note 153, at 269–70 (detailing the provisions of the 1992 Patent Act).

firm commitment to accomplish this reform by completing this transition in much less time than the five years required to comply with the TRIPS agreement.[176] All these legislative efforts resulted in the 1992 Patent Act.[177]

1. Expansion of Patentable Subject Matter

The new statute expanded the patentable subject matter in Thailand by lifting prior restrictions on patenting certain biological, natural, and necessary items such as "food, beverages, pharmaceutical products or ingredients, as well as machinery used directly in agriculture."[178] Additionally, the law expanded the patentability of more things that occurred in nature, by limiting non-patentibility to "microorganisms and any component of microorganisms which exist in nature, animals, vegetation or extracts of animals or vegetation."[179]

Also, it instituted the "right of priority" to patent holders by allowing them to claim the benefit of a one-year grace period where they can show an "earlier filing date of a corresponding application filed in a foreign country that extends reciprocal rights to Thai nationals."[180] The

176. *See* Ragavan, *supra* note 174, at 173–74 (establishing that Thailand first came under pressure in 1989 and passed its amendments in 1992); *see also* Rosalyn S. Park, *The International Drug Industry: What the Future Holds for South Africa's HIV/AIDS Patients*, 11 MINN. J. GLOBAL TRADE 125, 134–35 (2002) (demonstrating that America has influenced countries, in this case Thailand, to change their patent laws in 1992 and again in 1999); *see also* Samantha Shoell, Note, *Why Can't the Poor Access Lifesaving Medicines? An Exploration of Solving the Patent Issue*, 4 MINN. INTELL. PROP. REV. 151, 172 (2002) (attributing Thailand's patent law changes to American desire to eliminate the ability of nations to compulsory license).

177. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 242 (1993) (explaining the function of Thailand's 1992 Patent Reforms); *see also* Kwon, *supra* note 49, at 582–86 (discussing the primary cause of Thailand's Patent Amendment in 1992); *see also* Morgan, *supra* note 101, at 802 (2000) (noting where Thailand's intellectual property rights stem from).

178. *See* Kwon, *supra* note 49, at 590 (mentioning the lift of prior restrictions on nature and its affiliated products); *see also* Kirchanski, *supra* note 154, at 571–73 (stressing the consequences from excluding pharmaceutical, agricultural and biological products from the 1979 Patent Act). *See generally* Julio Nogues, *Patents and Pharmaceutical Drugs: Understanding the Pressures on Developing Countries,* 24 J. WORLD TRADE 81, 83 (1990) (emphasizing the prevalence of weak patent protection for pharmaceutical products globally).

179. *See* Geertrui Van Overwalle, *Patent Protection for Plants: A Comparison of American and European Approaches,* 39 IDEA 14, 14 (1999) (exploring objections to patenting plants); *see also* Jerzy Koopman, *The Patentability of Transgenic Animals in the United States of America and the European Union: A Proposal for Harmonization*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 103, 179–86 (2002) (comparing the patentability of animals in the patent regimes of the United States and European Union). *See generally* Insoon Song, *Old Knowledge into New Patent Law: The Impact of United States Patent Law on Less-Developed Countries*, 16 IND. INT'L & COMP. L. REV. 261, 286–90 (2005) (discussing whether inventions patented by the United States using genetic resources or indigenous knowledge of less-developed countries represent bio-prospecting or bio-piracy).

180. *See* PAUL J. DAVIDSON & FRANCA CIAMBELLA, INVESTMENT IN SOUTHEAST ASIA: POLICY AND LAWS 278 (Elsevier ed., 1995) (noting the importance of filing for a patent application in Thailand under certain time limits); s*ee also* WORLD INTELLECTUAL PROPERTY ORGANIZATION, THE USE OF INTELLECTUAL PROPERTY AS A TOOL FOR ECONOMIC GROWTH IN THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN REGION) 17 (2004) (recognizing the increase in Thailand's filing of foreign patent applications); *see also* BUSINESS INTERNATIONAL CORPORATION, BUILDING A LICENSING STRATEGY FOR KEY WORLD MARKETS 92 (The Corporation, 1990) (emphasizing restrictions on applying for a patent in Thailand).

statutory term was extended from 15 years to 20 years.[181] Additionally, it offered patent holders more stringent legal remedies by allowing them to institute infringement cases while the application was pending if they could show that the infringement was willful and that the infringer had notice that the application has been filed.[182]

2. Closure of Loopholes in the Old Law

The Act also closed loopholes in the prior 1979 law used by parties to get around a patent holder's exclusive rights.[183] It created and recognized a patent holder's additional rights of possession for sale, offer for sale, and imports for such items.[184]

3. Reform of the Abuse Provisions

The more contentious provisions of the original Patent Act were also revised.[185] The ambiguous prohibitions on patent holders to enforce conditions and restrictions on licensees

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181. *See* John Richards, *Recent Patent Law Developments in Asia,* 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 599, 630, 639–40 (1997) (comparing patent law changes throughout Asia); *see also* Getlan, *supra* note 108, at 197–99 (discussing the changes made to Thailand's patent laws). *See generally* Newby, *supra* note 163, at 46 (magnifying the patent problems in Thailand before the amendments to its patent laws).

182. *See* ASSAFA ENDESHAW, INTELLECTUAL PROPERTY IN ASIAN EMERGING ECONOMIES: LAW AND POLICY IN THE POST-TRIPS ERA 41 (1950) (mentioning that the grounds for exemption of certain infringement acts have not been significantly altered in the 1992 patent act); *see also* Edward J. Kelly & Vipa Chuenjaipanich, *Intellectual Property in Thailand,* TILLEKE & GIBBINS INT'L LTD., March 2002, at 7 (discussing Thailand's efforts for suppression of infringements); *see also* Morgan, *supra* note 101, at 803–4, 839–42 (noting Thailand's emphasis on handling civil infringement cases instead of criminal).

183. *See* Park, *supra* note 176, at 136 (suggesting the likelihood of Thailand renouncing its compulsory licensing laws in its patent amendments); *see also* Jirawat Panpiemras & Thitima Puttitanun, *Facilitating the Entry of New Generic Drugs: A Proposal for Thailand*, TDRI QUARTERLY REVIEW, Sept. 2006 at 7 (proposing changes to the Thai Patent Act to reduce risk of infringement). *But see* Peter Magic, International Technology Transfer & In-tellectual Property Rights 7 (Nov. 30, 2003) (unpublished final paper, University of Texas, Austin) *available at* http://www.cs.utexas.edu/users/fussell/courses/econtech/public-final-papers/Peter_Magic_International_IP_Rights.pdf (providing that Thailand's 1992 Patent Act strengthened patent laws to lessen risks of infringement).

184. *See* Office of the United States Trade Representative, *Determination Concerning Patent Protection in Thailand*, 1992 WL 292793 (1992) (stating the United States' criticisms of Thailand's patent regime and stating reasons for adopting measures to force Thailand to amend its laws); *see also* Howard A. Kwon, *Patent Protection and Technology Tranfor in the Developing World: The Thailand Experience*, 28 GEO. WASH. J. INT'L L. & ECON. 567, 590 (1995) (noting that the 1992 Amendments addressed many of the deficiencies that were present in the original patent act); *see also* Srividhya Ragavan, *Can't We All Get Along? The Case for a Workable Patent Model*, 35 ARIZ. ST. L.J. 117, 173–74 (2003) (enumerating several reasons that caused Thailand to feel pressured to revise its patent laws in the mid to late 1980s).

185. *See* Skees, *supra* note 153, at 269 (assessing the modifications that Thailand's legislators made to the original regime's process for granting licenses through the 1992 Patent Act); *see also* Kwon, *supra* note 184, at 591. (describing the way that the 1992 amendment closed various loopholes patent license issuance that were present in the original legal scheme). *See generally* Jakkrit Kuanpoth, *Major Issues in the Thai Patent System*, L.J THAILAND BARRISTERS ASSN., THE ONLINE THAILAND L. J. (1999), *available at* http://www.thailawforum.com/articles/jakpat1.html (describing the intended and actual effects of the 1992 Patent act on the compulsory licensing system).

were loosened.[186] Instead of an outright prohibition, the 1992 Patent Act[187] allowed licensors to enforce restrictions on licensees so long as they do not do so "in a manner which limit[ed] competition illegitimately."[188] The controversial abuse provisions were also narrowed.[189] The amendment allowed any person to apply for a compulsory license of a patent if it remained unutilized for three years subsequent to its grant or four years after its application date.[190] The new law deviated from the original provision by mandating that an individual seeking a compulsory license must now show that he had attempted to obtain one from the patent holder and had "proposed reasonable conditions and compensation" to no avail.[191]

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186. *See* Patent Act B.E. 2522 (1979) *as amended by* the Patent Act (No. 2) B.E 2535 (1992) *and* the Patent Act (No. 3) B.E. 2542 (1999) (citing the relevant 1992 Amendments to the 1979 regime); *see also* Stefan Kirchanski, *Protection of U.S. Patent Rights in Developing Countries: U.S. Efforts to Enforce Pharmaceutical Patents in Thailand*, 16 LOY. L.A. INT'L & COMP. L.J. 569, 573 (1994) (explaining that the Thai Legislative Assembly passed a revision of the Act in 1992 to appease U.S. pressures to revise the 1979 Act); *see* Kwon, supra note 184, at 567 (noting that foreign investors were long awaiting for the Thai legislature to take reform measures on their Patent legal infrastructure).

187. *See* Patent Act B.E. 2522 § 39 (1979) *as amended by* the Patent Act (No. 2) B.E. 2535 (1992) *and* the Patent Act (No. 3) B.E. 2542 (1999) (restricting what impositions the patentee shall be able to impose upon any licensee); *see also* Kwon, *supra* note 184, at 592 (1995) (explaining that a patent licensor cannot make illegitimate demands); *see also* Michael Begg, Comment, *How the West Was Won: A Critique of U.S. Tactics in Negotiating Patent Protection for Pharmaceuticals in Thailand*, 1 PAC. RIM. L. & POL'Y J. 299, 327 (1992) (discussing how a patent holder would be able to prevent developments of patents under the old act).

188. *See* Patent Act B.E. 2522 § 55 (1979) *as amended by* the Patent Act (No. 2) B.E 2535 (1992) *and* the Patent Act (No. 3) B.E. 2542 (1999) (allowing the Director-General to cancel a patent when the licensee has sat idle on the patent for a specific period of time); *see also* Kwon, *supra* note 184, at 585 (opining that the most contentious provision may have been the "abuse provision" which disallowed people to sit on their rights). *See generally* Kuanpoth, *supra* note 172 (discussing the narrowed controversial abuse provisions).

189. *See* Patent Act B.E. 2522 § 55 (1979) *as amended by* the Patent Act (No. 2) B.E 2535 (1992) *and* the Patent Act (No. 3) B.E. 2542 (1999) (allowing the Director-General to cancel a patent when the licensee has sat idle on the patent for a specific period of time); *see also* Kwon, *supra* note 184, at 585 (opining that the most contentious provision may have been the "abuse provision" which disallowed people to sit on their rights). *See generally* Kuanpoth, *supra* note 185 (discussing the narrowed controversial abuse provisions of the origin).

190. *See* Patent Act B.E. 2522 § 46 (1979) *as amended by* the Patent Act (No. 2) B.E 2535 (1992) *and* the Patent Act (No. 3) B.E. 2542 (1999) (allowing that a compulsory license may be issued three to four years after its application date subject to certain conditions); *see also* Jakkrit Kuanpoth, *Patent and Access to Medicines in Thailand—The DDL Case and Beyond*, 2 INTELL. PROP. Q. 149, 153 n. 8 (2006) (explaining that the application for a compulsory license cannot be made from whichever period expires later, three or four years); *see also* Kwon, *supra* note 184, at 585 (showing that the original Act was inferior to the 1992 revision because it only allowed a three-year non-use period before another person could be granted a compulsory license).

191. *See* Patent Act B.E. 2522 § 46 (1979) *as amended by* the Patent Act (No. 2) B.E 2535 (1992) *and* the Patent Act (No. 3) B.E. 2542 (1999) (requiring applicant to show he has made an effort to obtain a license from the patentee before being issued a compulsory license); *see also* Cortney M. Arnold, *Protecting Intellectual Property in the Developing World: Next Step—Thailand*, 2006 DUKE L. & TECH. REV. ¶1, 8 (2006) (stating that compulsory licenses can be issued if certain conditions, such as prior negotiations for a voluntary license, are met); *see also* Kwon, *supra* note 184, at 592 (explaining that a person would have to try to obtain one to no avail before obtaining a compulsory license); *see also* Jakkrit Kuanpoth, *Patent and Access to Medicines in Thailand—The DDL Case and Beyond*, 2 INTELL. PROP. Q. 149, 153 (2006) (explaining that it must be shown that no agreement could be made with the patent holder).

4. Judicial Review and Remedies

The statute granted an injured party the ability to seek judicial review that was not afforded in the old law "relating to registrability and legality of license agreements and the grant and cancellation of compulsory licenses."[192]

Furthermore, although the old law explicitly stated a 300,000 baht (US $12,000) penalty or a three-year prison term for patent infringements,[193] it failed to provide a cause of action for aggrieved parties, which rendered the penalty moot.[194] The 1992 Patent Act filled this void by granting an injured patent holder a right to bring a civil action against the alleged infringer for legal or equitable relief.[195] Additionally, the injured party could obtain preemptive relief if it could provide "clear evidence" of imminent infringement.[196]

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192. *See* Patent Act B.E. 2522 § 35 (1979) *as amended by* the Patent Act (No. 2) B.E 2535 (1992) *and* the Patent Act (No. 3) B.E. 2542 (1999) (entitling applicant to file with the court for damages from the infringer in specific circumstances); *see also* Kwon, *supra* note 184, at 591 (explaining that the amendment clarifies an injured party's rights to bring an action in court); *see also* Preeti Sinhi, *Special 301: An Effective Tool Against Thailand's Intellectual Property Violations*, 1 PAC. RIM. L. & POL'Y J. 281, 293 (1992) (surveying some situations in which a patentee will receive protection if damaged).

193. *See* FRANCK FOUGERE AND CARMEN KULAJTA, *Thailand*, *in* ANTI-COUNTERFEITING (2010) 219, 219 (reporting the new maximum penalties for counterfeiting); *see also* JULIA SORG, INTELLECTUAL PROPERTY IN ASIA: LAW ECONOMICS, HISTORY AND POLITICS 311 (Peter Ganea et al. eds., Springer 2009) (2009) (asserting the fines and penalties for patent infringers); *see also* TILLEKE & GIBBINS INTERNATIONAL LTD., THAILAND LEGAL BASICS 22 (2003) (recognizing the rights of intellectual property owners).

194. *See* RODERIC BROADHURST AND PETER GRABOSKY, CYBER-CRIME: THE CHALLENGE IN ASIA 238 (2005) (reporting how Thailand's IP laws now place a greater emphasis on determent); *see also* FRANCK FOUGERE AND CARMEN KULAJTA, *THAILAND in* ANTI-COUNTERFEITING 2010 219, 220 (indicating that there are now both civil and criminal remedies for a patent holder); *see also* TILLEKE & GIBBINS INTERNATIONAL LTD., THAILAND LEGAL BASICS 22 (2003) (demonstrating the protection a patent holder now has).

195. *See* C.C.C., Part 1 § 420 (Thai) (addressing the right to compensation that an injured party has against a wrongdoer); *see also* EDWARD J. KELLY AND VIPA CHUENJAIPANICH, INTELLECTUAL PROPERTY IN THAILAND 3–4 (2002) (describing the civil remedies available to a patent holder owners, even though proceeding under cranial law is still the preferred method).

196. *See* NANDANA INDANANA AND AREEYA RATANAYU, INTERNATIONAL—ASIA: BURDEN AND STANDARD OF PROOF TO OBTAIN PRELIMINARY INJUNCTION and Anton Piller, *Order in Patent Infringement Cases*,16 IP LITIGATOR 31 (2010) (illustrating the necessary standard of proof needed to obtain a preliminary injunction); *see also* VICHAI ARIYANUNTAKA, INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE COURT: A NEW DIMENSION FOR IP RIGHTS ENFORCEMENT IN THAILAND (2010) (discussing the right of a patent owner to prevent an infringement through a preliminary injunction); *see also* DARANI VACHANAVUTTIVONG AND NANDANA INDANANDA, THAILAND: NEW LAWS BRING EXPANDED RIGHTS AND ADDITIONAL OBLIGATIONS 190–91 (2010) (demonstrating how the Supreme Court is willing to grant preliminary injunctions).

J. Immediate Effects of 1992 Patent Act on FDI: A Short-Term Assessment

Thailand's prospects from amending the original patent regime included not only an increase in FDI, but also a significant increase in complementary R & D and other technology intensive activity.[197] Howard A. Kwon explored the correlation between increased patent protection and FDI activity in his 1995 article on patent protection and technology transfer in Thailand.[198] He used such factors as the rate of patent applications, survey results grading the relative importance of patent protection to foreign investors, and the rate of FDI to gauge the effects of the 1992 Patent act on development.[199]

Although he found a general increase in the rate of patent applications subsequent to the establishment of the new law, he also found that general investment activities declined.[200] Immediately following the amendment, the number of foreign applicants increased by a dra-

197. *See* WALDEN PUBLISHING LTD, WORLD OF INFORMATION BUSINESS INTELLIGENCE REPORT 30 (2001) (reporting how in the mid to late 1990s information technology was one of the most important sectors to Thailand's economy); *see also* TILLEKE AND GIBBONS, INTERNATIONAL LTD, A GUIDE TO DOING BUSINESS IN THAILAND 3 (2005) (reporting the rapid evolution of the telecommunication industry in Thailand in the past 15 years); s*ee also* Jakkrit Kuanpoth, *Major Issues in the Thai Patent System*, 50 THAI BAR L. J. 55 (1994) (asserting that process patent laws are important to grow the R & D of developing countries).

198. *See* UNITED NATIONS, NEW YORK AND GENEVA, A CASE STUDY OF THE ELECTRONICS INDUSTRY IN THAILAND: TRANSFER OF TECHNOLOGY FOR SUCCESSFUL INTEGRATION INTO THE GLOBAL ECONOMY, 9 (2005) (suggesting how the protection of IPR in Thailand led to an increase in FDI); *see also* PLUVIA ZUNIGA AND ELIF BASCAVUSOGLU, IMITATION, PATENT PROTECTION AND ENTRY MODE 6 (2003) (demonstrating how as IPR protection increases, the cost of FDI to foreign investor decreases); *see also* Yi Qian, *Do National Patent Laws Stimulate Domestic Innovation in a Global Patenting Environment?: A Cross Country Analysis of Pharmaceutical Patent Protection*, 89 REV. OF ECON. AND STATISTICS, 436, 448 (2007) (hinting that national patent laws attract FDI and other forms of foreign technology transfer).

199. *See Contracts, Intellectual Property Rights, and Multinational Investment in Developing Countries*, 53 J. OF INT'L ECON. 189-204 (2001) (suggesting that the risk of technology spill over due to weak IP protection laws will have a negative effect on FDI); *see also* Richard Raysman and Peter Brown, *Global Sourcing: Intellectual Property, Tech Transfers* 237 no. 88 N.Y. L. JOURNAL 1, 1 (2007) (asserting that treaty protecting IPR are an important consideration for foreign investors); *see also* ERIC D. RAMSTETTER, RECENT TRENDS IN FOREIGN DIRECT INVESTMENT IN ASIA: THE AFTERMATH OF THE CRISIS TO LATE 1999 29 (2000) *(*showing how from 1992 to 1998 Thailand's FDI more than tripled. This is probably due to the 1992 Patent Act).

200. *See* PLUVIA ZUNIGA & ELIF BASCAVUSOGLU, IMITATION, PATENT PROTECTION AND ENTRY MODE 9-10 (2003) (suggesting that the effect of IPR protection on FDI depends on the host country's market size); *see also* WALDEN PUBLISHING, *supra* note 197, at 16 (explaining how the global liquidity shortage had an adverse effect on business in Thailand); *see also* ECONOMIST INTELLIGENCE UNIT, THAILAND: FDI OUTLOOK, 14 SEP. 2010 (2004) (stating how FDI levels reached their peak in 1998 and have since tapered off).

matic 21%.[201] This is a marked improvement from a stagnant period of patent filing activities years prior to the act.[202] Contrastingly, total net FDI fell 27% in 1993.[203]

Moreover, it appeared that minimal progress was being made with respect to improving the efficiency of the technology transfer process between MNEs and Foreign investors to local affiliates.[204] R & D activities remained low.[205] Doors to more sophisticated avenues of technology remained closed as transfer remained limited to low-level technology turnkey projects.[206]

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201. *See* Howard A. Kwon, *Patent Protection and Technology Transfer in the Developing World: The Thailand Experience*, 28 GEO. WASH. J. INT'L L. & ECON. 567, 598 (1995) (asserting that the 1992 Patent Act caused a significant twenty-one percent surge in patent applications in 1993). *See generally* Ali Imam, *How Patent Protection Helps Developing Countries*, 33 AIPLA Q. J. 377, 393 (2005) (illustrating that inventors' desires for more protection for their inventions in a growing economy persuades them to file more patent applications). *But see* HIROYUKI ODAGIRI ET AL., INTELLECTUAL PROPERTY RIGHTS, DEVELOPMENT, AND CATCH-UP: AN INTERNATIONAL COMPARATIVE STUDY 394 (2010) (explaining that despite the 1992 amendment, patent registration to protect Thai inventions and design remained low).

202. *See* Odagiri, *supra* note 201, at 394 (emphasizing that the period before the 1992 amendment, the patent regime was weak and patent registration was low and increased slowly); *see also* Biswajit Dhar & C. Niranjan Rao, *International Patent System: An Empirical Analysis*, RES. & INFO. SYS. FOR THE NON-ALIGNED AND OTHER DEVELOPING COUNTRIES, 1, 39 (2002) (claiming that some developing countries, including Thailand, had a 10% increase in foreign application within the period of 1975–1998); *see also* Kwon, 598 (1995) (discussing the marked increase in the total number of patent applications filed by foreign applicants form a previous three year stagnant period).

203. *See* Bulletin of World Trade Organization, *Impact of the World Trade Organization TRIPS Agreement on the Pharmaceutical Industry in Thailand*, 79 BULL. WORLD HEALTH ORG. 5, ¶ 11 (2001), www.scielosp.org (search "subject," type "Thailand," go to second page, scroll down to article) (showing that the existence of more Thai than foreign pharmaceutical shareholders is an indication of low FDI flow into the country); *see also* Kwon, *supra* note 201, at 598–99 (contrasting the increase in patent application to a 27% decrease in total FDI and suggesting that the investment decline will continue); *see also* Lauren Loew, Note, *Creative Industries in Developing Countries and Intellectual Property Protection*, 9 VAND. J. ENT. & TECH. L. 171, 187 (2006) (explaining that even after the 1992 amendment, the number of foreign investors in Thailand remained low).

204. *See* Kwon, *supra* note 201, at 600 (1995) (arguing that Thailand's inability to improve technology transfers support the unpopularity of patent protections as investment factors). *See generally* Keith E. Maskus, *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer*, 9 DUKE J. COMP. & INT'L L. 109, 143 (1998) (asserting that East Asia's limited access to foreign technologies through FDI has been a detriment to its industrial growth). *But see* Symposium, *Competition Policy and the Stimulation of Innovation: TRIPS and the Interface Between Competition and Patent Protection in the Pharmaceutical Industry*, 26 BROOKLYN J. INT'L L. 363, 375 (2000) (interpreting Edwin Mansfield's work to show that technical development such as intellectual property protection results in investment flow).

205. *See* Kwon, *supra* note 201, at 600 (describing how Thailand's ongoing low R & D corroborates its decrease in technology transfer efficiency); *see also* Maskus, *supra* note 191, at 143 (using a study to indicate that the proportion of R & D facilities is associated to the strength and weakness of a country's patent protection system); *see also Competition*, *supra* note 204, at 375–76 (acknowledging that patent protection is essential to R & D because with a higher patent protection, there is more investment).

206. *See* Amir H. Khoury, *A Neoconventional Trademark Régime for "Newcomer" States*, 12 U. PA. J. BUS. L. 351, 375 (2010) (indicating that "turnkey technology" does not entail real technology transfer); *see also* Kwon, *supra* note 201, at 600 (1995) (revealing that the survey results showed turnkey projects and expert consultation accounted for a large part of technology flow into Thailand). *See generally* KEITH E. MASKUS, ENCOURAGING INTERNATIONAL TECHNOLOGY TRANSFER 7 (International Centre for Trade and Sustainable Development 2004) (reviewing international technology transfer and its policy considerations).

Finally, Kwon found that secondary flows of technology transfer are still purposely and seriously impeded by investors seeking to prevent access to their more sophisticated and valuable technologies.[207] Foreign investors retain strict control over access by engaging in only very low-level R & D activity with local affiliates and contractually forbidding sublicensing, and imposing export and local-use restrictions.[208]

Kwon concluded that much more was to be desired from Thai officials than just legislative reform if they wanted to reach the level of development necessary to engage in effectual technology transfer.[209] Although Thai officials did make a concerted effort to reform their Patent Regime through the 1992 Patent Act,[210] it led to unfavorable results since foreign investors per-

207. *See* Kwon, *supra* note 201, at 600 (stating that transfers are limited to dated and inferior technologies as evidenced by a lack of higher levels of technological capability); *see also* Keith E. Maskus, *Using the International Trading System to Foster Technology Transfer for Economic Development*, 2005 MICH. ST. L. REV. 219, 233 (2005) (reporting that developing countries complain that the level of technology transfer is limited and positing that the limit is the result of policy failures). *See generally* Yiheng Feng, Note, *"We Wouldn't Transfer Title to the Devil": Consequences of the Congressional Politicization of Foreign Direct Investment on National Security Grounds*, 42 N.Y.U. J. INT'L L. & POL. 253, 254 (2009) (observing the restrictive treatment of FDI due to the concern that foreign states will siphon off valuable technologies).

208. *See* Wendy Duong, *Effect of Artificial Intelligence on the Pattern of Foreign Direct Investment in the Third World: A Possible Reversal of Trend*, 36 DENV. J. INT'L L. & POL'Y 325, 330 (2008) (highlighting the pattern of transnational corporations resisting research & development in industrialized countries); *see also* Kwon, *supra* note 201, at 600–601(enumerating the types and effects of the stringent use and dissemination controls imposed by transnational corporations on local affiliates over imported technology). *See generally* Leon E. Trakman, *Foreign Direct Investment: Hazard or Opportunity?*, 41 GEO. WASH. INT'L L. REV. 1, 61 (2009) (reflecting on the historical disparity of negotiating power between investors from wealthy developed states and the developing world).

209. *See* Stefan Kirchanski, *Protection Of U.S. Patent Rights in Developing Countries: U.S. Efforts to Enforce Pharmaceutical Patents in Thailand*, 16 LOY. L.A. INT'L & COMP. L. REV. 569, 573 (1994) (stating that despite the amendments made to the original 1979 Patent Act, for the United States much remained to be desired with regard to Thailand's intellectual property regime); *see also* Kwon, *supra* note 201, at 572 (asserting that legislative changes made by Thai officials are largely concerned with ensuring economic growth, and not the intellectual property rights of inventors"). *See generally* ANDREW B. ULMER, MEDIA, ADVERTISING, & ENTERTAINMENT LAW THROUGHOUT THE WORLD, § 34:3 (2008) (recognizing that Thailand recognized the need to improve intellectual property rights protection by establishing a court with exclusive jurisdiction in cases involving intellectual property).

210. *See* Srividhya Ragavan, *Can't We All Get Along? The Case for a Workable Patent Model*, 35 ARIZ. ST. L.J. 117, 174 (2003) (examining the creation of the Pharmaceutical Patent Board by the Thai government within the 1992 Patent Act as an effort to improve patent protection); *see also* Preeti Singha, *Special 301: An Effective Tool Against Thailand's Intellectual Property Violations*, 1 PAC. RIM L. & POL'Y J. 281, 293 (1992) (discussing the legislative amendments made in 1992, that changed Thailand's patent regime "in several critical respects). *See generally* Kirchanski, *supra* note 209, at 573 (explaining that Thailand revised the 1979 Patent Act in 1992, largely to satisfy US objections).

ceived the new law as nothing more than a political tool to appease the international forum.[211] By 1995, it was not the revolutionary precursor to increased FDI investment and technology spillover intended by Thailand.[212] But Kwon did concede that the legal reform at the very least did serve as a symbol of Thailand's efforts to commit to its economic responsibilities within the international arena.[213] Therefore, once Thailand reaches the level of sophistication necessary to make the gradual transition to a society that benefits from FDI technology spillover, it will serve as a useful and practical learning example to other developing countries.[214]

As mentioned in my discussion regarding the 2005 and 2007 World Bank reports indicating Thailand's lack of interest in promoting R & D development, Thailand has invested very little in this area. Further indications that Thailand has yet to reach a level of sophistication necessary to utilize outside technology for the benefit of its domestic infrastructure is its recent practice of utilizing compulsory licenses for pharmaceutical drugs. A compulsory license is a judicially or governmentally mandated "annulment of patent rights." Therefore, if a country issues a compulsory license for a particular product then the product not receive patent protec-

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211. *See* Michael Halewood, *Regulating Patent Holders: Local Working Requirements and Compulsory Licenses at International Law*, 35 OSGOODE HALL L.J. 2, 245 (1997) (recognizing that governments around the world are being pressured to change their patent legislation); *see also* Singha, *supra* note 210, at 293–94 (discussing that despite Thailand's 1992 Patent Act amendments, the United States Trade Representative maintained that the new laws were still deficient in critical respects). *See generally* Michael W. Smith, *Bringing Developing Countries' Intellectual Property Laws to TRIPs Standards: Hurdles and Pitfalls Facing Vietnam's Efforts to Normalize an Intellectual Property Regime*, 31 CASE W. RES. J. INT'L L. 211, 233–34 (1999) (detailing the reaction of the Thai public to the pressure by United States for it to modify its intellectual property regime).

212. *See* Edwin Mansfield, *Unauthorized Use of Intellectual Property: Effects on Investment, Technology Transfer and Innovation*, in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY, 107, 110 (Mitchel B. Wallerstein et al. eds., 1993) (suggesting that a greater respect for intellectual property rights in developing countries would incentivize inventive and innovative activity in developing countries); Howard A. Kwon, *Patent Protection and Technology Transfer in the Developing World: The Thailand Experience*, 28 GEO. WASH. J. INT'L L. & ECON. 567, 599 (1995) (explaining the inability of the 1992 amendments to sufficiently attract foreign investors and increase technology flow). *See generally* Alice O. Martin & Sendil K. Devadas, *Patents with an "I"—Patients*, 18 ANNALS HEALTH L. 261, 268 (2009) (suggesting that countries which emulated Western patent regulations in the 1990s saw significant economic benefits, while those, like Thailand, which refused did not).

213. *See* Kirchanski, *supra* note 209, at 573 (stating that Thailand's 1992 amendments to its original 1979 Patent Pact was largely motivated by its desire to assuage the United States' concerns); s*ee also* Kwon, *supra* note 212, at 604 (recognizing that despite the lack of substantive reform made to Thai patent law, the legislative reforms signal Thailand's acceptance of its economic responsibilities). *See generally* Christopher Heath, *Indonesian Law*, 44 AM. J. COMP. L. 669, 671 (1996) (stating that even after its reformation of the Patent Act in 1992, Thailand intended to maintain its commitment to intellectual property rights, with the establishment of an IPR court in 1997).

214. *See* Kwon, *supra* note 212, at 604–5 (positing that Thailand's gradual evolution toward stronger intellectual property right protection will provide a model for other developing countries); *see also* Stephanie Skees, *Thai-ing Up the Trips Agreement: Are Compulsory Licenses the Answer to Thailand's AIDS Epidemic?*, 19 PACE INT'L L. REV. 233, 269 (2007) (discussing that Thailand has made several amendments to its patent laws and followed the lead of developed countries in order to improve its patent system). *See generally* Edward J. Kelly, *Advocating IP Protection as an Aspect of National Competitiveness*, ASPATORE, 1.15 (2009) (arguing that the United States, European Union and Japan could potentially guide Thailand to reaching a world-class international standard in intellectual property sophistication).

tion, allowing citizens of the host country to freely produce copies of it at a much lower price. The 2007 and 2008 Special 301 reports noted the use of compulsory licenses applied to imported patented drugs in Thailand. Use of compulsory licenses serves as indications that developing countries lack their own technological wherewithal to research and develop their own products. Although Thailand has made some apparent minor strides in attempting to foster innovation in 2010 through its public encouragement of patent filings in the biotechnology sector, a combination of its lack of interest in developing R & D and reliance on compulsory licenses shows that Thailand still has a long way to go before it can provide a platform for efficient FDI technology spillover.

K. The 1999 Amendment

A lot was left to be desired from the 1992 Patent Act amendments. A combination of U.S. pressure to change its patent regime and the resulting scare of the 1997 Asian market crash caused Thailand to amend its patent laws once again in 1999. Since much of the recent controversy on IP issues in Thailand involves the pharmaceutical industry and the recent AIDs epidemic, most scholarly and news articles that discuss the 1999 amendments and their effects focus on the compulsory licensing issue. In short, the 1999 amendment was a legislative reaction to the pressures from the USTR to eliminate the Patents Board, which was created pursuant to the 1992 Act and was given the power to initiate proceedings for compulsory licensing and to narrow conditions under which compulsory licenses may be granted. After the 1997 crisis, Thailand passed the 1999 Patent Act, which integrated the USTR's demands to significantly cut back on compulsory licensing in fear of losing its ties to the global economy. Very little has been reported about the effects of the amendment on FDI generally.

L. Increased Importance of Protecting Intellectual Property Rights for Foreign Investors

Some 2006 studies have reported that the importance of protecting intellectual property rights has moved up the ranks among motivating factors to invest in a developing country in the prior two decades.[215] Although numerous studies have explored the effects of a strong IP regime on a country's development, it has not yet been said with absolute confidence that a stronger regime necessarily promotes growth.[216] However, there is a general agreement among commentators, including critics of strong patent regimes, that patents are a legal and business

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215. *See* David Hindman, *The Effect of Intellectual Property Regimes on Foreign Investments in Developing Economies*, 23 ARIZ. J. INT'L & COMP. LAW 467, 481; *see also* Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89, 91 (1993) (acknowledging that patents comprise an important incentive for an investor to invest in a particular country), *see also* Mansfield, *supra* note 212, at 112 (stating the importance of intellectual property rights, to different industries, and its effect on their foreign direct investments). *See generally* Cortney M. Arnold, *Protecting Intellectual Property in the Developing World: Next Stop—Thailand*, 2006 DUKE L. & TECH. REV., ¶14 (2006) (discussing the improvement of the enforcement of intellectual property rights and gradually meeting the expectations of foreign investors).

216. *See* Cynthia Ho, *Patent Breaking or Balancing? Separating Strands of Fact from Fiction Under TRIPS*, 34 N.C.J. INT'L L. & COM. REG. 371 at 454 (2009) (noting that, contrary to the many assertions of the importance of strong patent rights, there are no definitive studies that show that such rights promote innovation).

reality.[217] Many high technology companies, especially pharmaceutical companies, rely on patents to recoup expensive R & D costs and to reap profits.[218]

To examine the impact of an IP regime on the development of a host country, multiple factors have to be taken into consideration.[219] The anticipated benefits or costs derived from new law would depend on such factors as the openness of the market, human capital and the policies for improving domestic infrastructure.[220]

Also, economists have pointed out that IP activity can have both negative and positive effects on a country.[221] Whereas IP protection is critical to developed countries that place importance on providing incentives for innovation, developing countries have had a "singular lack of regard for intellectual property rights," which they view as hampering domestic competition.[222]

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217. *See id*. at 383 (stating that patents are a "business reality" since many business rely on patents as part of their business plan).

218. *See id*. at 446 (asserting that there is an implicit assumption that patents are necessary to recoup the costs associated with marketed drugs and also drugs that are investigated but ultimately deemed unmarketable).

219. *See* EMMANUEL HASSAN, INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES 4 (RAND Corporation 2010), available at http://www.rand.org (enumerating several IPR factors that MNES take into consideration when deciding to invest in a developing country); *see also* Hindman, *supra* note 215, at 468 (2006) (demonstrating that IP regimes can affect a nation's economic status); *see also* Rosemary Wolson, Intellectual Property Tools, Innovation and Commercialization of R & D (2004), available at http://www.iprsonline.org (explaining that IP regimes will affect countries in different stages of development distinctly).

220. *See* Robert L. Ostergard, *The Development Dilemma*, 36 N.Y.U. J. INT'L L. & POL. 177, 205 (2003) (discussing the effect of IP Laws on Open Markets and the pressure of developing countries to adopt them); *see* Mikhaelle Schiappacasse, *Intellectual Property Rights in China*, 2 BUFF. INTELL. PROP. L.J. 164, 166 (2004) (examining the effect of IP Laws and human capital on the economy and the long term beneficial effects they will have); *see also* MARGRIET F. CASWELL, KEITH O. FUGLIE & CASSANDRA A. KLOTZ, AGRICULTURAL BIOTECHNOLOGY: AN ECONOMIC PERSPECTIVE 10 (2006) (analyzing the potential negative effects that IP rights may have on a country).

221. *See* Matthew D. Goodstein, *Sarbanes-Oxley: A Dark Cloud over Intellectual Property and Business*, 6 J. MARSHALL REV. INTELL. PROP. L. 272, 274 (2007) (explaining that in modern business IP activities play a greater role and have a more positive role in the economy); *see also* JIYOUNG HAN ET AL., INTELLECTUAL PROPERTIES IN ASIAN COUNTRIES, 123 (demonstrating that it is difficult to separate IP policies in order to determine their impact on economic growth); *see also* DONALD G. RICHARDS, INTELLECTUAL PROPERTY RIGHTS AND GLOBAL CAPITALISM 74 (2004) (discussing the potential negative effects that strengthening IPR's might have on economic growth).

222. *See* Peter K. Yu, *P2P and the Future of Private Copying Property,* 7 U. COLO. L. REV. 653, 729 n.376 (2005) (highlighting how developing countries do not see the practical purpose behind implementing stricter IP laws); *see also* Beatrice Lindstrom, *Scaling Back TRIPS Plus*, 42 N.Y.U. J. INT'L L. & POL'Y 917, 922 (2010) (questioning whether there is a benefit to IP laws in developing countries as implementing them has long term benefits yet there are short term needs); *see also* Robert Greene Sterne, *The 2005 U.S. Patent Landscape for Companies*, 5994 PRACTISING L. INST. 293, 357 n.81 (2005) (identifying that there are weak IP rights in developing countries).

However, within the broad context of increased globalization, a policy approach that is favorable to protecting IP rights will have a profound positive effect on a host country's development.[223] A policy regime that can strike a balance between creating both a favorable IP environment for foreign investors and encouraging domestic competition will more likely be successful in a developing country that previously had a cynical perception of IP rights.[224]

Influenced by the increased pervasion of globalization, companies across all industries have sought to adopt a global strategy of sourcing products, services and expertise from low-cost developing countries.[225] Currently, vast improvements in communications and transport technology have allowed companies to seamlessly move information and products through borders at low costs.[226] Therefore, a well-structured global strategy would enable companies to reduce costs and efficiency without diminishing the quality of products or services.[227] In this environment it is favorable for companies to be able to reduce costs as much as possible when embarking on such ventures.[228]

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223. *See* Tu Thanh Nguyen, *Competition Law and Access to Pharmaceutical Technology in the Developing World*, 28 BIOTECH L. REP. 693, 693 (2009) (discussing how IP Rights help further social and economic ends through increased trade flow and technological innovation); *see also* Bernard M. Hoekman, Transfer of Technology to Developing Countries 14 (University of Colorado at Boulder, Working Paper No. PEC2004-0003, 2004) (demonstrating that trade flow increases as patent rights protection increases).

224. *See* Justin McCabe, *Enforcing Intellectual Property Rights*, 8 PIERCE L. REV. 1, 1 (2009) (discussing the balance between economic development and stricter IP rights); *see also* Amir H. Khoury, *Dubai's New Intellectual Property Based Economy*, 9 J. MARSHALL REV. INTELL. PROP. L. 84, 90–91 (2009) (debating the positive and negative effects of IP rights on the economies of developing countries and whether they actually attract foreign investors); *see also* Andrew Michaels, *International Technology and TRIPS Article*, 41 GEO J. INT'L L. 223, 223 (2009) (reviewing the advantages and disadvantages of implementing IP rights in developing countries).

225. *See* Sonia Baldia, *Intellectual Property in Global Sourcing*, 38 GEO. J. INT'L L. 499, 499 (2007) (discussing the adoption of the globalized strategy of sourcing products); *See generally* GARY M. LAWRENCE, REPRESENTING HIGH TECH COMPANIES, RHTC § 9.10, (2004) (noting the reliance of developed countries to source product from developing countries as a result of globalization); *see generally* M.G.K. MURPHY, GLOBALISATION: MANAGING ORGANISATIONAL ADAPTATION 17 (Anmol Publications 2000) (2000) (establishing sourcing as the norm of globalization).

226. *See* Tim Rupp, *The Effect of the Telecommunications Act of 1996 on Local Exchange*, 70 S. CAL L. REV. 1085, 1117 (1997) (establishing the lower cost of newer transport technologies by connecting various networks); *see also* Jeffrey M. Hirsch, *Competition in the Global Workplace*, 54 ST. LOUIS UNIV. L. J. 427, 428–29 (2010) (demonstrating that technological advances have resulted in the lower cost of communication); *see also* Adam L. Masser, *The Nexus of Public and Private in Foreign Direct Investment*, 32 FORDHAM INT'L L. J. 1698, 1702–03 (2009) (stating that advances in communication technology are providing lower cost options and reshaping economies).

227. *See* American Society of International Law, *Japan-United States: Policies and Measures Regarding Inward Direct Investment and Buyer-Supplier Relationships*, 34 I.L.M. 1341, 1365 (1995) (expressing the shared opinion between Japan and the United States that the countries can facilitate the flow of information and products by working together to improve global buy-supplier relationships); *see also* Uri Geiger, *The Case for the Harmonization of Securities Disclosure Rules in the Global Market*, 1997 COLUM. BUS. L. REV. 241, 303 (1997) (citing harmonization of international activity as facilitating a true global market). *See generally* Jenkins v. Worldcom, Inc., 96 F. Supp. 2d 936, 942 (D. Neb. 1999) (citing an employer who provided guidelines for the company's global strategy in order to reduce costs).

228. *See* Procter & Gamble Co. v. Commissioner, 95 T.C. 323, 330 (T.C. 1990) (presenting an instance where prohibitive costs forced a company to reduce costs by adjusting payment plan); *see also* Peter Cukor & Lee McKnight, *Knowledge Networks, the Internet, and Development*, 25 FLETCHER F. WORLD AFF. 43, 50 (2001) (emphasizing the important role played by reasonably-priced business development tools); *see also* Commission Decision 1999 O.J. (L 142) (reporting that the Austrian government sought aid to offset economic risks and pursue international objectives in developing countries).

Since the 1960s, developed countries have gradually lost their competitive advantage in the production of manufactured goods.[229] The only area where they have kept a comparative advantage is in high-technology products.[230] Because such sophisticated goods, bought and sold in the global market, are generally expensive to develop and cheap to replicate,[231] companies have sought to enforce stricter IP regimes in developing countries.[232]

The costs of infringement and pirating can debilitate a company investing in developing countries.[233] For example, the World Customs Organization has reported that counterfeiting

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229. *See* Robert E. Scott, *Policy Questions and Strategy Choices: Means to the End: Sectoral Strategies and Participant Commitments: The Keys to Effective Trade and Industrial Policies: New Forms of Industrial Assistance and New Institutions to Assess Industry Structure and Develop Policy Are Needed to Create High Wage Manufacturing Jobs*, 5 STAN. L. & POL'Y REV. 127, 129 (1993) (citing decline of goods production in the United States and other developed countries); see also Morristown Magnavox Former Employees v. Marshall, 671 F.2d 194, 196 (6th Cir. 1982) (addressing petitioner's contentions that American television industry lost its competitive advantage to producers in other areas of the world); *see also* Robert W. Dziubla, *International Trading Companies: Building on the Japanese Model*, 4 NW. J. INT'L L. & BUS. 422, 472 (1982) (illustrating the decline of Japan's competitive advantage, using the sogoshosha as an example).

230. *See* DuPont Teijin Films Luxembourg SA v. Comm'n, Case T-113/00, 2002 ECJ EUR-Lex LEXIS 1422 (demonstrating Luxembourg's, Germany's, and France's attempt to protect their advantage with respect to high-technology film used in electronics); *see also* Keith E. Maskus, *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer*, 9 DUKE J. COMP. & INT'L L. 109, 133 (1998) (asserting that firms seeking to undertake foreign direct investment perceive high returns from high-technology sectors). *See generally* Mike Meier & John R. Schmertz, Jr., *In Controversy Between U.S. and EU, WTO Dispute Settlement Body Decides That EU Was Violating GATT Agreement by Imposing Greater Tariffs on High-Technology American Exports*, 4 INT'L L. UPDATE 33 (1998) (noting that United States high-technology exports account for the majority of such equipment sales in the European market).

231. *See* Scoggins v. Commissioner, 46 F.3d 950, 952 (9th Cir. 1995) (outlining an example of a multimillion-dollar deal for development in the high-technology industry); *see also* Wendy Duong, *Effect of Artificial Intelligence on the Pattern of Foreign Direct Investment in the Third World: A Possible Reversal of Trend*, 36 DENV. J. INT'L L. & POL'Y 325, 328 (2008) (discussing how businesses can cheaply replicate technology at Third World manufacturing sites); *see also* Andrew Beatty, *Measures Adopted on Cut-Price Medicines*, May 26, 2003, www.euobserver.com (explaining that since research and development costs are paid by developed nations, developing countries can produce drugs at a fraction of the price, to the dismay of foreign investors who try to exert control over the new technologies).

232. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299 (aiming to promote protection of intellectual property rights without creating barriers to legitimate trade); *see also* Jeffrey Colin, Note, *Coming into Compliance with TRIPS: A Discussion of India's New Patent Laws*, 25 CARDOZO ARTS & ENT. L.J. 877, 883 (1994) (discussing how TRIPS reflected developed countries' desire for increased intellectual property protection in less-developed countries).

233. *See* International Cablevision v. Noel, 982 F. Supp. 904, 910 (W.D.N.Y. 1997) (highlighting a plaintiff company that believed tens of thousands of dollars in damages were necessary to ensure the continued existence of the cable service industry in the face of cable piracy); *see also* Bruce Zagaris, *U.S. Business Associations Press U.S. Government to Act on PRC IPR Violations*, 21 INT'L ENFORCEMENT L. REPORTER 4, April 2005 (reporting on the millions of dollars U.S. businesses lose from pirating). *See also* David Hindman, Note, *The Effect of Intellectual Property Regimes on Foreign Investments in Developing Economies*, 23 ARIZ. J. INT'L & COMP. L. 467, 468 (2006) (arguing that costs faced by multinational corporations in attempts to protect their intellectual property could be detrimental to foreign investment).

"accounts for six percent of the global merchandise market";[234] the World Health Organization has announced that "approximately ten percent of medicines are counterfeited, costing the pharmaceutical industry forty-five billion dollars a year";[235] and 39% of software used in the world market has been pirated.[236] In the global market, the costs incurred by companies through violations of IP rights are immense.[237] Since developed countries' competitive edge has shifted to the manufacturing and selling of high-technology goods,[238] the importance of IP policies and enforcement has moved to the forefront of important investment considerations.[239]

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234. *See* Cortney M. Arnold, *Protecting Intellectual Property in the Developing World: Next Stop—Thailand*, 2006 DUKE L. & TECH. REV. 10, ¶ 1 (2006) (reporting the World Custom Organization's estimate of the role that counterfeiting plays in the global merchandise trade); *see also* Frederik Balfour, *Fakes! The Global Counterfeit Business Is Out of Control, Targeting Everything from Computer Chips to Life-Saving Medicines,* BUS. WK., Feb. 7, 2005, at 54, *available at* http://www.businessweek.com/magazine/content/05_06/b3919001_mz001.htm (discussing increases in counterfeiting in the global merchandise market); *see also* Press Release, World Customs Organization, *Africa's Efforts to Combat Fake Trade During 2010 FIFA World Cup Applauded* (July, 28 2010) (announcing that customs intercepted fake items worth millions of South African Rand prior to and during the 2010 FIFA World Cup).

235. *See* Balfour, *supra* note 234, at 52 (affirming that the World Health Organization estimated that 10%t of the worldwide market's medicine was counterfeit); *see also* CENTERS FOR DISEASE CONTROL AND PREVENTION, *Counterfeit Drugs and Travel*, *available at* http://wwwnc.cdc.gov/travel/content/counterfeit-drugs.aspx.

236. *See* Alina M. Collisson, Note, *The End of Software Piracy in Eastern Europe? A Positive Outlook with International Help*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1005, 1006 (2003) (stating that nearly 40% of the software sold in the world is counterfeit and has resulted in a $13 billion loss in revenue worldwide); *see also* Bus. Software Alliance, Sixth Annual BSA-IDC Global Software Piracy Study (2008) (stating that the percentage of pirated software on the world market is on the rise); *see also* Hema Vithlani, *The Economic Impact of Counterfeiting,* Org. for Econ. Co-operation and Dev. (1998) (affirming the high percentage of pirated software in the world market).

237. *See* Office of U.S. Trade Representative, Special 301 Rep., at 1 (2010) (explaining that legitimate businesses suffer heavy monetary losses due to intellectual property rights violations); *see also* Amy R. Edge, Comment, *Preventing Software Piracy Through Regional Trade Agreements: The Mexican Example*, 20 N.C.J. INT'L L. & COM. REG. 175, 175 (1994–1995) (asserting that software companies have lost almost half of their potential revenues in the past due to lack of IP protection and unauthorized copying). *See generally* Peter Lowe, *The Scope of the Counterfeiting Problem*, 7 CURRENTS: INT'L TRADE L.J. 78, 79 (1998) (stating that counterfeiting "results in significant pecuniary loss to business worldwide").

238. *See* A. Coskun Samli, *High-Tech Firms Must Get More Out of Their International Sales Efforts: An Exploration in Developing a Competitive Edge*, 23 INDUS. MARKET MANAGING, 333, 333 (1994) (describing how developed countries can be competitive in the future high-tech industry). *See generally* David Dollar, *What Do We Know About the Long-Term Sources of Comparative Advantage?: Technological Differences as a Source of Comparative Advantage*, 83 THE AM. ECON. REV. 431, 432 (1993) (describing how the United States can remain competitive in the future high-tech industry by focusing its limited resources in specialized fields).

239. *See* Hindman, *supra* note 233, at 468 (explaining the importance that potential investors place on intellectual property protection); *see also* Susan K. Sell, *Industry Strategies for Intellectual Property and Trade: The Quest for TRIPS and Post-TRIPS Strategies*, 10 CARDOZO J. INT'L & COMP. L. 79, 85 (2002) (describing the rigid view investors take toward adhering to World Trade Organization intellectual property rights standards); *see also* Haley Stein, *Intellectual Property and Genetically Modified Seeds: The United States, Trade, and the Developing World*, 3 NW. J. TECH. & INTELL. PROP. 160, 161 (2005) (stating that a country's intellectual property rights are becoming increasingly paramount to potential investors).

M. Cusp of Industrialization

The extent of the benefits reaped from an IP regime in order to promote economic development depends on the state of "technological development" of a developing host country.[240] Economists like Robert Solow, a respected developmental economist, recognized that an assessment of a developing country's ability to stimulate significant economic growth involves a consideration of such factors such as labor, capital and technical capabilities. Since technological growth from FDI spillover depends on a host country's ability to absorb and utilize the technology, the effects of IP protection on development should involve exploring an array of country-specific factors.[241]

A 1987 study identified countries that were on the cusp of transitioning into industrialized countries but have low commitments to intellectual property rights and revealed characteristics that set them apart from other developing nations.[242] It was the first to coin the term "LOWCOMM" to refer to a particular category of countries that have experienced some success in attracting foreign investors but have chosen not to stringently enforce IP rights. Thailand was identified as a second-tier LOWCOMM country and therefore at the cusp of industrialization but hindered from moving forward due to a lack of regard for IP rights.[243]

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240. *See* Jean Raymond Homere, *Intellectual Property Rights Can Help Stimulate the Economic Development of Least Developed Countries*, 27 COLUM. J.L. & ARTS 277, 283 (2004) (referring to an article by Evelyn Su, who states that the key to continual economic success of a county is the level of technological development of that country).

241. *See* Keith E. Maskus, *Intellectual Property Rights and Economic Development*, 32 CASE W. RES. J. INT'L L. 471, 473 (2000) (delineating how the benefits of a country's intellectual property policy are affected by its business atmosphere, merchandise, and culture); *see also* Peter Nunnenkamp & Julius Spatz, *Intellectual Property Rights and Foreign Direct Investment: A Disaggregated Analysis*, 140 REV. WORLD ECON. 393, 395 (2004) (explaining different ways a host country's traits can shape the effects of an intellectual property policy).

242. *See* J. Benjamin Bai, *From Infringement to Innovation: Counterfeiting and Enforcement in the BRICs*, 5 NW. J. TECH. & INTELL. PROP. 525, 536 (2007) (affirming the need to achieve symmetry between IP regulation and a host country's developmental needs); *see also* Banri Ito & Ryuhei Wakasugi, *What Factors Determine the Mode of Overseas R & D by Multinationals? Empirical Evidence*, 36 RES. POL'Y 1275, 1276 (2007) (listing some aspects of a host country that will be relevant in shaping its progress in intellectual property protection); *see also* Christine T. Phan, Note, *Can the Intellectual Property-Human Rights Framework Bridge the Gap Between Vietnam's Legal Reality and Rhetoric?*, 22 COLUM. J. ASIAN L. 143, 156 (2008) (highlighting the importance of a host country's developmental needs when deciding to introduce IP protection).

243. *See* J. Davidson Frame, *National Commitment to Intellectual Property Protection: An Empirical Investigation*, 2 J.L. & TECH. 209, 209 (1987) (classifying developing nations that display a low commitment to developing an intellectual property protection regime as different from other economically advancing countries); *see also* Stefan Kirchanski, *Protection of U.S. Patent Rights in Developing Countries: U.S. Efforts to Enforce Pharmaceutical Patents in Thailand*, 16 LOY. L.A. INT'L & COMP. L.J. 569, 598–99 (1994) (identifying characteristics of developing, pirating countries that stand to benefit from a strong intellectual property system); *see also* Robert Weissman, *A Long, Strange TRIPS: The Pharmaceutical Industry Drive to Harmonize Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available to Third World Countries*, 17 U. PA. J. INT'L ECON. L. 1069, 1123 (1996) (highlighting the difference between LOWCOMM countries and other third world countries).

Results showed that these countries tended to have a larger gross national product, a strong positive balance of trade, and high productivity.[244] Moreover, they are more scientifically and technologically advanced than their similarly situated countries; they produce more scholarly articles and file more patents in the United States than their counterparts.[245]

As developed countries' competitive edge in the international market has shifted toward high technology industries, and have come to realize that the lack of IP protection was resulting in billions of dollars of loss, the pressure on LOWCOMM countries to conform to international standards of protection has increased dramatically.[246] LOWCOMM countries' strong domestic markets have increased their visibility in the world arena and therefore made them easy targets for pressure to reform their IP regime.[247]

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244. *See* U.S. International Trade Commission, Pub. No. 1479, *The Effects of Foreign Product Counterfeiting on U.S. Industry* (1984) (conducting a study of the countries with low intellectual property protection); *see also* Dru Brenner-Beck, *Do as I Say, Not as I Did*, 11 UCLA PAC. BASIN L.J. 84, 106 (1992) (explaining that certain countries that are on the cusp of industrialization have low protection for intellectual property rights but have larger economy and technology capacities than their counterparts); *see also* Frame, *supra* note 243, at 212 (detailing certain LOWCOMM countries that have higher gross national product, positive trade balance and productivity levels than other third world countries).

245. *See* John R. Allison & Mark A. Lemley, *The Growing Complexity of the Unites States Patent System*, 82 B.U. L. REV. 77, 95–96 (2002) (showing that developing countries are engaging in heavy patenting in the United States); *see also* Frame, *supra* note 243, at 215 (asserting that LOWCOMM countries publish more scientific and technology related articles than their third world counterparts); *see also* Weissman, *supra* note 243, at 1123 (citing a study that found that countries with low commitment to maintaining intellectual property rights property have better scientific and technological capacities than third world countries).

246. *See* Frame, *supra* note 243, at 212 (listing Thailand as one of the second-tier LOWCOMM problem countries with regard to intellectual property protection); *see also* Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 281 n. 41 (1991) (providing a list of developing countries, which includes Thailand, that are indicated to have difficulties enforcing intellectual property rights); *see also* Bruce A. Lehman, *Intellectual Property Under the Clinton Administration*, 27 GEO. WASH. J. INT'L L. & ECON. 395, 395 n. 2 (1993) (describing the inadequacies and lax nature of Thailand's, among other countries, intellectual property regime).

247. *See* Cortney M. Arnold, *Protecting Intellectual Property in the Developing World: Next Stop—Thailand*, 2006 DUKE L. & TECH. REV. 10, ¶ 4 (2006) (explaining the importance of enforcing intellectual property rights on an international scale and the pressure of developing countries to conform to international standards in order to compete in a high-tech goods industry); *see also* World Intellectual Property Organization's Open Forum on the Draft Substantive Patent Law Treaty, *Patent Law Harmonization and the Draft SPLT*, at 3 (Mar. 2006) (stating that developing countries are challenged by the need update their intellectual property protection since developed countries refuse to bring new high-tech goods to these places); *see also* Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*, at 4–5 (2002), *available at* http://www.iprcommission.org/papers/pdfs/final_report/ciprfullfinal.pdf (asserting that developing countries are under pressure to conform intellectual property rights in order to achieve global harmonization between developed and developing countries).

More recent reports, however, have indicated that Thailand has tried to move away from the this trend of IP noncompliance through the encouragement of patent filings[248] through enlisting the Thai police force to stop the proliferation of piracy, and by creating specialized IP courts to provide forums for claimants to litigate their claims.[249] However, attorneys have complained that it is still difficult to bring civil actions against infringers and that deterrence is even more difficult to achieve when Thailand does not provide for punitive damages for infringement.[250] While Thailand's patent laws generally adhere to the TRIPS standard[251] and offer protection for most innovations, it has recently been reported that Thailand's patent office lacks the resources to keep up with the volume of applications being filed regularly.[252] This reveals that Thailand's efforts to encourage patent filings have provided more teeth to its patent amendments, but it also shows that the government will have to invest a lot more in an effective enforcement system to convince foreign investors that it is serious in its efforts to commit to IP protection.[253]

1. Small Open Economy, More Pressure to Bow to International Pressures to Reform IP Laws

A 2005 economic study found that Thailand has a small open economy, and therefore the size of its market alone is not significant enough to attract FDI.[254] Within the last five years,

248. *See* Alex Fayette, *Biotech in Thailand: How Patents Can Change a Developing Nation*, http://www.yalelawtech.org/ip-in-the-digital-age/biotech-in-thailand-how-patents-can-change-a-developing-nation/ (2010) (noting that Thailand's government has encouraged the filing of biotech patents in with substantial monetary incentives).

249. *See Creativity Leads to Unusual IP Cases in Asia*, ASIA LAW, Features 2008 WLNR 27709604 (2008) (noting that Malaysia, in 2007, established 21 specialized IP courts).

250. *See id.* (citing lawyers who claim that it is difficult to bring civil actions again patent infringers, and that punitive damages are unavailable under Thai law).

251. *See* Rosemary Sweeney, *The U.S. Push for Worldwide Patent Protection for Drugs Meets the AIDS Crisis in Thailand: A Devastating Collision*, 9 PAC. RIM. L. & POL'Y J. 445, 457 (2000) (asserting that, in the realm of patent protection for drugs, Thailand's Patent Act meets and, in some cases, exceeds the minimum requirements called for by TRIPS).

252. *See* Office of the United States Trade Representative, 2009 National Trade Estimate Report—Thailand, at 493 (2009), *available at* http://www.ustr.gov/sites/default/files/uploads/reports/2009/NTE/asset_upload_file239_15509.pdf (iterating that, because patent examinations can take five years or more in Thailand, this indicates that Thailand's patent office lacks sufficient resources to keep up with the number of applications).

253. *See id.*, at 492–93 (detailing the plethora of issues that are currently impeding Thailand's effective enforcement of its IP laws and stating that the U.S. will continue to raise its "serious concerns" about the lack of effective IPR protection with the Thai government).

254. *See* J. Davidson Frame, *National Commitment to Intellectual Property Protection: An Empirical Investigation*, 1987 GEO. J.L. & TECH. REV 209, 215 (1984) (concluding that LOWCOMM countries should be capable of providing intellectual property protection because of their expanding domestic markets and should be pressured by the international community to enforce a strict regime); *see also* Lehman, *supra* note 246, at 395 (illustrating the increased demand for intellectual property protection enforcement on a global scale); *see also* Robert Weissman, *A Long Strange Trips: The Pharmaceutical Industry Drive to Harmonize Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available to Third World Countries*, 17 U. PA. J. INT'L ECON L. 1069, 1118–19 (1996) (explaining how poor patent enforcement has enabled countries like Argentina, Turkey and India to build up its technological capacity through imitation of developed countries' already existing technologies).

the main attraction for foreign investors has been in such "labor-intensive assembly activities" as "electronics and electrical goods industries."[255] In Thailand, foreign plants manufactured approximately 50% of gross output,[256] and "the output share of foreign plants to total industry is relatively large in electrical machinery, transport equipment, and beverages," "accounting for more than seventy percent of the total industry."[257] In these industries, technology is a proprietary asset per se and is dominated by a small number of MNEs.[258] Because Thailand does not

255. *See* Archanun Kohpaiboon, *Foreign Direct Investment and Technology Spillover: A Cross-Industry Analysis of Thai Manufacturing*, 34 WORLD DEV. 541, 548 (2006) (explaining that Thailand's domestic market is too small to be a significant factor to attract FDI). *See generally* Staff of the Thailand Board of Investment, *World Investment Report*, at 1 (Nov. 2007) (reporting that Thailand's FDI in 2006 was about $10 billion in 2006); *see generally* Florence Jaumotte, *Foreign Direct Investment and Regional Trade Agreements: The Market Size Effect Revisited* 11 (International Monetary Fund Working Paper No. 206, 2004), *available at* http://204.180.229.21/external/pubs/ft/wp/2004/wp04206.pdf (concluding that there is a correlation between a country's domestic market size and the amount of FDI).

256. *See* Kohpaiboon, *supra* note 255, at 543 (acknowledging that recent foreign direct investment can be attributed to the electronics and electronic assembly industries); *see also* Juthathip Jongwanich & Archanun Kohpaiboon, *Export Performance, Foreign Ownership, and Trade Policy Regime: Evidence from Thai Manufacturing,* 3–4 (Asian Dev. Bank Econ., Working Paper No. 140, 2008) *available at* http://www.adb.org/Documents/Working-Papers/2008/Economics-WP140.pdf (explaining that developments in electronic and labor-intensive manufacturing in Thailand has attracted more foreign multinational corporation investors). *See generally* LINDA Y.C. LIM & PANG ENG FONG, FOREIGN DIRECT INVESTMENT AND INDUSTRIALISATION IN MALAYSIA, SINGAPORE, TAIWAN AND THAILAND 166 (1991) (commenting that Thailand's labor-intensive electronic industry consists of multinational firms).

257. *See* William E. James & Eric D. Ramstetter, *Trade, Foreign Firms and Economic Policy in Indonesian and Thai Manufacturing*, 19 J. ASIAN ECON. 413, 418 (2008) (claiming that Thailand's gross output of manufacturing by multi-national corporations is about fifty percent); *see also* Kohpaiboon, *supra* note 255, at 542–43 (2006) (stating that 48.3% of Thai manufacturing was done by foreign plants); *see also* Jongwanich & Kohpaiboon, *supra* note 256, at 8 (presenting that foreign plants completed about fifty percent of manufacturing in Thailand).

258. *See* Jim Glassman, *Economic Crisis in Asia: The Case of Thailand*, 77 ECON. GEOGRAPHY 122, 125–26 (2001) (describing the industrial and technological growth in Thailand due to the assistance of foreign investment companies); s*ee also* Howard A. Kwon, *Patent Protection and Technology Transfer in the Developing World: The Thailand Experience*, 28 GEO. WASH. J. INT'L L. & ECON. 567, 581 (1995) (asserting that foreign investment created most of the existing industrial firms in Thailand, which is the prime source of technology and manufacturing output). *See generally* Henry Wai-Chung Yeung, *The Limits to Globalization Theory: A Geographic Perspective on Global Economic Change*, 78 ECON. GEOGRAPHY 285, 287–88 (2002) (explaining how foreign investment contributed to the economic globalization process).

have the vast resources and huge markets that are prime attractions for foreign investors,[259] there is a more pronounced pressure on it than on other LOWCOMM countries to strengthen its IP laws in order to promote these labor-intensive, technology-focused activities.[260]

2. Absorptive Capacity

It is important to mention at the outset that a developing country must have the capacity to absorb the technology in a way that "develops the country's own technological capabilities" to be able appreciate the benefits of a strong IP regime.[261] Studies from 2005 and 2007 have found that a moderate technological gap between the MNE investors and the local affiliates must exist for the host country to benefit from higher technology spillovers.[262] If the gap was

259. *See* Shih-Fen S. Chen, *Extending Internalization Theory: A New Perspective on International Technology Transfer and its Generalization*, 36 J. INT'L BUS. STUD. 231, 232 (2005) (assessing the high degree of control that MNEs have over their technology in a particular industry at a particular location); *see also* Nicholas C. Georgantzas, *MNE Competitiveness: A Scenario-Driven Technology Transfer Construct*, 12 MANAGERIAL & DECISION ECON. 281, 282–83 (1991) (declaring the stronghold that an MNE has in a new technology in a developing country and the competition between MNEs). S*ee generally* Xavier Martin & Robert Salomon, *Tacitness, Learning, and International Expansion: A Study of Foreign Direct Investment in a Knowledge-Intensive Industry*, 14 ORG. SCI. 297, 298 (2003) (focusing on the knowledge based assets, such as technological intelligence, that foreign companies bring to developing countries).

260. *See* Keith D. Brouthers, *Institutional, Cultural and Transaction Cost Influences on Entry Mode Choice and Performance*, 33 J. INT'L BUS. STUD. 203, 205 (2002) (affirming the necessities that foreign investors require when investing internationally, such as scale economies in an industry); *see also* Kazi N. Islam, *Pro-Cyclicality of Consumer Spending and the Financial Crisis of Thailand*, 38 J. DEVELOPING AREAS 41, 41–42 (2005) (describing Thailand's financial crisis that relates to a decline in export growth and makes Thailand less desirable to foreign investors). *See generally* C.P. Chandrasekhar & Jayati Ghosh, *Financial Crisis and Elusive Recovery: Lessons from South Korea and Thailand*, 34 ECON. & POL'Y WKLY. 273, 274 (1999) (explaining that the lack of financial regulations in Thailand has led to cyclical surges of foreign capital, which creates market bubbles that lead to economic instability).

261. *See* Julian Birkinshaw, John Hulland & Allen Morrison, *Structural and Competitive Determinants of a Global Integration Strategy*, 16 STRATEGIC MGMT. J. 637, 639 (1995) (listing the drivers of global investing companies in international markets as economies of scale, comparative advantages in different regions and standardized market demands); *see also* Greg B. Felker, *Southeast Asian Industrialization and the Changing Global Production System*, 24 THIRD WORLD Q. 255, 255–56 (2003) (asserting South East Asia's economy is linked to the foreign industrial mode which depends on foreign investors and their technology); *see also* H. Jalilian, *A Theory of Foreign Investment Possibility, Modes and Timing*, 17 MANAGERIAL & DECISION ECON. 331, 332 (1996) (arguing that the exclusivity of a production technique permits a firm to influence a foreign market that has an absorptive capacity to increase efficiency and attract investors).

262. *See* David Hindman, *The Effect of Intellectual Property Regimes on Foreign Investment in Developing Economies*, 23 ARIZ. J. INT'L & COMP. L. 467, 475 (2006) (describing the benefits of a developing country that can absorb the foreign technology to create its own technological abilities); s*ee also* Lauren Loew, *Creative Industries in Developing Countries and Intellectual Property Protection*, 9 VAND. J. ENT. & TECH. L. 171, 179 (2006) (displaying the global benefits of intellectual property in developing countries when developed countries promote the transfer of technology to these countries). *See generally* Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7 J. INT'L ECON. L. 279, 287–88 (2004) (acknowledging that technology is instrumental for the modernization of economic structures in developing countries).

too small, the MNE would transfer few technologies that would benefit the domestic companies.[263] Moreover, if the gap were too large, domestic firms would lack the capacity to adequately absorb the complementary technology.[264]

O. Legal Regime: Specific Examples of FDIs Retracting From Host Countries Due to Infringement

As a result of past short-term economic failures and increased pressure from developed countries like the United States, major developing countries are increasingly recognizing the value of a strong rule of law to becoming a competitive player in the global economy.[265] Recently, there have been many instances that show powerful MNEs are heavily factoring IP protections into their foreign investment decisions. In 1998, Microsoft refused to place major capital resources in Brazil until it enacted new copyright and software protection laws.[266] Japa-

263. *See* Charles Weiss, Jr., *Mobilizing Technology for Developing Countries*, 203 SCI. 1083, 1083 (1979) (introducing industrial and technological change to developing countries that are best suited for advanced equipment that they currently lack but can adapt). *See generally* Jeffrey J. Blatt & Phillip H. Miller, *Preparing for the Pacific Century: Fostering Technology Transfer in Southeast*, 3 ANN. SURV. INT'L & COMP. L. 235, 238–39 (1996) (describing the benefits to an MNC that invests in a country with an existing technological structure that can support the MNCs operations while generating internal efficiencies); *see generally* David M. Haug, *The International Transfer of Technology: Lessons That East Europe Can Learn from the Failed Third World*, 5 HARV. J.L. & TECH. 209, 212–13 (1992) (declaring that a true technological transfer exists when the host company has the capacity to absorb spillover technology from an FDI in a small to medium sized project).

264. *See* Cristina Baez, Michele Dearing, Margaret Delatour & Christine Dixon, *Multinational Enterprises and Human Rights*, 8 U. MIAMI INT'L & COMP L. REV. 183, 192 (1999–2000) (discussing that MNEs seek to invest in developing countries that have low labor and production costs and the technological benefits that these developing countries derive from their investment); s*ee also* Eric M. Burt, *Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization*, 12 AM. U. J. INT'L & POL'Y 1015, 1020–21 (assessing the profit potential for MNEs to be greatest in countries that are not developed where production costs are low and the profit margin high) (1997). *See generally* Tamir Agmon, *Who Gets What: The MNE, the National State and the Distribution Effects of Globalization*, 34 J. INT'L BUS. STUD. 416, 418 (2003) (demonstrating the advantages that MNE's provide to newly industrializing countries, include a stimulating economy, employment, research and development).

265. *See* Jean-Eric Aubert, *Promoting Innovation in Developing Countries: A Conceptual Framework* 22 (World Bank Institute, Working Paper No. 3554, 2005) (suggesting that developing countries must be provided the proper legal and financial resources to operate in the global market, and noting that while many of these countries have competition laws, there are no mechanisms to ensure their proper enforcement); *see also* Paulina Beato and Jean-Jacques Laffont, *Competition in Public Utilities in Developing Countries* 13 (Inter-American Development Bank, Technical Paper No. IFM-127, 2002), *available at* http://cdi.mecon.gov. ar/biblio/docelec/MU2007.pdf (positing that the lack of a well-functioning rule of law owes to the fact that strict enforcement is costly, the enforcement mechanism itself is corrupt, and the quality of human resources is poor); *see also* Richard A. Posner, *Law and Economics in Common-Law, Civil-Law, and Developing Nations*, 17 RATIO JURIS. 66, 77 (2004) (arguing that it is more cost- and time-efficient for developing countries to enact rules for existing inefficient institutions rather than investing in the creation of efficient legal institutions because the latter requires heavy inputs of highly educated labor).

266. *See* Dinmukhamed T. Eshanov & Kamil G. Ahmed, *The Expectations of Developed Countries from the International Investment Regime*, in THE FUTURE OF THE INTERNATIONAL INVESTMENT REGIME (José E. Alvarez et al. eds., Oxford Univ. Press, forthcoming 2011) (confirming that Microsoft moved major capital resources to Brazil only after Brazil enacted new copyright laws); *see also* Hindman, *supra* note 233, at 473 (stating that Microsoft did not move major capital resource into Brazil until Brazil changed its copyright and software protection laws in 1998). *See generally* Michael A. Ugolini, *The Protection of Intellectual Property in Brazil*, 5 NAFTA: L. & BUS. REV. AM. 431, 432–34 (1999) (concluding that Brazil's new copyright laws increase the IP protection of software authors).

nese electronics companies that were once very involved in outsourcing manufacturing are now preferring to produce and manufacture at home to avoid the costs of losing trade secrets.[267] Moreover, 80% of chemical companies have avoided investing in India and China due to their lack of IP protection.[268]

Furthermore, many companies who initially took investment risks in low IP protection countries are reconsidering certain decisions because of concerns about costs.[269] For instance, Canon recently announced that it was transferring production of key components from China to facilities in Japan to combat IP infringement in China.[270] Sony also recently decided to move "production of key Play station 2 consoles back to Japan" to protect important IP assets.[271]

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267. *See* Hindman *supra* note 233, at 473 (describing how Japanese electronics companies prefer to domestically produce their technological crown jewels); *see also* Sharon Barner & Harold Wegner, *China Outsourcing*, MONDAQ BUS. BRIEFING, Sept. 20, 2004 (discussing how a leading Japanese electronics company maintains domestic manufacturing facilities in order to avoid losing trade secrets); *see also Sharp Boss Machida Wants Technology Kept Under Wraps*, DAILY YOMIURI, June 17, 2004 (indicating that the president of Sharp Corp. prefers domestic production in order to protect intellectual property rights).

268. *See* Jean Raymond Homere, *Intellectual Property Rights Can Help Stimulate the Economic Development of Least Developed Countries*, 27 COLUM. J.L. & ARTS 277, 287 (2004) (reporting that 80% of surveyed chemical firms and managers of foreign enterprises were reluctant to invest in India and China because of weak intellectual property rights protection); *see also* Keith E. Maskus, *Intellectual Property Rights and Economic Development*, 32 CASE W. RES. J. INT'L L. 471, 484 (2000) (presenting a survey indicating that 80% of chemical firms would not transfer new technology to India because of concerns over intellectual property rights); *see also* Hindman *supra* note 233, at 473 (showing survey results which indicate that at least 80% of surveyed companies are not willing to invest in India and China due to weak IP protection).

269. *See* Mei Gechlik, *Making Transfer of Clean Technology Work: Lessons of the Clean Development Mechanism*, 11 SAN DIEGO INT'L L. J. 227, 271–72 (2009) (attributing the fact that 72% of business executives cite IP protection as one of their top three concerns to low transfer rates of technologies into poor IP protection countries); *see also* Hindman *supra* note 233, at 473 (asserting that some companies who had invested in countries with weak IP protection are now hesitating to continue their investments); *see also* Mikhaelle Schiappacasse, Note, *Intellectual Property Rights in China: Technology Transfers and Economic Development*, 2 BUFF. INTELL. PROP. L. J. 164, 183–84 (2004) (claiming that companies are reluctant to pursue R & D in weak IP protection countries and that they will only transfer their old technology to such markets).

270. *See* Canon Inc., Annual Report (Form 20-F) (June 4, 2004) (confirming that Canon plans to relocate semiconductor facilities to Japan because of IP infringement); *see also* David Pilling, *Canon to Cut Procurement Cost 10%*, FIN. TIMES (London), May 27, 2004, at 18 (noting that Canon had stated that it intended to produce key components in Japan to protect its products from being copied); *see also Manufacturing in Japan: (Still) Made in Japan*, ECONOMIST, Apr. 10, 2004, at 64 (indicating that Canon plans to have 80% of their global capital spending over the next three years to be in Japan to maintain a technological edge).

271. *See* Hindman *supra* note 233, at 473 (clarifying that Sony is moving production back to Japan despite adding manufacturing capacity in China); *see also* Daisuke Wakabayashi & Nathan Layne, *Japan Turning to Patents to Keep Competitive Edge*, TAIPEI TIMES, July 8, 2004, at 9 (announcing that Sony Corp. planned to continue making Playstation 2 chips in Japan to protect its technology).

Sometimes foreign investors showed a willingness to invest in countries with poor IP regimes if other costs were low.[272] For example, Intel decided to "expand semiconductor production facilities" in China, India or Russia over Latin America despite poor IP protection because labor costs were extremely low.[273] Despite these types of exceptions, studies have generally shown that the quality of transferred technology is positively correlated with increases in IP protection.[274] If IP laws and enforcement are strong, an MNE is more likely to engage in a joint venture or apply for a license to create a domestic business over a wholly owned subsidiary, where it would have more control over their technology.[275] Joint ventures are more condu-

272. *See* Peter K. Yu, *Intellectual Property, Economic Development and the China Puzzle*, abridged and adapted from *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA, 169–216 (Daniel J. Gervais ed., 2007) (alleging that firms often relocate to China to take advantage of the lower production costs despite ineffective intellectual property protection); *see also* Minyuan Zhao, *Conducting R & D in Countries with Weak Intellectual Property Rights Protection*, 52 MGMT. SCI., 1185, 1186 (2006) (asserting that many companies estimate that their R & D costs can be more than halved by going offshore to countries like China, India and Russia where resources cost a fraction of their counterparts in the United States); *see also* Swetha Shantikumar, *Emerging Market Focus: India and China Continue to Fuel Big Pharma's Imagination*, *in* FROST & SULLIVAN MARKET INSIGHT (2010), http://www.frost.com/prod/servlet/market-insight-top.pag?Src=RSS&docid= 202191420 (expressing weak IP protection laws in emerging markets will not stop big companies from investing in countries like India and China which offer cheap land and labor).

273. *See* David Hindman, *The Effect of Intellectual Property Regimes on Foreign Investment in Developing Economies*, 23 ARIZ. J. INT'L & COMP. L. 467, 474 (2006) (stating that Intel made a recent announcement that it is passing on building a semiconductor plant in Brazil because China, India, or Russia have substantially lower labor rates); *see also* Alan Clendenning, *Intel CEO Sees No Chip Plant for Brazil*, ASSOCIATED PRESS, Sept. 17, 2004 (asserting that Intel's announcement to not build a chip manufacturing plant in Brazil is due to Latin America's high labor costs); *see also* Greg Levine*, Barrett: Intel Nixes Brazil; Prefers China, India Labor Costs,* FORBES (Sept. 16, 2004) (reporting that there will be no semiconductor plant built in Brazil because China, India and Russia offer cheaper alternatives).

274. *See* Robert Bejesky, *Investing in the Dragon: Managing the Patent Versus Trade Secret Protection for the Multinational Corporation in China*, 11 TULSA J. COMP. & INT'L L. 437, 476 (2004) (describing the effects of stronger IP enforcement by central governments on transferred technology); *see also* Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89, 119–20 (1993) (advocating for increased IP protection in developing countries to increase the quality of transferred technology); *see also* Schiappacasse, *supra* note 269, at 167 (outlining benefits of stronger IP protection for MNEs and developing countries).

275. *See generally* Robert Bird and Daniel R. Cahoy, *The Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargaining Approach*, 45 AM. BUS. L.J. 283, 297–98 (2008) (explaining a general positive effect of stronger IP enforcement on FDI); *see generally* Prabuddha Sanyal, *Valuation of Patents from a Multinational Perspective*, 87 J. PAT. & TRADEMARK OFF. SOC'Y 548, 555–57 (2005) (suggesting patent protection is necessary for MNEs to ensure higher profits with FDI than exportation).

cive to technology spillover because it allows locals more access to MNE technologies that would then be adopted and integrated into the host country's domestic infrastructure.[276]

II. The Special Case of Singapore

Unlike other FDI-targeted developing countries, Singapore is an anomaly because it lacks ample resources and huge markets, yet it has grown to become an economic powerhouse in the international market.[277] Within the past five years, it remained one of the United State's top 20 largest trading partners and is an export hub for MNEs across the world.[278]

The Singaporean case is the rare exception to the historical trend of IP enforcement after attaining "development" status.[279] There, it was the adoption of strong IP laws and strict enforcement policies that attracted foreign investors and catalyzed economic growth.[280] Further, continued maintenance of its sophisticated IP regime has continued to steadily attract FDI to progressively contribute to advanced technology projects and R & D developments.[281]

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276. *See* Daniel C.K. Chow, *Why China Does Not Take Commercial Piracy Laws Seriously*, 32 OHIO N.U. L. REV. 203, 206–7 (2006) (asserting that joint ventures encourage success to foreign companies through infusion of technology); *see also* Daniel C.K. Chow, *Reorganization and Conversion of a Joint Venture into a Wholly Foreign-Owned Enterprise in the People's Republic of China*, 73 TUL L. REV. 619, 624–26 (1998) (showing China's technological growth was a product of joint ventures with MNEs); *see also* Keith E. Maskus, *Lessons from Studying the International Economics of Intellectual Property Rights*, 53 VAND. L. REV. 2219, 2224 (2000) (identifying a need for an infusion of technology through stronger IP laws to incentivize investment).

277. *See* Maskus, *supra* note 276, at 115 (discussing Singapore's significant increase in FDI during the 1990s).

278. *See* Office of the United States Trade Representative, http://www.ustr.gov/countries-regions/southeast-asia-pacific/singapore (identifying Singapore as United States' 11th largest export market in 2009); *see also* U.S. Department of State, Country Profile: Singapore, http://www.state.gov/r/pa/ei/bgn/2798.htm (listing Singapore as a major export market for the United States). *See generally* Kenneth Chiu, *Harmonizing Intellectual Property Law Between the United States and Singapore: The United States-Singapore Free Trade Agreement's Impact on Singapore's Intellectual Property Law*, 18 TRANSNAT'L LAW. 489, 494 (2005) (stating economic reasons for Singapore and the United States to enter into FTA based on increase in bilateral trade between the two countries).

279. *See generally* Chun-Hsien Chen, *Explaining Different Enforcement Rates of Intellectual Property Protection in the United States, Taiwan, and the People's Republic of China*, 10 TUL. J. TECH. & INTELL. PROP. 211, 218–20 (2007) (explicating social and economic reasons for diminished awareness of IP enforcement in developing countries). *But see* Assafa Endeshaw, *Intellectual Property Enforcement in Asia: A Reality Check*, 13 INT'L J.L. & INFO. TECH. 378, 404–5 (2005) (contrasting Singapore's adoption of Western IP laws to promote foreign investment with China's delayed recognition of importance of IPR).

280. *See* Jean Raymond Homere, *Intellectual Property Rights Can Help Stimulate the Economic Development of Least Developed Countries*, 27 COLUM. J.L. & ARTS 277, 284 (2004) (attributing Singapore's economic growth to adoption of more stringent IP laws).

281. *See* Hindman, *supra* note 273, at 484 (comparing Singapore as a center of FDI from R & D and high technology manufacturing with China's reliance on FDI from MNCs and India's reliance on domestic private enterprise); *see also* Edmund Leow and Kenny Foo, *Singapore: Tax Planning in the "World's Most Competitive Economy,"* 10 SEP J. INT'L TAXATION 22, 26 (1999) (highlighting tax incentives for businesses engaged in R & D projects in Singapore); *see also* Terence Stewart and Margaret L.H. Png, *The Growth Triangle of Singapore, Malaysia and Indonesia*, 23 GA. J. INT'L & COMP. L. 1, 15 (1993) (explaining use of tax incentives to encourage R & D in Singapore).

Throughout the mid-1990s, the main theme of Singapore's development plans was to develop a "knowledge based economy."[282] Singapore officials knew that it could not compete with its Asian counterparts because of Singapore's lack of resources and therefore shifted their energy toward building a high information technology economy.[283] Therefore, the need for an up-to-date and sophisticated IP regime was particularly significant to Singapore. In addition to common-law remedies, Singapore has a comprehensive IP statutory scheme that strongly aspires to meet international standards.[284] In 1995, the Patent Act streamlined patent applications by replacing the old system of requiring applicants to obtain a patent in Europe before gaining protection in Singapore.[285] Under the system established in 1995, original filing with Singapore was sufficient.[286] Further, e-commerce, trademark and copyright legislative plat-

282. *See* Rahul Sen & Sanja S. Pattanayak, *The Challenges Before the Singapore Economy*, 24 FLETCHER FORUM OF WORLD AFFAIRS 15, 16 (2000) (recognizing Singapore as one of the few states that realized the need for developing knowledge-based economy); *see also* Eugene Kheng-Boon Tan, *Law and Values in Governance: The Singapore Way*, 30 H.K. L.J. 91, 112 (2000) (describing how Singapore's continuous efforts to keep pace with international standards of law have successfully supported and developed a high-technology, knowledge-based economy); *see also* Dr. Wai-keung Chung, Assistant Professor of Sociology, Sing. Mgmt. Univ., Presentation at American Sociological Association Annual Meeting: Knowledge-based Economy and Developmental State. Information Technology Policies in Singapore and Hong Kong, *available at* http://www.allacademic.com/meta/p_mla_apa_research_citation/1/8/3/4/6/pages183465/p183465-1.php (Aug. 11–14, 2007) (declaring that the government of Singapore has put its efforts into the building of a knowledge-based economy).

283. *See* Kheng-Boon Tan, *supra* note 282 at 112 (concluding that Singapore's best economic option is in the "realm of high technology and information technology"); *see also* Lynn Carino, Note, *Creative Technology, Ltd. v. Aztech System PTE, Ltd.: The Ninth Circuit Sends a United States Copyright Infringement Case to Singapore on a Motion of Forum Non Conveniens*, 41 VILL. L. REV. 325, 338 (1996) (noting that Singapore placed an emphasis on developing high-technology industries); *see also* Michael W. Smith, Note, *Bringing Developing Countries' Intellectual Property Laws to TRIPs Standards: Hurdles and Pitfalls Facing Vietnam's Efforts to Normalize an Intellectual Property Regime*, 31 CASE W. RES. J. INT'L L. 211, 231–32 (1999) (iterating the announcement of the Singaporean government to turn the economy into a "high-technology-oriented economy").

284. *See* Kheng-Boon Tan, *supra* note 282, at 112 (asserting that Singapore strongly aspires to have a statutory scheme that meets international standards); *see also* Kenneth Chiu, Comment, *Harmonizing Intellectual Property Law Between the United States and Singapore: The United States-Singapore Free Trade Agreement's Impact on Singapore's Intellectual Property Law*, 18 TRANSNAT'L LAW. 489, 496 (2005) (describing the intellectual property standards adhered to by Singapore through the signing of a free trade agreement with the United States); *see also* Smith, *supra* note 283, at 231 (1999) (noting that Singapore adopted a copyright act that conformed to international law).

285. *See* Kheng-Boon Tan, *supra* note 282, at 112 (proclaiming that the Patents Act of 1995 replaced the old system of foreign patent registration before registering in Singapore); *see also* Christian H. Nguyen, Comment, *A Unitary ASEAN Patent Law in the Aftermath of TRIPS*, 8 PAC. RIM L. & POL'Y 453, 466 (1999) (stating how the old patent law requirements were replaced); *see also* John Richards, *Recent Patent Law Developments in Asia, Address Before the Fourth Annual Conference on International Intellectual Property Law and Policy*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 599, 632–33 (1997) (remarking that the Patent Law enacted in 1995 replaces the previous system of registration).

286. *See* Stanley Lai, *The Singapore Patents Act 1994: Whither Biotechnology and Patent Law?*, 7 SING. ACAD. L.J. 396, 396 (1995) (noting that the most significant change from the past process was "processing applications and making grants locally"); *see also* Kheng-Boon Tan, *supra* note 282, at 112 (declaring that it is sufficient under the 1995 Patents Act to originally file patent applications in Singapore).

forms were constantly updated to meet international standards and keep Singapore at the forefront of the cutting edge technology market.[287]

Singapore's developmental and economic success in the international forum has been attributed to its emphasis on "universal applicability and conformity to international norms" at the outset.[288] It was constantly aware of its lack of resources and of expansive domestic markets, key attractions for FDI, and knew that it needed to overcompensate in areas of law and enforcement to have a competitive standing in the world market.[289] In 1995, Senior Minister Lee Kuan Yew noted that Singapore's "reputation for the rule of law has been and is a valuable economic asset, part of our capital, although an intangible one."[290] To say the least, the Singaporean perception of law as an economic asset has translated well to MNEs and foreign investors.[291]

Throughout the 1990s, Singapore reacted from the pressure of sudden statehood by establishing strong governance and a stable and predictable legal system as top priorities.[292] As a result of creating this strong economic foundation, developed countries have rewarded Sin-

287. *See* Kheng-Boon Tan, *supra* note 282, at 112 (explaining Singapore's commitment to a continuously updated legislative intellectual property platform to keep pace with changes in technology); *see also* Marie Wilson, *TRIPS Agreement Implications for ASEAN Protection of Computer Technology*, 4 ANN. SURV. INT'L & COMP. L. 18, 54 (1997) (recommending other ASEAN member follow the example of Singapore in "significantly increas[ing] intellectual property protection in recent years"). *See generally* Carino, *supra* note 283, at 338 (noting how Singapore increased intellectual property protections to the level of the United States via the Singapore Copyright Act of 1987).

288. *See* Kheng-Boon Tan, *supra* note 282, at 91 (stating that Singapore has acceded to numerous international treaties in the economic and commercial arena); *see also* Eugene B. Mihaly, *Multinational Companies and Wages in Low-Income Countries*, 3 J. SMALL & EMERGING BUS. L. 1, 11 (1999) (asserting that Senior Minister Lee Kuan Yew crafted an approach founded on balancing the interests of Singapore with the interests of foreign investors); *see also National Security Minister Professor Jaya Kumar Speaks at Launch of Centre for International Law on Oct. 30*, SINGAPORE GOVERNMENT NEWS, Nov. 1, 2009, at 1 (stressing that because it is a small country in the global system, international law is important to Singapore).

289. *See* David Hindman, *The Effect of Intellectual Property Regimes on Foreign Investment in Developing Economies*, 23 ARIZ. J. INT'L & COMP. L. 467, 484 (2006) (alleging that Singapore can compete for foreign investment and improve its economy by taking advantage of opportunities as they are presented, and by creating an environment conducive to economic growth); *see also* Robert Post, *The Rule of Law: What Is It?,* 603 ANNALS 292, 314 (1996) (suggesting that evidence shows that implementation of rule of law is necessary for sustained economic development in Singapore); *see also* Fareed Zakaria, *Is America Losing Its Mojo?,* NEWSWEEK, Nov. 23, 2009, at 38 (asserting that Singapore is actively changing their laws and systems to make themselves more competitive with other countries).

290. *See* Kheng-Boon Tan, *supra* note 282, at 110 (revealing that Singapore scored well in areas of the legal system assessment such as legal enforcement of commercial contracts, availability of alternative modes of dispute resolution and the efficiency of the courts and law enforcement); *see also* Robin Chan, *Low Company Taxes, but Singapore Not a Tax Haven*, STRAIGHTS TIMES (Sing.), Feb. 11, 2009, at 1 (stating that Singapore has a reputation for strong rule of law).

291. *See Thailand Government Urged to Make It Easier for Foreign Companies to Invest in Thailand*, THAI PRESS REPORTS, Sept. 14, 2009, at 1 (asserting that Singapore has developed flexible laws for foreign investors in order to attract foreign direct investment).

292. *See* Kheng-Boon Tan, *supra* note 282, at 91 (noting that Singapore has been able to weather the economic turmoil in East Asia in the late 1990s due to the premium it placed on good governance and an efficient legal system, which was garnered when statehood was suddenly thrust upon it).

gapore in several respects. In 2003, Singapore was the fifth nation and the first Asian Pacific country to sign a Free Trade Agreement (FTA) with the United States.[293] An FTA "is an agreement between two or more sovereign nations to remove all substantial barriers to trade (e.g., tariffs, regulatory requirements) between" nations.[294] Subsequently, Singapore has continued an aggressive strategy of initiating FTAs with all of its trade partners.[295]

As of 2009, Singapore still has a thriving and efficient economy, mostly due to its world-class port, which continues to serve as the life stream to its international trade sector, and its continued and active participation international agreements.[296]

A. Thailand: A Comparison

Similar to Singapore, Thailand in the late 1990s and early 2000s was a small developing country with scarce resources and a small open economy.[297] Unlike Singapore, when Thailand started attracting foreign investors, it did not realize the heightened need to provide transparency and predictability in its legal system.[298] Despite the fact that Thailand has managed to consistently attract FDI in the past few decades,[299] it has not been able to attain the level of

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293. *See* Anne Hiaring, *What's New in the Neighborhood—The Export of the DMCA in Post-TRIPS FTAs*, 11 ANN. SURV. INT'L & COMP. L. 171, 174 (2005) (stating as an aside that the U.S. first entered into an FTA with Singapore). *See generally* Sherrilyn S. Lim, Comment, *The U.S.-Singapore Free Trade Agreement: Fostering Confidence and Commitment in Asia*, 34 CAL. W. INT'L L.J. 301 (2004) (detailing the FTA signed between the United States and Singapore).

294. *See* Cortney M. Arnold, *Protecting Intellectual Property in the Developing World: Next Stop—Thailand*, 2006 DUKE L. & TECH. REV. 10, 11 (2006) (defining an FTA).

295. *See* Economy Watch, *Singapore, Trade, Exports and Imports*, http://www.economywatch.com/world_economy/singapore/export-import.html (citing the various FTA's signed by Thailand).

296. *See id.*

297. *See* Peter Brimble, *Foreign Direct Investment: Performance and Attraction*, THE BROOKER GROUP PLC. 1, 10 (2002). http://www.imf.org/external/pubs/ft/seminar/2002/fdi/eng/pdf/brimble.pdf

298. *See* John Fagan, *The Role of Securities Regulation in the Development of the Thai Stock Market*, 16 COLUM. J. ASIAN L. 303, 310 (2003) (stating that the IMF, which took responsibility for the bailout and rescue of Thailand, identified a lack of transparency as one of the primary causes); *see also* Cem Karacadag & Barbara C. Samuels II, *In Search of the Market Failure in the Asian Crisis*, 23 FLETCHER F. WORLD AFF. 131, 139 (1999) (acknowledging that a larger problem of transparency and analysis continues in Thailand); *see also* Sonia E. Rolland, *Developing Country Coalitions at the WTO: In Search of Legal Support*, 48 HARV. INT'L L.J. 483, 498 (2007) (stressing that Thailand utilizes domestic protectionist positions while Singapore hardly does).

299. *See* Richard J. Hunter Jr., *Property Risks in International Business*, 15 CURRENTS: INT'L TRADE L.J. 23, 26 (2006) (concluding that Thailand was among the major recipients of FDI in developing and transition countries at the beginning of the year 2000); *see also* Richard J. Hunter Jr., Robert E. Shapiro & Leo V. Ryan, *Legal Considerations in Foreign Direct Investment*, 28 OKLA. CITY U.L. REV. 851, 852 (2003) (noting that Thailand has been among the major recipients of FDI in developing and transition countries); *see also* Howard A. Kwon, *Patent Protection and Technology Transfer in the Developing World: The Thailand Experience*, 28 GW J. INT'L L. & ECON. 567, 580 (1995) (reporting that Thailand's successful efforts to attract foreign investment led to an extraordinary influx of FDI in the latter half of the 1980s, placing it among the top ten recipients in the developing world).

sophistication necessary to control and efficiently utilize the inflow of foreign technology due to its lack of R &D and innovation-producing centers.[300] Progressively, this objective will become more difficult to achieve without a strong IP regime.[301]

International pressure to force developing countries with past reputations of pirating and counterfeiting, like Thailand, to conform to international standards of IP protection has proved to be futile. [302] Absent efforts to change other factors that influence, first, the developing country's perception of IP rights and, second, foreign investors' perceptions of infringement risks, effectual FDI technology transfer will be unlikely.[303]

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300. *See* Joseph C. Blasko, *Overcoming the Legal and Historical Obstacles to Privatization: The Telecommunications Sector in Thailand*, 30 CASE W. RES. J. INT'L L. 507, 511 (1998) (asserting that while the volume and sophistication of telecommunications services in Thailand have increased rapidly in recent years, there are various impediments which may be extremely difficult for the telecommunications sector to overcome); *see also* Charles T. Collins-Chase, *The Case Against TRIPS-Plus Protection in Developing Countries Facing AIDS Epidemics*, 29 U. PA. J. INT'L L. 763, 782 (2008) (noting that FDI in Thailand fell from $3.9 billion in 2001 to an average $1.5 billion from 2002 to 2005, partly because FDI was lost to China, a country frequently cited as an IP rights violator); *see also* Kwon, *supra* note 299, at 580 (arguing that the quality of the technology transferred to local industry via FDI is quite low even though technology imports into Thailand have increased in the last decade).

301. *See* Jean Raymond Homere, *Intellectual Property Rights Can Help Stimulate the Economic Development of Least Developed Countries*, 27 COLUM. J. OF L. & ARTS 277, 286–87 (2004) (arguing that a legal infrastructure to protect IP rights is necessary to attract foreign investors); *see also* Kwon, *supra* note 299 at 581–83 (citing weak patent laws as the primary cause for less foreign investment in Thailand); *see also* Carlos A. Primo Braga & Carson Fink, *The Relationship Between Intellectual Property Rights and Foreign Direct Investment*, 9 DUKE J. COMP. & INT'L L. 163, 169–72, 175, 177 (1998) (showing a positive correlation between high levels of IP rights and FDI).

302. *See* Robert Bird, *Defending Intellectual Property Rights in the BRIC Economies*, 28 AM. WASH. BUS. L.J. 317, 331 (2006) (asserting that, while American coercion has substantially changed the IP laws of Brazil, Russia, India, and China, lack of enforcement of these laws rendered those efforts ineffectual); *see also* Wei Shi & Robert Weatherley, *Harmony or Coercion? China-EU Trade Dispute Involving Intellectual Property Enforcement*, 25 WIS. INT'L L.J. 439, 439 (2007) (emphasizing that a coercive policy toward intellectual property rights is ineffective); *see also China Gets EU Threat on Piracy*, INT'L HERALD TRIB., Oct. 6, 2006, at 18 (illustrating that despite intellectual property laws in place in China, piracy still exists, resulting in threats of sanctions by the European Union).

303. *See* Glen Butterton, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081, 1107–08 (1998) (noting that laws dictating intellectual property rights are premised on values and institutions of developed countries, and therefore, they are ineffectual in developing countries which do not have the "basic conditions" for the concept); *see also* Robert J. Gutowski, Comment, *The Marriage of Intellectual Property and International Trade in the Trips Agreement: Strange Bedfellows or a Match Made in Heaven?*, 47 BUFF. L. REV. 713, 747–48 (1999) (recognizing that the intellectual property concept is a Western construct contrary to the values of indigenous peoples who practice collective ownership).

The problem with Thailand's initial approach to patent regulation in 1979 and utilization of FDI benefits was that it yielded short-term successes where locals refused to trade in for desired long-term infrastructural benefits.[304] Therefore, despite having been a consistently attractive foreign investment target like Singapore, the latter has made significantly more progress toward technological self-reliance than Thailand.[305]

Unlike Singapore, Thailand initially viewed and treated its patent amendments as necessary and immediate political tools to appease U.S. pressures and prevent impending trade sanctions throughout the 1990s.[306] It has not strictly adhered to the legal mandates of its newly passed laws, nor has it made significant progress in improving enforcement measures which, in turn, has kept the foreign investment confidence that is required for significant technology flow at bay.[307] More recently, Thailand's recent and controversial issuance of compulsory licenses for patented pharmaceutical drugs has received serious and severe backlash and criticisms from foreign investors.[308] To effectively stave off threats of trade sanctions and be stricken from the USTR's priority watch list, Thailand must do more than simply amend its laws in response to foreign pressure.[309] It must show the international community that it is going to commit to an effective reformation of its patent regime. To do this, it can learn from the Singaporean experience.[310]

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304. *See* Kwon, *supra* note 299, at 583–86 (showing how legislators, through the enactment of the 1979 Patent Act, shared locals' view that the short term gains from domestic competition and wide and free access to information outweighed the benefits received from a strong IP regime).

305. Kenneth Chiu, Comment, *Harmonizing Intellectual Property Law Between the United States and Singapore: The United States-Singapore Free Trade Agreement's Impact on Singapore's Intellectual property Law*, 18 TRANSNAT'L LAW, 489, 511–14 (2005); *see also* Homere, *supra* note 301, at 284 (2004) (stating that Thailand's failure to implement a stringent IP protection like that imposed by Singapore, resulted in continued piracy and lack of FDI). *But see* Evelyn Su, *The Winners and the Losers: The Agreement on Trade-Related Aspects of Intellectual Property Rights and Its Effects on Developing Countries*, 23 HOUS. J. INT'L L. 169, 207 (2000) (declaring that countries with the lowest levels of IP protection, like Thailand, have the highest levels of FDI).

306. *See* Rosemary Sweeney, *The U.S. Push for Worldwide Patent Protection for Drugs Meets the AIDS Crisis in Thailand: A Devastating Collision*, 9 PAC. RIM. L. & POL'Y J. 445, at 458 (asserting that Thailand enacted its patent amendments largely in response to economic pressure from the United States).

307. *See* David Hindman, *The Effect of Intellectual Property Regimes on Foreign Investments in Developing Economies*, 23 ARIZ. J. INT'L & COMP. L. 467, 491 (reflecting that countries such as Thailand, which have attempted to resist Western pressures to reform IP laws and their enforcement, become havens for piracy).

308. *See* Cynthia Ho, *Patent Breaking or Balancing?: Separating Strands of Fact from Fiction Under TRIPS*, 34 N.C. J. INT'L L. & COM. REG. 371, 373 (noting the criticism by newspapers such as the Financial Times on Thailand's issuance of compulsory licenses on patented drugs).

309. *See* Sweeney, *supra* note 306, at 461–62 (iterating how Thailand was moved from USTR's "priority foreign countries" list, to the less serious "priority watch list," and eventually in 1994, to the "regular watch list" due to Thailand's progress in curbing copyright violations).

310. *See* Collins-Chase, *supra* note 300, at 78 (implying that the costs of investment in a developing country outweigh the benefits because of poor IP protection); *see* also Anna Gelpern, *Systemic Corporate and Bank Restructuring in Financial Crisis*, 34 INT'L LAW. 223 (2000) (emphasizing the grim plight of the legal system in Thailand in the late 1990s); see also Stefan Kirchanski, *Protection of U.S. Patent Rights in Developing Countries: U.S. Efforts to Enforce Pharmaceutical Patents in Thailand,* 16 L.A. INT'L & COMP L. J. 569, 601 (1994) (suggesting that the benefits of intellectual property protection in Thailand will eventually outweigh the costs with proper incentives).

III. Recent Developments in IP Enforcement in Thailand

By the end of the 1990s and early 2000s, foreign investors had determined that the costs of a poorly established legal system outweighed the benefits of investing in Thailand. Since the 1997 crisis, Thailand has been in the latter part of the legislative reform cycle described in John Hewko's article, where he describes foreign investors, ailed and frustrated by ineffective legal and regulatory systems, begin to withdraw their investments.[311] News of such withdrawals, in turn, deters potential future investors.[312] These dramatic declines in foreign investment have spurred alarm and consequential legal amendments and reforms that have yet to be met with the desired positive results.[313] Thai officials will have to understand that a legal system lags several steps behind business transactions, and that despite short-term costs; only persistence in legal reform will reap gradual rewards in the long run.[314]

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311. *See* Warren Coats, *The Asian Meltdown of 1997: The Role of the Financial Sector and Bank Exit Policies*, 23 FLETCHER F. WORLD AFF. 77, 78 (1999) (addressing the fact that U.S. and foreign investors began to withdraw their investments from the unstable Thailand financial market); *see also* John Hewko, *Foreign Direct Investment in Transitional Economies: Does the Rule of Law Matter?* 12 E. EUR. CONST. REV. 71, 75 (2003) (analyzing the issue that arises when foreign investors are dissatisfied with the legal and regulatory systems in the country which houses their investments); *see also* Jordan C. Kahn, *Investment Protection Under the Proposed ASEAN-United Stated Free Trade Agreement*, 33 SUFFOLK TRANSNAT'L L. REV. 225, 227 (2010) (reiterating that investors withdrew their investments from Thailand in the late 1990s due to economic crisis).

312. *See* Hewko, *supra* note 311, at 75 (stating that news of investment withdrawals deterred potential future investors); *see also* Hindman, *supra* note 307, at 467–68 (2006) (suggesting that developing countries often overlook the effects of their IP regimes on future investors); *see also* Cortney M. Arnold, Comment, *Protecting Intellectual Property in the Developing World—Next Stop: Thailand*, 2006 DUKE L. & TECH. REV. 10, ¶35 (2006) (concluding that future foreign investors will be less apprehensive about making IP investments if Thailand increases IP protection).

313. *See* Coats, *supra* note 311, at 85 (explaining that in order for Thailand to fully recover from its financial difficulties, investor confidence must still be restored); *see also* Hewko, *supra* note 311, at 75 (stating that after increased legal problems, Thailand passed amendments to commercial legislation); *see also* George M. Kelakos, *ABI in the "Land of Smiles": A Report on Joint ABI/Thai Educational Projects*, 19-2 AM. BANKR. INST. J. 28, 28 (2000) (stating that amendments to Thailand's Bankruptcy Act were passed in response to the July 1997 Thai economic downfall).

314. *See* Nisha Kanchanapoomi, *Accelerating Corporate Governance Reform in Thailand: The Benefits of Private Reform Mechanisms* 15 S. CAL. INTERDISC. L.J. 165, 195 (noting the difficulty in short term public reform); *see also* Cammellia Ngo, *Foreign Investment Promotion: Thailand as a Model for Economic Development in Vietnam*, 16 HASTINGS INT'L & COMP. L. REV. 67, 86 (1992–93) (stating that Thailand took multiple legislative steps to incite foreign investment); *see also* Scott B. MacDonald, *Transparency in Thailand's 1997 Economic Crisis: The Significance of Disclosure,* 38 ASIAN SURVEY 688, 693 (1998) (addressing the weaknesses in the legal system including transparency and lack of predictability).

A. Amendments and Change in Thai Domestic Law

1. The Alien Business Law

In 1999, Thailand reformed its original Alien Business Law and renamed it as the Foreign Business Act. This new Act relaxed prior limitations on foreign involvement in several professions including "law, accounting, advertisement and most types of construction."[315] Additionally, it also reduced previous limits on foreign ownership of firms and manufacturing of such products as "cement, pharmaceuticals, alcohol, textiles, garments and footwear."[316] It also abrogated the requirement for special government approval of foreign ownership in the retail and securities and brokerage sectors.[317] Whereas the Foreign Business Act was more liberal toward foreign investment than the original law, in some respects it was more stringent.[318] Unlike the previous provisions of the Alien Business Law, the currently enforced Act[319] has more severe criminal penalties, which are strictly enforced against foreigners who do not adhere to its mandates.[320]

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315. *See* WTO Secretariat, Trade Policy and Regimes: Framework and Objectives, WT/TPRS/123 (Oct. 15, 2003), *available at* http://www.wto.org/english/tratop_e/tpr_e/s123-2_e.doc (identifying that the new Foreign Business Act replaced the 1972 Alien Business Law); *see also* Thai Law Forum, The Foreign Business Act and Other Foreign Business Restrictions (2006), available at http://www.thailawforum.com/articles/foreignbusiness.html (detailing the Alien Business Law's amendment into the Foreign Business Act); see also Ramit Nagpal, *The IMF's Pursuit of Capital Account Convertibility: A Developing Country Perspective*, 12 LAW & BUS. REV. AM. 27, 38 (2006) (discussing the conversion of the Alien Business Law into a more liberal law).

316. *See* Apisith John Sutham, *The Asian Financial Crisis and the Deregulation and Liberalization of Thailand's Financial Services Sector: Barbarians at the Gate*, 21 FORDHAM INT'L L.J. 1890, n.157 (1998) (stating that the Alien Business Law had excluded brokering from alien participation); *see also* Andrea Morgan, Comment, *Trips to Thailand: The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court,* 23 FORDHAM INT'L L.J. 795, n.75 (2000) (explaining that the practice of law was only allowed to Thai professional under the old Alien Business Law). *But see* The Economist Intelligence Unit, *Thailand's New Foreign Investment Law: Aliens No More*, BUSINESS ASIA, Oct. 5, 1998 at 12 (stating that accounting, legal and other sectors are still off limits).

317. *See* Office of Baker & McKenzie, *Regulatory Watch: Thailand,* BUSINESS ASIA, Feb. 22, 1999 at 9 (remarking on the liberalization of multiple areas on Thai business); *see also Aliens No More*, *supra* note 316, at 12 (commenting on the number of reductions in restrictive categories in the Foreign Business Law); *see also Ministry of Foreign Affairs: Kingdom of Thailand* (2006), *available at* http://www.mfa.go.th/web/160.php (pointing out the reduction in limits on foreign ownership and manufacturing).

318. *See* Chaninat & Leeds Co., Ltd, *The Foreign Business Act and Other Foreign Business Restrictions*, http://www.thailawforum.com/articles/foreignbusiness.html (iterating that while the Act has liberalized foreign access to business in Thailand, it appears to be more restrictive in other areas).

319. *See generally* Commercial Mediation and Arbitration Center: Law Dispute Resolution Worldwide, *Foreign Business Law in Thailand*, http://www.medart-al.org/foreign-business-law-in-thailand.htm.

320. *See, e.g.*, *id*. (pointing to the categories of A, B and C, which progressively restrict business rights of foreigners).

2. BOI's Relaxation on Restrictions and Conditions

Through the mid-1990s to early 2000s, the BOI relaxed restrictions that it placed on the majority ownership of resource-based, manufacturing and service projects for the domestic market.[321] It gradually loosened these restrictions by expanding approval of foreign participation in more developed provinces and allowing 100% foreign ownership of projects with local shareholder consent.[322]

Additionally, the BOI created other non-tax incentives for existing foreign investors to engage in the expansion of existing projects and to also encourage further foreign investment.[323] These incentives include: permission to own land and bring in foreign experts and technicians, the ability to obtain permanent residence permits if certain sums of money are invested, and other incentives to trade and facilitate foreign companies' operations in Thailand.[324] Most recently, in early May 2010, the BOI approved a change in regulations extending foreigners working on R & D projects in the country from two years to four years.[325]

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321. *See* Chris Dixon, *The Liberalisation of Foreign Ownership and Cross-border M&A in South East Asia Since the 1997 Financial Crisis,* 26 J. CURRENT SOUTHEAST ASIAN AFFAIRS 5, 21 (2006) (discussing ownership reform in the Foreign Business Act); *see also* Aliens No More, *supra* note 316, at 12 (noting Thailand's new liberal and flexible foreign investing environment); *see also Custody and Settlement,* EUROMONEY, Sept. 1996 at 6 (relaying percentages required under Alien Business Law for securities).

322. *See* ARCHANUN KOHPAIBOON & ERIC RAMSTETTER, PRODUCER CONCENTRATION, CONGLOMERATES, FOREIGN OWNERSHIP, AND IMPORT PROTECTION: THAI MANUFACTURING FIRMS A DECADE AFTER THE CRISIS 14 (The International Centre for the Study of East Asian Development, Kitakyushu, Working Paper Series Vol. 2008-05, 2008) (claiming the increase of foreign owned companies was from the loosening of Thai restrictions); *see also* US Department of State Bureau of Economic, Energy, and Business Affairs, 2010 Investment Climate Statement Thailand, *available at* http://www.state.gov/e/eeb/rls/othr/ics/2010/138154.htm (noting that the BOI has relaxed their requirements to promote expansion and development); *see also* Thailand Board of Investment: A Guide to the Board of Investment 2010 10, *available at* http://www.boi.go.th/english/services/guide10.pdf (stating their new criteria for foreign shareholding).

323. *See* DANIEL FLEMING & KRISTEN NORDHAG, GLOBAL CHALLENGES—LOCAL RESPONSES: AN INSTITUTIONAL PERSPECTIVE ON ECONOMIC TRANSFORMATION IN ASIA 252, n.105 (Rolkside University, 2006) (noting the foreign holding increase to 100%); *see also* REGIONAL TRADE AGREEMENTS IN ASIA 90 (Tran Van Hoa & Charles Harvie ed., Edward Elgar Publishing 2008) (stating the 100% ownership equity principle in Thailand).

324. *See* Baker & McKenzie, *supra* note 317, at 9 (pointing out different BOI investment incentives in Thai zones); *see also Taiwanese Seek FTA with Thailand to Boost Trade*, THE NATION (Thai), July 8, 2010, at 1 (noting the efforts of the BOI and Foreign Business Act to actively lure foreign investors); see also Thailand Board of Investment, supra note 322 (showing the tax and non-tax incentives available to investors).

325. *See* Abhisit Vejjajiva, Prime Minister of the Kingdom of Thailand, Keynote Address at The Prime Minister Meets Investors (June 18, 2010), in THAI PRESS REP., June 22, 2010, 2010 WLNR 12556943 (articulating that, in order to make Thailand more attractive, the BOI has approved a visa extension of two years to four years for foreign experts and technicians working on R & D projects).

B. An Attempt to Consummate the 2006 U.S.-Thai Free Trade Agreement

The gradual escalation of the realized importance of IP protection around the world is evidenced by the more aggressive stance that developed countries have taken with regard to global enforcement.[326] While pressure on developing countries to reform their IP laws has been established in the international forum, commencing with the Tokyo Round of negotiations, several investor countries believed that plans were thwarted by a coalition of developing countries.[327] As a result, these countries, the United States in particular, resorted to unilateral forms of pressure to ensure that developing host countries strengthen their intellectual property regime (IPR).[328]

Although in the early 2000s, foreign investors have taken note of Thailand's strong immediate recovery from the 1997 Asian financial crisis, foreign investors, who immediately pulled out of the Thai market during the financial crash, have demanded aggressive reform efforts to promote transparency and a change in the country's legal culture from Thailand.[329] Accordingly, the U.S. has been increasingly involved with FTA negotiations with Thai officials.[330] The most recent wave of FTAs entered into by the United States has the common characteristic of exceeding minimum TRIPS standards.[331] In October 2003, the Bush

326. *See* Wei Shi, *Globalization and Indigenization: Legal Transplant of a Universal TRIPS Regime in a Multicultural World*, 47 AM. BUS. L.J. 455, 463 (expressing that developed countries have placed a "coercive demand" on developing countries to strengthen enforcement of IPR).

327. *See* Cortney M. Arnold, Comment, *Protecting Intellectual Property in the Developing World: Next Stop—Thailand*, 2006 DUKE L. & TECH. REV. 10, ¶5 (2006) (noting that the U.S. was forced to change its strategy to implement an international agreement on IPR protection due to pressure from a united front of developing counties bent on thwarting the effort).

328. *See id.* at ¶¶ 5–6 (stating that the U.S. first used unilateral pressure to increase IPRs in the developing world through legislation called "Special 301," which would identify foreign countries that deny adequate protection to IPR).

329. *See* Nisha Kanchanapoomi, Note, *Accelerating Corporate Governance Reform in Thailand: The Benefits of Private Reform Mechanisms*, 15 S. CAL. INTERDIS. L.J. 165 at 179 (2005) (arguing that the legal culture must change before fundamental changes may be seen in areas of Thai corporate governance).

330. *See* RUDOLPH DOZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 78 (Kluwer Law International 1995) (1995) (noting that BITs only denotes IP generally as an investment); *see also* Arnold, *supra* note 327 (maintaining that BITs fail to offer IP protection like FTAs do, evidenced by the fact that FTAs go into much more detail about intellectual property, whereas BITs groups IP as a general investment). *See generally* Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 125, 137 (2003) (stating that bilateral treaties treated intellectual property generally as "private property interests").

331. *See* Jose E. Alvarez, *Contemporary Foreign Investment Law: An "Empire of Law" or the "Law of Empire"?*, 60 ALA. L. REV. 943, 975 (stating that BITs generally assure foreign investors that they will receive better treatment from the host state than other foreign investors); see also Kenneth J. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621, 632 (1998) (explaining that BITs provide protection against state interference, but do little to protect property rights against private infringement or resolve issues between investors and private parties); *see also The Law of Investment Treaties Impact of Umbrella Clauses on State Liability*, FIN. TIMES, Sept. 9, 2010 (stating that BITs give confidence to foreign investment).

Administration announced its intention of engaging in negotiations for a potential U.S.-Thai FTA.[332] Since then, talks have been inevitably delayed.[333] Analysts predicted that prospects for an FTA were bleak.[334] Despite studies indicating that such an agreement would be beneficial for both countries' economies, the parties would have to come to terms with numerous challenging issues to reach material results.[335] Both countries have reached a stalemate with regard to the contentious compulsory licensing issue.[336] While Thailand has committed itself to taking significant steps to improve copyright protection and fight counterfeiting, the United States has refused to make any concessions to their demand to prohibit compulsory licensing practices.[337] Moreover, the U.S.-Thai FTA would be the most comprehensive FTA that Thailand has ever attempted.[338] While Thailand has made notable efforts to strengthen its IPR through such actions as the biotechnology patent filing campaign, which is modeled after the

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332. *See* RAYMOND J. AHEARN & WAYNE M. MORRISON, U.S.-THAILAND FREE TRADE AGREEMENT NEGOTIATIONS 1 (2004); *see also Transnational Law Associates, LLC, Chile and U.S. Sign Free Trade Agreement*, INT'L L. UPDATE, (2003) (stating that after more than two years of negotiations, the U.S. signed a Free Trade Agreement with Chile); *see also Hearing on Promoting U.S. Agricultural Trade Exports*, U.S. FED. NEWS, Aug. 5, 2010 (quoting the Senate Committee on Agriculture, Nutrition and Forestry as saying that increasing exports could lead to negotiations with new sets of trading partners); *see also Whatever Happened to the US-Korea FTA?*, INT'L POL'Y ECON. ZONE, July 4, 2010 (explaining that the United States has pending FTAs with Colombia, Peru and South Korea).

333. *See* Rachel Denae Thrasher & Kevin P. Gallagher, *21st Century Trade Agreements: Implications for Developing Sovereignty*, 38 DENV. J. INT'L L. & POL'Y 313, 344 (2010) (explaining that TRIPS allows countries to exclude plants from patentability, but the U.S. model demands contracting countries to make every effort to impose a plant patenting system); *see also* Timothy P. Trainer, *Intellectual Property Enforcement: A Reality Gap (Insufficient Assistance, Ineffective Implementation)?*, 8 J. MARSHALL REV. INTELL. PROP. L. 47, 61 (2008) (stating that the U.S. has raised TRIPS enforcement standards by eliminating ambiguities in its own FTAs); *see also* Bruce Zagaris, *International Anti-Counterfeiting Coalition Urges US to Enforce Intellectual Property Laws*, 20 INT'L ENFORCEMENT L. REP. 5 (2004) (asserting that the United States had been commended for raising the level of enforcement of TRIPS in recent FTAs).

334. *See* EMMA CHANLETT-AVERY, THAILAND: BACKGROUND AND U.S. RELATIONS, CRS REP. NO. RL32593 11 (2005); *see also* RAYMOND J. AHEARN & WAYNE M. MORRISON, U.S.-THAILAND FREE TRADE NEGOTIATIONS 1 (2004), available at www.nationalaglawcenter.org/assets/crs/RL32314.pdf (stating that six negotiation rounds took place and U.S. officials hoped to conclude negotiations by early 2006); *see also* Kristy L. Balsanek, Robert E. Defrancesco, Melanie A. Frank, David T. Hardin & Matthew R. Nicely, *International Trade*, 40 INT'L LAW. 217 (2006) (explaining that as of January 1, 2005, the United States was in the process of negotiating five FTAs, including an FTA with Thailand); *see also* Walter Lohman, *A Meaningful Agenda for President Obama's Meeting with Southeast Asian Leaders*, STATES NEWS SERVICE, Nov. 10, 2009, *available at* http://www.heritage.org/research/reports/2009/11/a-meaningful-agenda-for-president-obamas-meeting-with-southeast-asian-leaders (indicating that the Bush Administration opened negotiations with Thailand for a Free Trade Agreement).

335. *See* Pablo M. Bentes, Stacy J. Ettinger, Gregory Husisian, Valentin A. Povarchuk, John M. Ryan, Matthew T. Simpson, P. Lee Smith & Margaret R. Tretter, *International Trade*, 43 INT'L LAW 335 (2009) (stating that U.S.-Thailand FTA talks remained dormant in 2008); *see also* William H. Cooper, Mark E. Manyin, Remy Jurenas & Michaela D. Platzer, *The Proposed U.S.-South Korea Free Trade Agreement; KORUS FTA: Provisions and Implications*, CONG. RES. SERVICE REP. ISSUE BRIEFS (2010) (indicating that the FTA negotiations which were initiated by the Bush Administration ultimately stalled); *see also* Robert Sutter, *The Obama Administration and US Policy in Asia*, 31 INST. SE. ASIAN STUD. ¶ 28, 60 (2009) (explaining that U.S. FTA negotiations with Thailand stalled).

336. *See* Beatrice Lindstrom, *Scaling Back TRIPS-Plus: An Analysis of Intellectual Property Provisions in Trade Agreements and Implications for Asia and the Pacific*, 42 N.Y.U. J. INT'L L. & POL'Y 917, 976 (2010) (noting that the United States has not been willing to budge on the issue of compulsory licenses, whereas Thailand has demonstrated a commitment to improving copyright protection).

337. *See id.* (iterating that the United States will not concede on the compulsory licensing issue).

338. See CHANLETT-AVERY, *supra* note 334, at 11.

Singapore-U.S. FTA model,[339] it has to yet to take significant steps toward investing in R & D resources, which are the foundation of a knowledge-based economy and infrastructural self-sustainment.[340]

1. Political Instability: The Current State of Matters

In May 2010, Thailand's position as a major foreign investment destination was seriously threatened when a violent political riot, led by red-shirted protestors, resulted in 91 deaths along with destruction of the country's stock exchange headquarters and several other commercial locations.[341] Yet, business as usual was resumed shortly after the event. While the financial center has been closed, other export industries, like the automotive and electronic sectors remained unaffected, tourists continued to vacation at the resorts, and "investment continues to trickle in."[342] Despite this unexpected instant recovery, the ongoing political instability has forced foreign investors to seriously consider making more urgent demands to ensure the safety of its employees.[343]

Conclusion

A cycle composed of trials and tribulations has revealed the inherent weaknesses in Thailand's IP regime. The lack of respect for and enforcement of IP rights, which persisted even subsequent to adoptions of amendments and an abrogation of provisions unfavorable to foreign investors, has placed Thailand in an economic stalemate.

While strong IP laws will result in short-term losses, the long-term benefits are well worth the costs, and the consequences of inaction are far worse than the costs of the resulting short-term loss of decreased domestic competition. Although no studies have confidently and definitively stated a direct positive impact of strong IP laws with economic development, deeper and more complex country- and market-specific analyses show a positive correlation.

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339. *See* Alex Fayette, *Biotech in Thailand: How Patents Can Change a Developing Nation*, http://www.yalelawtech.org/ip-in-the-digital-age/biotech-in-thailand-how-patents-can-change-a-developing-nation (emphasizing how Thailand took the lead from Singapore's IPR, which involved government investment in state-of-the art research facilities to attract foreign investors).

340. *See* Patarapong Itarakumberd & Daniel Schiller, *University-Industry Linkages in Thailand: Successes, Failures and Lessons Learned for Other Developing Countries*, 22 SEOUL J. ECON. 551, Table 5, 2009 WLNR 26468405 (2009) (articulating that firms who provide R & D view universities as bastions of knowledge and information).

341. *See* Thomas Fuller, *Citing Instability, Thailand Extends Emergency Decree*, N.Y. TIMES, July 7, 2010, at A8 (expressing that nearly 90 people were killed, and 1800 injured in the protests conducted by the red shirts, who were demanding greater political participation for the lower strata of Thai society).

342. *See Bouncing Briefly Back*, THE ECONOMIST, September 16, 2010, *available at* http://www. economist.com/node/17049141 (noting that, while the financial centers of the country may have been closed, the beaches were still open, and "[i]nvestment continues to trickle in").

343. *See* Patrick Barta & Alex Frangos, *Thai Standoff Threatens Foreign Investment*, WALL ST. J., May 20, 2010 http: //online.wsj.com/article/SB10001424052748704912004575252362408455950.html.

Despite the fact that Thailand has generally tried to create a favorable environment toward foreign investors, its past efforts to promote positive growth through technology spillover have been futile. There are many alternative approaches available to Thailand to promote long-term growth. First, Thailand must remain persistent in enacting and enforcing stronger and new IP laws. Second, it must take a multi-factored approach, which means that in addition to legal reform, and investment liberalization, it must actively train and educate its citizens of the value of a strong IP regime. To reap sustainable and long-lasting results from such efforts, foreign investors must consider ways to alter the Thai people's cultural perception of intellectual property rights.[344]

The recent political strife, instability, and contention regarding compulsory licensing of drugs has definitely set back Thailand's efforts to become a more competitive player in the international forum. However, when the opportunity to create an atmosphere conducive to positive long-term growth presents itself again, it will benefit Thailand to value strong governance and laws as valuable economic assets which it must invest in, rather than just political vehicles. Such an approach will reap the long anticipated benefits in the future.

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344. *See* Wei Shi, *Globalization and Indigenization: Legal Transplant of a Universal TRIPS Regime in a Multicultural World*, 47 AM. BUS. L.J. 455, 505 (2010) (emphasizing that, while it's important to promote a worldwide IPR, specific cultural norms and values should not be overlooked).

Correction

The article *Recapturing Art: A Comprehensive Assessment of the Italian Model for Cultural Property Protection*, by Lauren Fae Silver, originally printed in the Summer 2010 issue, contained an error. Under Swiss Law, after the Swiss Federal Act on the International Transfer of Cultural Property ("CPTA") was enacted in 2005, a good faith purchaser acquires title after thirty years. The article erroneously stated it was five years. In addition, Switzerland currently has bilateral agreements with Columbia, Egypt, Greece and Peru that restrict importation of objects in violation of each of these countries' laws. However, despite Switzerland's attention to the problem as shown in this recent legislation there are difficulties in interpretation of the CPTA statute and in the implementation of its provisions.[1] Furthermore, the Act makes very few changes in Switzerland's liberal exportation regime. Since none of the changes are retroactive, the effectiveness of the new laws will only be tested going forward.

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1. *See, e.g.,* Alexander Jolles, *Dealing with Cultural Property: Switzerland's New Act on the International Transfer of Cultural Goods*, ART LAW, Nov. 2, 2006 at 13.

Cedeño v. Intech Group, Inc.

No. 09 Civ. 9716, 2010 WL 3359468 (S.D.N.Y. Aug. 25, 2010)

RICO suit is dismissed where the Venezuelan government-affiliated defendants' sole connection to the United States is limited to the transfers of funds into and out of U.S.-based bank accounts. The court effectively extends the presumption against extraterritoriality to racketeering under the RICO Act.

I. Holding

In *Cedeño v. Intech Group, Inc.*[1] the U.S. District Court for the Southern District of New York grants the defendants' motion to dismiss[2] the civil action brought under the Racketeer Influenced and Corrupt Organizations Act (RICO).[3] The plaintiff seeks "'damages arising out of a wide-ranging money laundering scheme that [allegedly] utilized New York-based U.S. banks to hold, move and conceal the fruits of fraud, extortion and private abuses of public authority'"[4] by Venezuelan government officials and their confederates.[5] The court holds that, because RICO is silent as to its application to other countries, it will not substitute its own judgment for the presumption against extraterritoriality. In other words, the defendants' activities "exceed[ ] the territorial limits of RICO's reach"[6] where they consist of alleged money-laundering schemes concerned entirely with foreign enterprises.[7]

II. Facts and Procedural History

Eligio Cedeño, the plaintiff, a citizen of Venezuela, named as co-plaintiff his company, Cedel International Investment Ltd., which is incorporated in the British Virgin Islands.[8] Cedeño was imprisoned in Venezuela for almost three years, during which time his business was allegedly damaged by the defendants.[9]

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1. No. 09 Civ. 9716, 2010 WL 3359468 (S.D.N.Y. Aug. 25, 2010).
2. Only defendants Jose Jesus Zambrano, Juan Felipe Lara Fernandez, Werner Braschi, Ruben Rogelio Idler Osuna, Adina Mercedes Bastidas Castillo, and Alhambra Investments LLC have moved to dismiss the Amended Complaint. Conversely, the court granted the motion for default judgment against defendants Intech Group, Inc. and Domingo R. Martinez, and refers this part of the case to Magistrate Judge Andrew J. Peck on the issue of damages. The remaining defendants—Pedro Carreño, Gonzalo E. Vazquez Perez, Julian Isaias Rodriguez Diaz, Edgar Hernandez Behrens, Maria Espinoza De Robles, Alfredo Pardo Acosta, Maigualida Angulo, Gustavo Arráiz, and Consorcio Microstar—have apparently not been served. The court directed the plaintiff to inform it in writing, by no later than September 8, 2010, of "what efforts, if any, have been made to serve those defendants and whether the court should dismiss those defendants without prejudice." *Id*. at *3, n.2.
3. Racketeer Influenced and Corrupt Organizations Act, 13 U.S.C. §§ 1961-1968 (2006).
4. *Cedeño*, 2010 WL 3359468, at *1.
5. *See id.*
6. *Id.*
7. *See id.* at *2.
8. *See id.* at *1.
9. *See id.*

Cedeño insists that he was unjustifiably imprisoned as part of a money-laundering scheme arranged by the defendants, many of which are associated with the Venezuelan government.[10] He claims that the defendants' use of extortion, fraud and private abuse of public authority is conducted "through an 'association-in-fact' RICO enterprise,"[11] dubbed a "regime" by Cedeño, that consists of three governmental bodies: "CADIVI,[12] the Central Bank of Venezuela, and the Venezuelan government agency that prosecutes alleged violations of Venezuela's laws."[13]

Cedeño brings the present suit in the Southern District of New York because of the defendants' contact with the United States, which consisted of "the movement of funds into and out of U.S.-based bank accounts."[14] The defendants move for dismissal on the ground that these activities exceed RICO's territorial scope.[15]

III. Analysis

A. Presumption Against Extraterritoriality

In this case, the court holds that there is a presumption against extraterritoriality under RICO. The court begins its analysis of the extraterritorial reach of RICO by citing *Morrison v. National Australia Bank Ltd.*,[16] which was decided only two months before the present case.[17] The court reiterates the recent repudiation of the Second Circuit's "effects test" and "conduct test" that had previously served to evaluate the extraterritoriality of statutes.[18] Instead, the court concludes, "one must look to 'the focus of congressional concern,'"[19] and, as the Supreme Court put it, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[20]

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10. *See Cedeño*, 2010 WL 3359468, at *1.
11. *Id.*
12. The Comisión de Administración de Divisas (Commission for the Administration of Currency Exchange), or CADIVI, is in charge of "administration, coordination, control, requirements, procedures and restriction of foreign currency." Registration with CADIVI is mandatory for any party purchasing foreign currency, as is reporting the entry or exit of foreign currency in amounts exceeding $10,000. *See* Exchange Control, 1 Venez. L. Dig. § 14.02.
13. *See Cedeño*, 2010 WL 3359468, at *1.
14. *Id.*
15. *See id.*
16. 130 S. Ct. 2869, 2878 (2010).
17. *See Cedeño*, 2010 WL 3359468, at *1 n.2 (explaining that *Morrison* was decided on June 24, 2010, and that the court invited and received additional briefing on the impact of the case even after original briefing and oral argument).
18. *Id*. at *2 (citing *Morrison*, 130 S.Ct. at 2879).
19. *Id.* at *2 (quoting *Morrison*, 130 S.Ct. at 2878).
20. *Id*. at *1.

B. Arguments in the Alternative

The plaintiff offers two alternative arguments. One argument stems from the predicate acts themselves. The first is that "since the federal statutes prohibiting money laundering are (they say) extraterritorial in nature, a RICO action predicated on violations of those statutes should be given extraterritorial application."[21] The second argument is based on the defendants' contacts with the United States. The plaintiff alleges "predicate acts of money laundering that involved transfers into and out of [New York] by U.S. banks."[22]

C. Application to RICO

1. RICO's Lack of Indication of Extraterritoriality

Morrison does not directly address RICO;[23] instead, the case involves the extraterritorial reach of the Securities Act of 1934.[24] However, the court in Cedeño seamlessly applies *Morrison*'s reasoning and borrows from *N.S. Fin. Corp. v. Al-Turki*,[25] which declares RICO "silent as to any extraterritorial application."[26] Therefore, the court reasons, RICO does not apply to claims that are extraterritorial in focus.[27] To Cedeño's detriment, RICO does not state any way a foreign enterprise can overcome the presumption against extraterritoriality. As stated above, it contains no language at all about any foreign bodies.[28]

For this reason, the court rejects Cedeño's first argument that, since federal statutes outlawing money laundering allegedly have an extraterritorial reach, a RICO action based on violations of those federal statutes should also have an extraterritorial reach.[29] The court rules that the focus of RICO is "on the enterprise as the recipient of, or cover for, a pattern of criminal activity."[30] The Act prohibits the use of a pattern of multiple criminal acts to impact an enterprise. Particularly, the following three actions are prohibited: "using the proceeds of a pattern of predicate acts to invest in an enterprise[31] . . . using a pattern of predicate acts to obtain or maintain an interest in an enterprise[32] . . . or . . . using the enterprise itself as a conduit for committing a pattern of predicate acts."[33] However, since the court establishes that RICO does

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21. *Id.*
22. *Id.* at *2.
23. *See Cedeño*, 2010 WL 3359468, at *2.
24. 15 U.S.C. §§ 78a *et seq.*
25. 100 F.3d 1046, 1051 (2d Cir. 1996).
26. *N.S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996).
27. *See Cedeño*, 2010 WL 3359468 at *2.
28. *See id.*
29. *Id.*
30. *Id.*
31. *Id.* (citing 18 U.S.C. § 1962(a)).
32. *Id.* (citing 18 U.S.C. § 1962(b)).
33. *See Cedeño*, 2010 WL 3359468 at *2 (citing 18 U.S.C. § 1962(c)).

not concern itself with foreign enterprises, it does not apply where, as here, all of the alleged activities were entirely foreign.[34]

2. Likelihood of Some Domestic Activity

As an alternative to reading extraterritoriality into RICO, Cedeño attempts to sidestep the *Morrison* test by citing the defendants' allegedly extensive contact with the United States (the mere transferal of funds within U.S. banks).[35] The court refuses to follow this line of thinking, though; it concludes that, in cases dealing with the question of extraterritoriality, there is rarely a situation that lacks all contact with the United States.[36] Citing *Morrison*, it compares the presumption against extraterritoriality to a "watchdog" and remarks how small a burden it would be to show any contact with the United States whatsoever.[37] In this way, the court rejects Cedeño's argument that any amount of contact with the United States will trump the presumption against extraterritoriality in lieu of statutory language explicitly extending a statute's extraterritorial reach.[38]

IV. Conclusion

In granting the defendants' motion to dismiss, the court makes it clear that it will respect the presumption against extraterritoriality previously articulated in *Morrison*. RICO is "'silent as to any extraterritorial application,'"[39] so the court refused to read in any such application.[40] Moreover, the court is not convinced of the substantiality of the defendants' American contacts. It implies that there would be a slippery slope if certain federal laws extended their reach into foreign jurisdictions every time a party transferred money in and out of the financial powerhouse that is the United States.[41] However, on September 22, 2010, Cedeño filed an appeal with the U.S. Court of Appeals for the Second Circuit.[42]

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34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.* (citing *Morrison*, 130 S.Ct. at 2884); *see also infra* note 41.

38. *See id.*

39. *Cedeño*, 2010 WL 3359468 at *2 (quoting *N.S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996).

40. *Id.*

41. *See id.* ("'[I]t is a rare case of all prohibited extraterritorial application that lacks *all* contact with the territory of the United States,' and the presumption against extraterritoriality 'would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case'" (quoting *Morrison*, 130 S. Ct. at 2884)).

42. *See* Charlie Devereux & Corina Rodriguez Pons, *Venezuelan Banker Presses U.S. Graft Case Against Chavez Allies*, BLOOMBERG BUSINESSWEEK, September 23, 2010.

The court recognizes the misfortune of the plaintiff's situation when it says that "although the dreadful events alleged therein may be perfectly plausible given what is generally known about the Chavez regime, the connections to the United States may be too peripheral or problematic to support a RICO lawsuit brought here."[43] Although the court hints that it wishes it could lend a helping hand, it sides instead with the presumption against extraterritoriality, thereby cutting off the statute's reach at the United States border.

Ally L. Colvin

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43. *Id.* at *1.

Guirlando v. T.C. Ziraat Bankasi A.S.

602 F.3d 69 (2d Cir. 2010)

No subject-matter jurisdiction over a Turkish bank was found under the Foreign Sovereign Immunities Act, because the "commercial activity exception" is inapplicable only when a bank's conduct lacks the requisite effect in the United States.

I. Holdings

In *Guirlando v. T.C. Ziraat Bankasi A.S.*,[1] the Court of Appeals for the Second Circuit affirms the decision of the United States District Court for the Southern District of New York. Under the Foreign Sovereign Immunities Act's (FSIA) commercial activities exception,[2] the mere act of denying plaintiff's request to open an individual bank account was not a direct cause of the loss suffered. Additionally, the bank's failure to notify the plaintiff that funds had arrived in the account from New York did not have the requisite direct effect in the United States. Finally, the court held that refusing to allow the plaintiff to open a new, individual account, as opposed to a joint account, did not have a direct effect in the United States, either.

II. Facts and Procedural History

The plaintiff, Theresa Guirlando ("Guirlando"),[3] is a U.S. citizen who brought an action against T.C. Ziraat Bankasi A.S. ("Ziraat" or the "Bank") after her husband, a Turkish citizen named Mevlut Cicek ("Cicek"), stole funds from a joint account that Guirlando opened in Turkey.[4] The two were married in Port Jefferson, New York, but, shortly thereafter, Cicek disappeared.[5] He turned up in Turkey and called Guirlando, informing her that he had been deported and wished for her to move to Turkey to live with him.[6] Guirlando sold her house and car and then flew to Turkey with a check payable to herself in the amount of $251,156.63.[7] The check represented "the proceeds from those sales and the entire balance of her Citibank account."[8]

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1. 602 F.3d 69 (2d Cir. 2009).
2. A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . ." 28 U.S.C.S. § 1605(a)(2) (2009).
3. It appears that the plaintiff's name is actually Giurlando, rather than Guirlando, but, as the court observes, "Because legal research catalogs and computers are governed by the principle of consistency, not correctness, we feel constrained to adhere to the erroneous spelling." Ford Motor Credit Co. v. Milhol-lin, 444 U.S. 555, 555 n.* (1980). *Guirlando*, 602 F.3d at 69 n.*.
4. *See Guirlando*, 602 F.3d at 72.
5. *See id.*
6. *See id.*
7. *See id.*
8. *Id.*

Guirlando alleges that bank employees told her that she could not open an individual account without a Turkish identification number, which led her to open a joint account with Cicek.[9] The forms and signature cards that Guirlando signed were entirely in Turkish and Guirlando was unaware that the forms created a joint account with a "disjunctive character," meaning that one owner could withdraw funds without the consent of the other owner.[10] The Bank informed Cicek, instead of Guirlando, when the funds became available, despite having promised to telephone Guirlando.[11] Cicek immediately withdrew more than $200,000.[12] Upon discovering that Cicek had stolen her money, Guirlando withdrew the remaining balance, flew home to the United States, and commenced this action against the Bank.[13]

Guirlando alleges, "the manager and executive personnel at Ziraat Bank knew that Cicek was a criminal and a swindler, and that his marriage to G[ui]rlando was bigamous and void because Cicek was already married to a Turkish woman when he married G[ui]rlando."[14] In addition, Guirlando asserts, "[t]he Ziraat employees expected to profit from Cicek defrauding G[ui]rlando."[15] Furthermore, she alleges that her marriage to Cicek was bigamous and void because Cicek was already married to a Turkish woman.[16] Guirlando's complaint alleges four causes of action resulting from the conduct of the Bank's employees: "negligence, negligent and intentional misrepresentations and omissions, breach of the covenants of good faith and fair dealing, and breach of fiduciary duty."[17]

The district court granted Ziraat's motion pursuant to Federal Rule of Civil Procedure 12(b)(6)[18] and the FSIA,[19] dismissing the action for lack of subject-matter jurisdiction. The court found that the bank was immune from suit because the plaintiff's claims were based on acts that did not cause a direct effect in the United States.[20] On appeal, Guirlando argued that the district court erred in concluding that the Bank's acts did not cause a direct effect in the United States.[21]

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9. *See id.*
10. *See Guirlando*, 602 F.3d at 72.
11. *See id.*
12. *See id.*
13. *See id.*
14. *Id.*
15. *Id.*
16. *See Guirlando*, 602 F.3d at 72–73.
17. *Id.*
18. FED.R.CIV.P. 12(b)(6) ("Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion . . . (6) failure to state a claim upon which relief can be granted. . . .").
19. *See* 28 U.S.C.S. §§ 1330(a) & 1603–1605 (2009).
20. *See Guirlando*, 602 F.3d at 73.
21. *See id.* at 73–74.

III. Discussion

A. Standard of Review

The parties did not dispute "the status of Ziraat as a foreign state within the meaning of the FSIA,"[22] and Ziraat accepted the complaint's allegations as true for purposes of its Rule 12(b)(6)[23] motion. "Foreign state . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state."[24] Thus, the plaintiff's contentions presented only questions of law, which the court reviews *de novo*.[25]

B. Interpretation of the Foreign Sovereign Immunities Act

The FSIA provides subject matter jurisdiction for federal courts over "any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement."[26] The "commercial activity exception" provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."[27]

An effect is "direct" within the meaning of the exception when it follows "'as an immediate consequence of the defendant's activity.'"[28] Courts use the "legally significant act" test "to determine whether the direct impact of the foreign state's foreign commercial activity was felt 'in the United States.'"[29] Acts can be positive or negative. For instance, the Second Circuit decided a case fell within FSIA jurisdiction because the legally significant act was the defendant's failure to abide by contractual terms obliging it to make payments in New York.[30] Commercial activity outside the United States that causes financial or physical injury to a U.S. citizen is not in and of itself a direct effect in the United States.[31] The court reasons that, if loss alone were sufficient to satisfy a direct effect, commercial disputes would result in litigation of events with no connection to the United States other than citizenship, frustrating the FSIA's provision of immunity for foreign states.[32]

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22. *Id.* at 74.
23. FED.R.CIV.P. 12(b)(6).
24. 28 U.S.C.S. § 1603(a) (2009).
25. *See Guirlando*, 602 F.3d at 74.
26. 28 U.S.C.S. § 1330(a) (2009).
27. 28 U.S.C. § 1605(a)(2) (2009).
28. *Guirlando*, 602 F.3d at 74 (quoting Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 617–18 (1992).
29. *Id.* at 75.
30. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), *aff'g* 941 F.2d 145, 153 (2d Cir. 1991).
31. *See Guirlando*, 602 F.3d at 78; s*ee also Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988).
32. *See Guirlando*, 602 F.3d at 78.

In the current case, the Second Circuit held that there is no direct effect in the United States, because financial loss from a foreign tort cannot, "standing alone, suffice to trigger the commercial activity exception."[33] In *Antares*, the court held that money, which happened to come from a bank in New York, was legally insignificant with regard to an alleged tort.[34] The court distinguishes this torts case from contracts cases, in which a breach of a contract in a designated place of performance *would be* a legally significant act.[35]

The court also held that the Bank's act of notifying Cicek, instead of Guirlando, that the funds arrived from New York could not satisfy the requirement of a direct effect in the United States.[36] The plaintiff contended that the requisite direct effect in the United States was the transfer of the funds from New York to Turkey.[37] Therefore, the notification of the funds' arrival in Turkey clearly could not have *caused* that transfer.[38]

Finally, the Bank's refusal to open an individual account did not have a direct effect in the United States for two reasons. First, Guirlando's financial loss was not a direct result of the Bank's denial of her request to open an individual account; instead, Cicek was the cause of her loss. Cicek's larcenous withdrawals were an intervening element between the Bank's conduct and Guirlando's impoverishment.[39] Second, although the *Antares* decision found that the breach of an agreement to pay money in the United States had the requisite direct effect in the United States,[40] the transfer of money out of a U.S bank account is not sufficient to place the effect of the conduct in the United States.[41]

IV. Conclusion

The court found all of Guirlando's claims to be without merit under the FSIA and consequently affirmed the judgment dismissing the action for lack of subject-matter jurisdiction.

The court also noted that its dismissal for lack of jurisdiction did not leave Guirlando without recourse. Ziraat had stated in its argument that it was amenable to suit in Turkey and would not challenge the appropriateness of a Turkish forum.

Christina E. Papadopoulos

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33. *Id.* at 79 (citing Antares Aircraft, L.P. v. Federal Republic of Nigeria, 999 F.2d 33, 36 (2d Cir. 1993)).
34. *See Antares*, 999 F.2d at 36.
35. *Id.*
36. *See Guirlando*, 602 F.3d at 80.
37. *See id.*
38. *See id.*
39. *See id.*
40. *See Antares*, 999 F.2d at 36.
41. *See Guirlando*, 602 F.3d at 80.

Karoon v. Franklin, Weinrib, Rudell & Vassallo, P.C.

No. 09 Civ. 6362, 2010 U.S. Dist. LEXIS 53259 (S.D.N.Y. May 27, 2010)

The defendant law firm's right to enforce a 12-year-old judgment against a former client's properties located in France, which the court holds are unprotected by New York Civil Practice Law & Rules 5208 (CPLR) and subject to contractual liability, is deemed enforceable.

I. Holding

In *Karoon v. Franklin, Weinrib, Rudell & Vassallo, P.C.*,[1] the U.S. District Court for the Southern District of New York grants the defendant's motion for summary judgment, holding that efforts to levy and execute upon the plaintiffs' properties in Paris and Cannes, France, do not violate New York statutory or common law.[2] Specifically, the court holds that (1) CPLR 5208[3] "does not apply where . . . enforcement is sought against a judgment debtor's property located outside of New York";[4] (2) the defendant's distribution plan for French properties and refusal to release a lien on the Paris property are insufficient to establish a prima facie tort;[5] and (3) the defendant has not breached the implied covenant of good faith and fair dealing, in part because it expressly preserved the right to enforce the New York judgment "in any jurisdiction worldwide."[6]

II. Background

Franklin, Weinrib, Rudell & Vassallo, P.C. ("the defendant"), a New York-based law firm, represented the plaintiff Mahin Karoon's late husband, Majid Karoon, in their divorce proceedings from May 8, 1997 through February 3, 1998.[7] The divorce involved the disposition of several foreign properties, including "apartments in London, England and Paris and

1. No. 09 Civ. 6362, 2010 U.S. Dist. LEXIS 53259 (S.D.N.Y. May 27, 2010) (hereinafter *Karoon*).
2. *See id.* at *1.
3. CPLR 5208 (2010) (specifying enforcement after death of judgment debtor; leave of court; extension of lien):

> Except where otherwise prescribed by law, after the death of a judgment debtor, an execution upon a money judgment shall not be levied upon any debt owed to him or any property in which he has an interest, nor shall any other enforcement procedure be undertaken with respect to such debt or property, except upon leave of the surrogate's court which granted letters testamentary or letters of administration upon the estate. If such letters have not been granted within eighteen months after the death, leave to issue such an execution or undertake such enforcement procedure may thereafter be granted, upon motion of the judgment creditor upon such notice as the court may require, by any court from which the execution could issue or in which the enforcement procedure could be commenced. A judgment lien existing against real property at the time of a judgment debtor's death shall expire two years thereafter or ten years after filing of the judgment-roll, whichever is later.").

4. *Karoon* at *14.
5. *See id.* at *16.
6. *See id.* at *20–21.
7. *See id.* at *1.

Cannes, France."[8] During the divorce proceedings, Mr. and Mrs. Karoon entered into three stipulations, in which they agreed to create two joint escrow accounts: one for expenses and a second for proceeds of the sale of the London property.[9] None of the three stipulations mentions the Paris or Cannes properties.[10]

In February 1998, the defendant sued Mr. Karoon for non-payment of legal fees and they entered into a stipulation of settlement ("the Legal Fees Stipulation").[11] It provides that Mr. Karoon "shall execute any documents which . . . may be necessary to enforce the judgment in any jurisdiction worldwide, or to enter judgment in any such jurisdiction."[12] Pursuant to that agreement, a judgment for $85,210 was filed against Mr. Karoon in the New York County Clerk's Office (the "New York Judgment").[13]

The Karoons' divorce was executed in accordance with New York law on September 29, 1999.[14] Approximately one year later, an amended judgment was filed to facilitate enforcement of the divorce in France, declaring that "all marital property, including the Cannes and Paris properties, [i]s to be liquidated 'without delay' and the proceeds placed in an escrow account to be distributed 65 percent to Mrs. Karoon and 35 percent to Mr. Karoon."[15]

In February 2002, Mr. Karoon died intestate.[16] Probate proceedings were initiated in California and his two children, also plaintiffs in this action, became administrators of his estate.[17] In December 2006, the defendant filed its claim with the administrator of Mr. Karoon's estate, in California, but it was rejected.[18]

III. French Proceedings

The French court enforced the New York judgments throughout the proceedings. In January 1999, three years before Mr. Karoon's death, the French court granted defendant provisional liens on the Paris and Cannes properties.[19] In September 1999, it validated the New York judgment against Mr. Karoon, holding "that it was enforceable in France and could 'be executed on the whole of the French territory' (the 'French Judgment')."[20] Ultimately, the High

8. *Id.* at *1–2.
9. *See id.* at *2–3.
10. *See Karoon.*
11. *See id.* at *4.
12. *Id.* at *4.
13. *See id.*
14. *See id.* at *7.
15. *Id.* at *7–8.
16. *See Karoon* at *8.
17. *See id.*
18. *See id.*
19. *Id.* at *6.
20. *Id.* at *7.

Court of Paris recognized the divorce as adjudicated in New York (the "French Divorce Judgment").[21]

In 2006, the defendant initiated proceedings in France to force the sale of the Cannes property.[22] The plaintiffs filed a complaint seeking to postpone the sale, arguing that (1) the property should be divided prior to sale, pursuant to the French Divorce Judgment, and (2) the defendant's claim on the Cannes property was invalid, because it was not litigated in the California probate proceeding.[23] The French court denied the plaintiff's petition in a non-appealable Order and the property was sold for $1.26 million.[24] Pursuant to French law, the defendant did not immediately receive any proceeds.[25]

Thereafter, the defendant refused to remove the lien on the Paris property, despite the plaintiffs' complaints that the lien was interfering with the sale.[26] The French court denied the plaintiffs' application to cancel the lien and granted their request to sell the Paris property.[27] It sold for approximately $700,000 in February 2009.[28]

IV. Discussion

The defendant claims that the plaintiffs still owe it more than $100,000, which includes interest and costs incurred in France.[29] In July 2009, the plaintiffs filed a complaint in the Southern District of New York asserting three claims in an attempt to preclude the defendant from enforcing the New York Judgment against the proceeds from the French properties.[30] The defendant filed the instant motion to dismiss in December 2009.[31]

A. Limitations of CPLR 5208

In the Southern District action, the plaintiffs alleged "that defendant's efforts to enforce the New York Judgment by levying and executing upon the Cannes and Paris properties violated CPLR 5208[32] because the defendant failed to seek leave from the California probate court."[33] The court found this claim to be without merit.[34]

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21. *See id.* at *8–9.
22. *See Karoon* at *9.
23. *See id.*
24. *See id.* at *9
25. *See id.* at *10.
26. *See id.*
27. *See id.*
28. *See Karoon.*
29. *See id.* at *10–11 (calculating the amount owed to the defendant as $85,210, plus interest and costs, totaling more than $100,000 "in all." The language of the opinion added "in all" to the language in the defendant's brief, indicating that $100,000 refers to total debt owed, and not the sum of interest and costs.).
30. *See id.* at *11.
31. *See id.* at *12.
32. *See supra* note 3.
33. *Karoon* at *13–14.
34. *See id.* at *14.

Under Section 5208, creditors are not permitted to execute on judgments for eighteen months following a debtor's death, including levying upon any of the deceased's property interests, unless the surrogate's court that has probated the will grants leave.[35] However, in dismissing the plaintiffs' claim, the court relies on *James v. Powell*,[36] holding that Section 5208 does not apply where a creditor seeks to enforce a judgment on property located outside of New York.[37] Judge Cote noted, "'[T]he law of New York does not and cannot determine the extent to which property located outside the State is subject to execution by a judgment creditor.'" [38]

B. Prima Facie Tort

The plaintiffs also allege that the defendant's legal actions in France constitute a prima facie tort. The claim is based on (1) the defendant's refusal to release the lien on the Paris property and (2) the defendant's disregard for Mrs. Karoon's 65 percent interest under the proposed distribution plan.[39]

The court dismisses the claim, because "plaintiffs fail to allege any facts showing that 'disinterested malevolence was the sole motivation' for the conduct."[40] Under New York law, the plaintiffs must establish: "'(1) an intentional infliction of harm; (2) without excuse or justification and motivated solely by malice; (3) resulting in special damages; (4) by an act that would otherwise be lawful.'"[41] The court holds that the conclusory assertion of malice is inadequate to state a claim, particularly in light of the existing debt owed to the defendant.[42] It also finds that the plaintiffs' complaint fails to describe any special damages resulting from the defendant's actions.[43]

C. Contractual Liability

The third question addressed is whether the defendant breached the implied covenant of good faith and fair dealing in the Legal Fees Stipulation by levying and executing upon the French properties.[44] Although the court acknowledges that the plaintiffs' have standing to bring the claim as administrators of Mr. Karoon's estate, it ultimately dismisses the claim.

The dismissal is based on the interpretation of the plain language of the Legal Fee Stipulation, as well as the limitation that "the implied covenant 'can only impose an obligation consis-

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35. *See id.* at *14 (citing Dulce v. Dulce, 233 F.3d 143, 146 (2d Cir. 2000)). *See also supra* note 3.

36. 225 N.E.2d 741 (N.Y. 1967).

37. *See Karoon* at *14.

38. *SId.* (quoting James v. Powell, 225 N.E.2d at 745).

39. *See id.* at *15.

40. *Id.* at *16 (quoting R.I. Island House, LLC v. North Town Phase II Houses, Inc., 858 N.Y.S.2d 372, 377 (App. Div. 2008)).

41. *Id.* at *15 (quoting Evergreen Pipeline Constr. Co. v. Merritt Meridian Constr. Corp., 95 F.3d 151, 161 (2d. Cir. 1996)).

42. *See id.* at *16–17.

43. *See Karoon* at *16.

44. *See id.* at *17.

tent with other mutually agreed upon terms in the contract.'"[45] According to the Legal Fee Stipulation, the defendant "shall not levy against the Escrow Accounts, or disbursements from the Escrow Accounts, to enforce its judgment in the Plenary Action."[46] The court notes that the "'Escrow Accounts' [are] limited to 'certain funds [that] are *currently being maintained* . . . subject to the control of the Court in the Matrimonial Action,'"[47] and that the proceeds of the French properties were not being maintained in the Escrow Accounts at the time.[48] The court also holds that the Legal Fees Stipulation expressly preserves the defendant's right to enforce the New York Judgment, including the right to execute upon the French properties—by the provision "requir[ing] Mr. Karoon to 'execute any documents which . . . may be necessary to enforce the judgment in any jurisdiction worldwide, or to enter judgment in any such jurisdiction.'"[49]

V. Conclusion

Judge Denise Cote granted the defendant's motion for summary judgment, finding insufficient evidence to support the plaintiffs' claims.[50] The case demonstrates the willingness of French courts to validate and enforce New York judgments, and the susceptibility of overseas properties to enforcement actions, even in the context of probate actions.

The plaintiffs have since appealed the decision to the Second Circuit.[51]

Christina Corcoran

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45. *Id. at* *18 (quoting Broder v. Cablevision Sys. Corp., 418 F.3d 187, 198–99 (2d Cir. 2005)).
46. *Id.* at *19.
47. *Id.*
48. *See id.*
49. *Karoon* at *20.
50. *See id* at *1.
51. Filed July 27, 2010.

Kiobel v. Royal Dutch Petroleum Co.

Nos. 06-4800-cv, 06-4876-cv, 2010 WL 3611392 (2d Cir. Sept. 17, 2010)

The court held that corporate liability is not a recognized norm of customary international law applicable pursuant to the Alien Tort Statute. Accordingly, the court dismisses the plaintiffs' claims for lack of subject matter-jurisdiction.

I. Holding

In *Kiobel v. Royal Dutch Petroleum Co.*,[1] the U.S. Court of Appeals for the Second Circuit affirms, in part, the ruling of the U.S. District Court for the Southern District of New York, which dismissed some of the plaintiffs' claims against the corporate defendants, and reverses that ruling insofar as it declined to dismiss the plaintiffs' remaining claims against the corporate defendants.[2] The circuit court reasons that, while an Alien Tort Statute ("ATS")[3] suit may be based on customary international law,[4] jurisdiction is limited to cases alleging a violation of an international norm.[5] Further, since no corporation has ever been "subject to *any* form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights,"[6] the court holds that the plaintiff's claims fail, because the ATS does not provide subject-matter jurisdiction.[7]

II. Facts and Procedural History

The plaintiffs are residents of the Ogoni Region of Nigeria.[8] They brought this suit against defendant Shell Petroleum Developments Company of Nigeria Ltd. (SPDC) and its parent companies, alleging human rights abuses.[9]

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1. Nos. 06-4800-cv, 06-4876-cv, 2010 WL 3611392 (2d Cir. Sept. 17, 2010).
2. *See id.* at *25.
3. 28 U.S.C. § 1350.
4. *See Kiobel,* 2010 WL 3611392, at *25 n.3 (explaining that in this opinion "customary international law" is used interchangeably with "law of nations").
5. *See id.* at *23.
6. *Id.* at *24. It is important to note that Judge Leval, in his concurring opinion, cites nine cases that have held as early as 2003 that corporations can be sued under the ATS for violations of international human-rights law. *See id.* at *34 n.14 (Leval J. concurring in judgment only).
7. *See id.* at *25 (majority opinion).
8. *See id.* at *5. The Ogoni Region is located in Nigeria on the eastern fringes of the Niger Delta. *See Ogoni—Nigeria,* SPEAKING4EARTH.NET http://www.speaking4earth.net/html/?people=38 (last visited Oct. 6, 2010) (stating that "[t]he greatest threat confronting the Ogoni people today is that of environmental degradation resulting from the reckless exploitation of oil and gas in the Ogoni territory which has destroyed local economic support systems of fishing and farming").
9. *Kiobel,* 2010 WL 3611392, at *5 (naming as additional defendants Royal Dutch Petroleum Company and Shell Transport and Trading Company PLC, which act through SPDC, a subsidiary of both the aforementioned companies).

Since 1958, SPDC has engaged in oil exploration and production throughout the Ogoni region.[10] The Ogoni residents formed the "Movement for Survival of Ogoni People" in order to protest the negative environmental effects of oil exploration in the region.[11] The plaintiffs claim that, in response to this movement, defendants enlisted the aid of the Nigerian government to suppress the resistance.[12] Subsequently, the plaintiffs specifically allege that the Nigerian military shot, beat, raped, and arrested residents, while also looting and destroying their property.[13] They allege this was accomplished with the help of the defendant corporations, which allowed the use of their property and provided food, transportation, and compensation to the soldiers involved in the attacks.[14]

The plaintiffs filed a class action complaint in September 2002 and amended it in May 2004.[15] They pursue their claim under the ATS for aiding and abetting the Nigerian government in alleged violations of the law of nations. Specifically, the claims include "aiding and abetting (1) extrajudicial killing; (2) crimes against humanity; (3) torture or cruel, inhumane, and degrading treatment; (4) arbitrary arrest and detention; (5) violation of the right to life, liberty, security, and association; (6) forced exile; and (7) property destruction."[16] The defendants move to dismiss, relying on *Sosa v. Alvarez-Machain*,[17] which states that federal courts may recognize a claim based on the law of nations provided they "rest on norm[s] of international character accepted by the civilized world and defined with a specificity comparable to features of the 18th-century paradigms [the Court had] recognized."[18]In September 2006, the district court dismissed the plaintiffs' claims regarding property destruction; forced exile; extrajudicial killing; and violations of the rights to life, liberty, security, and association.[19] The court reasoned that the claims did not rest on a norm that was "'specific, universal, and obligatory' as required by *Sosa*."[20] The district court subsequently denied defendants' motion to dismiss with respect to the remaining claims.[21]

In recognition of the importance of the issues surrounding this case, the district court "certified its order for interlocutory appeal pursuant to 28 U.S.C. §1292(b)."[22] Judge Jose A.

10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.*
15. *Kiobel,* 2010 WL 3611392, at *5.
16. *Id.*
17. 542 U.S. 692 (2004).
18. *Id.* at 725.
19. *See Kiobel*, 2010 WL 3611392, at *5.
20. *Sosa*, 542 U.S. at 732.
21. *See Kiobel*, 2010 WL 3611392, at *5.
22. *Id.* § 1292(b) states that when a district judge is of the opinion that an order "involves a controlling question of law as to which there is substantial ground for difference of opinion, . . . [t]he Court of Appeals, which would have jurisdiction of such action may thereupon, in its discretion, permit an appeal to be taken from such order." Interlocutory Decisions 28 U.S.C.A § 1292(b) (Supp. IV 2009).

Cabranes of the U.S. Court of Appeals for the Second Circuit delivered the opinion of the court and Judge Pierre N. Leval wrote separately in concurrence with the judgment only.[23]

III. Analysis—Majority

The ATS was passed by Congress in 1789 but lay dormant until 1980, when the Second Circuit decided *Filartiga v. Pena-Irala*.[24] In *Filartiga*, the court found "that the ATS provided jurisdiction over (1) tort actions, (2) brought by aliens (only), (3) for violations of the law of nations (also called 'customary international law')."[25] Until as recently as 1997, suits under this statute have been brought only for war crimes or crimes against humanity, against notorious foreign *individuals* as opposed to foreign corporations.[26] Although the Second Circuit Court of Appeals has published nine significant decisions since 1980 that address ATS cases, it had yet to rule explicitly on whether corporations are liable in civil actions brought under the statute;[27] this is the issue that was put before the court in *Kiobel*.

1. Domestic Law versus International Law

In deciding this issue, the court first has to determine whether to apply domestic law or international law.[28] In *Sosa*, "the Supreme Court held . . . that the ATS is a jurisdictional statute only."[29] While at the time of its adoption the statute enabled federal courts to hear a very limited category of claims "defined by the law of nations and recognized at common law,"[30] the Supreme Court does not limit the jurisdiction of federal courts to the claims listed.[31] Instead, a federal court may take a claim based on customary international law, as long as it is based on a recognized norm of international character sufficiently definite to support a cause of action.[32] Further, because, in the absence of a treaty, executive or legislative act, or controlling judicial decision, the Supreme Court has recognized international law as part of our law, the court here concludes that international law governs this inquiry.[33]

After determining the governing body of law, the court next asks whether subjects of international law are to be defined by the individual states or by international law.[34] The court notes that international law has defined subjects of international law as "'those that…have legal status, personality, rights and *duties* under international law and whose acts and relationships are

23. *See Kiobel*, 2010 WL 3611392 at *25 (Leval J. concurring in judgment only).
24. 630 F.2d 876 (2d Cir. 1980).
25. *Kiobel*, 2010 WL 3611392, at *1 (majority opinion) (citing *Filartiga*, 630 F.2d at 890).
26. *See id.*
27. *See id.*
28. *See id.* at *6.
29. *Id.* at *7.
30. *Id* (including violation of safe conducts, infringement on the rights of ambassadors, and piracy).
31. *See Kiobel,* 2010 WL 3611392, at *7.
32. *See id.* (quoting *Sosa*, 542 U.S. at 725).
33. *See id.* at *6 n.26.
34. *See id.* at *7.

the principal concerns of international law.'"[35] In its inquiry, the court studies the International Military Tribunal at Nuremberg, which recognized that *individuals* can be held liable for violations of international law, specifically for violations of norms of international human rights.[36] The court also consults *Sosa,* which instructs lower federal courts to look to international law to determine the scope of liability for violation of a norm if the perpetrator being sued is a private actor.[37] Further, the court refers to three decades of precedent in which the Second Circuit looked to international law to determine whether state officials, private individuals and aiders and abettors could be held liable under the ATS.[38] For these reasons, the court concludes that it is required to look to international law in determining whether a *corporation* can be held liable for a violation of the law of nations.[39]

2. Corporate Liability Under International Law

In determining whether corporate liability is a recognized norm of customary international law, thus providing jurisdiction on claims under the ATS, the court looks to authoritative sources of international law.[40] These sources are "identified in Article 38 of the Statute of the International Court of Justice ('IJC Statute')),"[41] which provides as follows:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as *subsidiary means for the determination of rules of law.*[42]

a. International Tribunals

Accordingly, the court first considers International Tribunals.[43] The most notable source of modern international law concerning violations of human rights is the Charter of the Inter-

35. *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW II IN NT (1987)).

36. *See id.* at *8.

37. *Kiobel*, 2010 WL 3611392, at 8.

38. *See id.* at *11 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Kadic v. Kardazi*, 70 F.3d 232 (2d Cir. 1995); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009)).

39. *See id.*

40. *See id.* at *12.

41. *Id*.

42. Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, 33 U.N.T.S. 993 (emphasis added).

43. *See Kiobel*, 2010 WL 3611392, at *12.

national Military Tribunal, commonly known as the "London Charter."[44] This charter authorizes the punishment of war criminals following the Second World War.[45] The London Charter established the International Military Tribunal at Nuremberg.[46] It grants the Tribunal jurisdiction over *natural persons only* and confers upon it the authority to declare organizations "criminal."[47] However, the significance of this declaration is that, although these entities can be declared criminal, that declaration is only a means to allow the prosecution of *individual* members.[48] For example, the military tribunal at Nuremburg refused to impose criminal liability on I.G. Farben, a corporation that produced materials that made Nazi war crimes possible.[49] Instead, twenty-four executives of the corporation were named individually in the indictment, making it clear that, at the time of the Nuremberg trials, corporate criminal liability was not recognized as a norm of customary international law.[50]

The Second Circuit also looks to international tribunals since Nuremberg. The charters for both the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") limit jurisdiction to "'natural persons.'"[51] In fact, the drafters of the ICTY considered jurisdiction over corporations but expressly rejected it.[52] Further, the Rome Statute of the International Criminal Court also restricts jurisdiction to "'natural persons.'"[53] Most tellingly, during deliberations, the French delegation proposed to "grant the International Criminal Court jurisdiction over corporations and other 'juridical' persons" but it was rejected by the consensus.[54] The court expresses the view that modern international tribunals have made it "abundantly clear that, since Nuremberg, the concept of corporate liability for violations of customary international law has not even begun to 'ripen[]' into a universally accepted norm of international law."[55]

b. International Treaties

The second source of authority consulted by the court is international treaties.[56] The court points out that a treaty will not constitute adequate proof of the existence of a norm of customary international law unless a large majority of States ratify the treaty and act consistently in accordance with its principles.[57] In its reasoning, the court contrasts what it considers

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44. *See id.* at *13 (citing Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279).
45. *See id.*
46. *Id.*
47. *Id.* (noting that several German government and military organizations were indicted).
48. It acted as an evidentiary rule for subsequent trials imposing liability on individuals. *See id.* at *16.
49. *See Kiobel*, 2010 WL 3611392, at *14.
50. *See id.*
51. *Id.* at *15.
52. *See id.* at *16.
53. *Id.*
54. *See id.*
55. *Kiobel,* 2010 WL 3611392, at *17.
56. *See id.*
57. *See id.*

the flawed logic applied in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,[58] in which the district court found that corporate liability is customary international law. It reasons that, because "corporations can be held liable for unintentional torts such as oil spills or nuclear accidents, . . . they can be held liable for intentional torts such as complicity in genocide, . . . or torture."[59] The treaties relied upon in *Presbyterian Church* have not been ratified by the United States, nor have many of them been ratified by states that would be most affected by their terms.[60] The court points out that "norms of customary international law . . . do[] not develop through the . . . expansion of existing norms [but] [r]ather . . . through the custom and practice 'among civilized nations.'"[61]

Further, when dealing with specialized treaties, ratified by an "overwhelming majority" of states, which impose corporate liability, the court emphasizes the importance of the subject matter of those treaties.[62] The court specifically points to the Convention Against Transnational Organized Crime[63] and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[64] to illustrate that, while corporate liability has been imposed under these circumstances, it would be inappropriate to arbitrarily extend this liability to other subject matters, say, for example, violations of human rights.[65]

This argument extends to specific treaty provisions. The court notes that, when a rule embodied in a multilateral treaty becomes a norm of customary international law, it does not follow that a specific provision imposing corporate liability also achieves the status of a recognized norm unless that provision, "'at all events potentially, be of *fundamentally norm-creating character* such as could be regarded as forming the basis of a general rule of law.'"[66] This being said, the court concludes that the few international treaties that impose particular obligations on corporations do not establish corporate liability as a norm of customary international law.[67]

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58. 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

59. *Kiobel*, 2010 WL 3611392, at *19.

60. *See id.* at *17.

61. *Id.* at *19.

62. *See id.* at *18.

63. United Nations Convention Against Transnational Organized Crime, art. 10(1), Nov. 15, 2000, S. Treaty Doc. No. 108-16 (2004), 2225 U.N.T.S. 209.

64. Organization for Economic Co-Operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, art. 2, Dec. 17, 1997, S. Treaty Doc. No. 105–43 (1997), 1997 U.S.T. LEXIS 105.

65. *See Kiobel*, 2010 WL 3611392, at *18.

66. *Id.* at *18–19 (quoting the *North Sea Continental Shelf* cases, Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands, 1969 I.C.J. 3, in which the International Court of Justice dealt with the argument of Denmark and the Netherlands that the Federal Republic of Germany was bound by a particular provision of a treaty that it had not ratified, because the rule embodied in the treaty had become a norm of customary international law).

67. *See id* at *20.

c. Subsidiary Sources

Finally, the court contemplates the works of legal scholars as a subsidiary, yet reliable, source.[68] The court refers to the affidavits of two renowned professors of international law.[69] Professor James Crawford "forcefully declared in litigation . . . that customary international law does not recognize liability for corporations that violate its norms."[70] He points out that "'no national court [outside of the United States] and no international judicial tribunal has so far recognized corporate liability, as opposed to individual liability, in a *civil or criminal context* on the basis of a violation of . . . customary international law.'"[71] Similarly, Professor Christopher Greenwood asserts that "'[t]here is not, and never has been, any assertion of the criminal liability of corporations in international law.'"[72]

Ultimately, after considering all the aforementioned sources, the court concludes that corporate liability is not a recognized norm of customary international law and therefore is not a rule that may be applied under ATS.[73] Accordingly, because the plaintiffs' claims seek to hold the corporations, and not the individuals within those corporations, liable, the court dismisses the claims for lack of subject-matter jurisdiction.[74]

3. Concurring Opinion

In his concurring opinion, Judge Pierre Leval agrees with the majority that the complaint must be dismissed, but only because it "fails to state a proper legal claim of entitlement to relief."[75] Judge Leval states that, in order for the complaint to be sufficient as a matter of law, the complaint would need to plead facts that support the inference that the defendant corporations have acted "*with a purpose* to bring about the Nigerian government's alleged violations of the human rights of the plaintiffs."[76]

Judge Leval disagrees with the majority at the fundamental level of what question is before the court:

> [W]hen one looks to international law to learn whether it imposes civil compensatory liability on those who violate its norms and whether it distinguishes between natural and juridical persons, the answer international law

68. *See id.*

69. *Id.* (citing Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 07-0016 (2d Cir. Jan. 22, 2009) (Crawford Decl. ¶ 10); Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 01-Civ. 9882 (S.D.N.Y. July 10, 2002) (Greenwood Decl. ¶ 13)).

70. *Id.* (quoting Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 07-0016 (2d Cir. Jan. 22, 2009) (Crawford Decl. ¶ 10)).

71. *See Kiobel*, 2010 WL 3611392, at *20 (emphasis added).

72. *Id.* (quoting Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 01-Civ. 9882 (S.D.N.Y. July 10, 2002) (Greenwood Decl. ¶ 13)).

73. *See id.* at *21.

74. *See id.*

75. *Id.* at *28.

76. *Id.* (citing *Presbyterian Church,* 528 F.3d 244; Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009)).

> furnishes is that it takes no position on the question. What international law does is it prescribes norms of conduct. . . . And as for civil liability of both natural and juridical persons, the answer given by the law of nations . . . is that each State is free to decide that question for itself.[77]

He begins with a response to the majority's argument, which asserts that, because international tribunals do not have jurisdiction to impose *criminal* liability on corporations, corporations are not governed by international law.[78] He argues that the reason they have not been granted jurisdiction to impose *criminal* liability is "solely [because of] the theory and objectives of *criminal punishment,* and [thus] ha[s] no bearing on civil liability."[79] Judge Leval explains that the view of some nations is that criminal punishment is justified only when a defendant acts "with criminal intent, a condition that cannot exist when the defendant is a juridical construct"[80] and that it is pointless to criminally punish a fictitious juridical entity, because that action fails to achieve the punitive objectives of criminal punishment.[81] In contrast, "the objective of civil liability to compensate victims for wrongs inflicted upon them" would be served perfectly by the imposition of liability on corporations.[82] Judge Leval reasons that international law recognizes differences between criminal and civil liability and demonstrates this by pointing out that tribunals have acknowledged that "criminal violations . . . may give rise to a claim for civil compensatory liability."[83] He concludes this argument by asserting that, with respect to civil liability, international law leaves it to the states to determine the appropriate remedies.[84]

Judge Leval then defines his position that the majority rule "operates in opposition to the objective of international law to protect [fundamental human] rights."[85] Prior to World War II, international law was primarily concerned with "problems relating to the sovereign interests of States."[86] However, Judge Leval points out, the Nuremberg trials brought about a shift in the focus of international law towards humanitarian values and shared moral objectives.[87] At that time, the law of nations focused only on a small category of conduct so heinous as to render the perpetrator "an enemy of all mankind."[88] He credits the forward thinking by past judges in solidifying preexisting international law. He states:

> If past judges had followed the majority's reasoning, we would have had no Nuremberg trials, which for the first time imposed criminal liability on natural persons complicit in war crimes; no subsequent international tribunals

77. *Kiobel*, 2010 WL 3611392, at *43 (Leval, J., concurring in judgment only).

78. *See id*. at *26.

79. *Id.*

80. *Id*.

81. *See id*.

82. *Id.*

83. *Kiobel*, 2010 WL 3611392, at *41.

84. *See id.* (citing OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 240 (1991)).

85. *Id.* at *25.

86. *Id*. at *29.

87. *See id.*

88. *See id*.

> to impose criminal liability for violations of international law norms; and no judgments in U.S. courts under the ATS, compensating victims for the violation of fundamental human rights.[89]

Next, Judge Leval asserts that there is no precedent to support the majority rule. He argues that no court has ever implied approval of a rule that would exempt juridical entities from any legal responsibility under the law and goes a step further to point out that he knows of only one dissenting opinion which has ever spoken favorably of such a principle.[90] With respect to international tribunals, Judge Leval argues that, while they have jurisdiction over individuals concerning criminal punishment, this does not provide a precedent for the majority's rule, because no international tribunal has ever had jurisdiction to consider civil remedy against either a natural person or juridical entity.[91] Lastly, he points out that, aside from two affidavits by law professors,[92] the majority has not cited any "work of scholarship, . . . treatise on the law of nations, [or] published book on the subject,"[93] noting that if international law with regard to inhumane acts did not apply to corporations this would surely have been acknowledged in some published work.[94]

Finally, Judge Leval argues that corporations are subjects of international law. He points out that "as early as the Nuremberg trials, courts recognized [in at least three of those trials] that corporations ha[ve] obligations under international law" by convicting individual defendants for their complicity in the corporations' violations of the law of nations.[95] He goes on to discuss two opinions of the Attorney General of the United States. In the first, Attorney General Charles L. Bonaparte opines "that an American corporation could be held liable under the ATS to Mexican nationals [for] an injury to substantial rights of [the] citizens . . . under the principles of international law or by treaty."[96] The second opinion, that of Attorney General William Bradford, states "that a British corporation could pursue civil action under the ATS for injury caused by American citizens in violation of international law."[97]

The practical difference, in Judge Leval's view, is enormous. This is evident in the example he offers of how the majority's rule would operate in conflict with the humanitarian objectives

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89. *Kiobel*, 2010 WL 3611392, at *28.

90. *Id.* at *34 (citing Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 292 (2d Cir. 2007). According to Judge Leval, "on many occasions courts have ruled in cases involving corporate defendants in a manner that assumed without discussion that corporations could be held liable." *Id.* at * 34. In support of this point, he cites nine decisions, four of them by the Second Circuit, including an earlier case against Shell based on its alleged activities in the Ogoni region, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000).

91. *Id.* at *35.

92. Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 07-0016 (2d Cir. Jan. 22, 2009) (Crawford Decl.); Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 01-Civ. 9882 (S.D.N.Y. July 10, 2002) (Greenwood Decl.).

93. *Kiobel,* 2010 WL 3611392, at *49 (Leval, J., concurring in judgment only).

94. *Id.* at *48.

95. *See id.* at *47.

96. *Id.* at *48 (citing 26 Op. Att'y Gen. 252 (1907)).

97. *Id.* (citing 1 Op. Att'y Gen. 57 (1975)).

of international law:[98] Specifically, where a corporation is engaged in the extraction of resources in a remote area and commits the genocide of local tribes that are attempting to hinder the corporation's operations due to compensatory or environmental issues.[99] Under the majority's rule, the corporation would never be required to defend the heinous act before a court, because it could successfully move to dismiss the suit on the grounds that a corporation cannot violate international human-rights law.[100] Therefore, while the corporation that profited from the violation of the rights of others is immune, a plaintiff's only option remains to sue the individuals that participated on behalf of the corporation.[101] Further, Judge Leval asserts that, "unlike the case with corporate criminal liability, which does not exist in many nations of the world, it is the worldwide practice to impose civil liability on corporations."[102] However, under the majority rule, because the principal profit lies with the corporation, the goal of civil tort liability to compensate victims is nearly defeated when the only source of compensation becomes the private individual.[103]

IV. Conclusion

The majority follows a two-step process in answering the questions presented by this case.[104] First, with guidance from Supreme Court rulings, the majority concludes that, where there is no treaty, controlling act, or judicial decision, international law is part of our law.[105] Next the majority determines whether corporations can be subject to liability for violations of customary international law.[106] This inquiry requires the court to determine whether corporate liability is a recognized norm of customary international law, thus providing jurisdiction under the ATS.[107] In doing so, the majority focuses on recognized authoritative sources, including Supreme Court decisions, three decades of Second Circuit precedent, international tribunals, international treaties, and the works of renowned scholars of international law.[108] These inquiries lead the majority to conclude that corporate liability has not achieved the status of a recognized norm of the customary international law of human rights.[109] Therefore, the plaintiffs' claims against the corporations lack subject matter jurisdiction under the ATS.[110]

In the concurring opinion, Judge Leval agrees that the complaint must be dismissed, but only because it falls short of the mandatory pleading standards established by the Supreme

98. *Id*. at *29.

99. *Kiobel,* 2010 WL 3611392, at *31.

100. *See id*. at *31.

101. *See id*. at *31.

102. *Id*. at *40.

103. *See id*. at *40.

104. *See id.* at *6 (majority opinion).

105. *See Kiobel,* 2010 WL 3611392, at *6 n.26.

106. *See id.* at *6.

107. *See id.* at *12.

108. *See id.*

109. *See id*. at *21.

110. *See id.*

Court.[111] While he points out the substantive deficiencies in the majority's reasoning,[112] his main source of contention with the majority rule is grounded in policy. Judge Leval asserts that the majority rule is in complete opposition to the objective of international law to protect fundamental human rights.[113]

The holding in this case is significant, because it answers a question that has been lurking in ATS jurisprudence for the thirty years since the revival of the ATS: Whether jurisdiction granted by the ATS extends to civil actions brought against corporations under the law of nations.[114] Here, the majority concludes that corporate liability is not a recognized norm of customary international law and is therefore inapplicable under the ATS.[115] However, a final answer is yet to be given, as a petition for a rehearing en banc was filed on October 18, 2010.[116] This comes as no surprise, as this decision has sparked a firestorm among international law scholars, many of whom vehemently disagree with the majority.[117]

Judge Leval's argument in support of corporate liability under the ATS is compelling for several reasons. He brings to light the fact that the majority's view, that international law does not apply to juridical entities, is without precedent and lies almost solely on arguments built upon inappropriate logical extensions.[118] He goes further by pointing to several cases in which courts have ruled in cases involving corporate defendants based on the assumption that they could be held liable under the law of nations.[119] More importantly, Judge Leval cites several cases that have held that corporations *can be sued* under the ATS for violations of international law.[120] Beyond the arguments in Leval's concurring opinion, it is difficult to reconcile the effect of the majority rule. While it allows the plaintiffs to seek redress from the individual members of a corporation, obtaining information to support specific allegations against specific individuals in an effort to survive pleading requirements is a formidable challenge that in many cases will end in defeat. This leaves victims empty handed and enables corporations to continue profiting from these violations.

Lyndsay R. Harlin

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111. *See Kiobel,* 2010 WL 3611392, at *54 (Leval, J., concurring in judgment only).

112. *See id.* at *38.

113. *See id.* at *61.

114. *See id.* at *1 (majority opinion).

115. *See id.* at *21.

116. Petition for Rehearing En Banc, Kiobel v. Royal Dutch Shell, Nos. 06-4800-cv, 06-4876-cv, 2010 WL 3611392 (2d Cir. Sept. 17, 2010) (No. 02 Civ. 7618).

117. *See A Question About Kiobel*, http://opiniojuris.org/2010/09/19/a-tentative-thought-on-kiobel/ (Sept. 18, 2010, 1:06 EDT); *see also* Chimene Keitner: *Not Dead Yet — Some Thoughts on Kiobel*, http://opiniojuris.or/2010/09/21/chimene-keitner-not-dead-yet-some-thought-on-kiobel/ (Sept. 21, 2010, 9:58 EDT); *see also U.S. Court Finds Corporations Immune From Liability For Human Rights Abuses*, http://www.earthrights.org/blog (Sept. 17, 2010, 14:33 EST).

118. *Kiobel*, 2010 WL 3611392, at *38 n.18 (Leval, J., concurring in judgment only).

119. *Id*. at *34 n.12(Leval, J., concurring in judgment only).

120. *Id*. at *34 n.14(Leval, J., concurring in judgment only).

Pik v. Chan

No. 08 Civ. 10659, 2010 WL 2653657 (S.D.N.Y. July 2, 2010)

A foreign plaintiff's federal constitutional claim based on grounds of forum non conveniens was dismissed, but the court required the defendants to agree to service of process in an alternative forum, the United Kingdom, and submit to its jurisdiction.

I. Holding

In *Pik v. Chan*,[1] the U.S. District Court for the Southern District of New York held that it had jurisdiction pursuant to 28 U.S.C. §§ 1331[2] and 1332[3] to dismiss a foreign pro se plaintiff's federal constitutional claims on grounds of forum non conveniens.[4] The court held that the dismissal was conditioned on the consent of the defendants, a corporation doing business in New York and an individual employed in New York, "to (1) submit to jurisdiction and waive service of process in a U.K. Court, and (2) waive any statute or other law of limitations not available at the time of the filing of the instant action that would otherwise apply under U.K. law to any action brought by [a plaintiff] in a U.K. Court."[5]

II. Facts and Procedural History

Plaintiff Jiri Pik (Pik), a Czech citizen, maintained a U.K. address but apparently resided in Switzerland.[6] From October 18, 2004, to November 1, 2005, Pik worked as an intern at the London branch of one of the defendants, J.P. Morgan Chase & Co. (JPMC).[7] The other defendant, Jerry Chan (Chan), worked closely with the plaintiff, but the two never met in person because Chan worked at the New York branch of JPMC.[8] Pik alleged that after his internship ended, JPMC divulged "false and malicious information"[9] to potential future employers, including "1) Pik's employment was terminated because of an amorous relationship with Chan, and 2) Pik [was] HIV positive."[10] Pik voiced his concerns to several employees at JPMC, including his supervisor, Andrew Freyre Sanders; a human resources head, John Bradley; and another employee, Walter Gubert.[11] Although he claimed he e-mailed Chan several times with

1. No. 08 Civ. 10659, 2010 WL 2653657 (S.D.N.Y. July 02, 2010).
2. 28 U.S.C. § 1331 (2010) (federal question jurisdiction): "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."
3. 28 U.S.C. § 1332(a)(3) (2010) (diversity of citizenship): "[C]itizens of different States and in which citizens or subjects of a foreign state are additional parties."
4. *Pik*, 2010 WL 2653657, at *1.
5. *Id.* at *4.
6. *Id.* at *1–2.
7. *Id.* at *1.
8. *See id.*
9. *Id.*
10. *Id.* at *1.
11. *Id.*

his concerns, Pik never received a response.[12] Pik also alleged that Chan may have provided confidential information about him to third parties.[13]

Pik filed a complaint against the defendants with the U.S. District Court for the Southern District of New York on October 29, 2008, asserting "claims for breach of contract and a related conspiracy, harassment, invasion of privacy, intentional affliction of emotional distress and violations of [the plaintiff's] constitutional rights."[14] He also asserted claims for unjust enrichment and quantum meruit against Chan.[15]

III. Discussion

A. The Plaintiff's Federal Constitutional Claims

Pik claimed that the defendants violated his federal constitutional rights. The court dismissed his claim for failure to state a claim under 42 U.S.C. § 1983.[16] Quoting *Ciambriello v. County of Nassau,*[17] the court noted that under § 1983, "a plaintiff must allege that he was injured by either a state actor or a private party acting under color of state law."[18] Because Pik's complaint did not allege that the defendants were either state actors or private actors who acted under color of state law or in concert with a state actor, the claims falling under the federal Constitution were dismissed.[19]

B. Three-Step Analysis for Determining Forum Non Conveniens

The court granted the defendants' motion to dismiss the entire complaint on the grounds of forum non conveniens. It found that New York was an inconvenient forum under those facts and that the United Kingdom was an adequate alternative forum in which to resolve the dispute.[20] The court applied the three-step analysis articulated by the Second Circuit in *Iragorri v.*

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12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. 42 U.S.C. § 1983 (2010), stating:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

17. 292 F.3d 307 (2d Cir. 2002).
18. *Id.* at 323.
19. *Pik*, 2010 WL 2653657, at *2.
20. *Id.* at *3.

United Technologies Corp.[21] The analysis required the court to determine "1) the degree of deference due to the plaintiff's original choice of forum; 2) the availability and adequacy of an alternative forum; and 3) the public and private interest factors resulting from litigation in the chosen forum."[22]

1. Degree of Deference Due to a Plaintiff's Original Choice of Forum

The court acknowledged that "generally, the greatest deference is afforded to a plaintiff's choice of his home forum, while less deference is afforded to a foreign plaintiff's choice of a United States forum."[23] The Second Circuit noted, in *Pollux Holding Ltd. v. Chase Manhattan Bank*,[24]

> that "when a foreign plaintiff sues in a United States forum such choice is entitled to less deference because one may not easily presume that choice is convenient," and that even in the absence of any indication of forum-shopping "there still is no reason to assume a U.S. forum is convenient for a foreign plaintiff's suit."[25]

Here the court found that New York was not Pik's home forum; therefore, less deference was afforded to New York as the forum.[26] The court also noted that Pik did not expect to call more than three witnesses from New York, and the defendants also would call those same witnesses.[27] Thus, Pik would not have had to bear all the cost of transporting the witnesses to an alternative forum.[28]

The court concluded that as required by the U.S. Supreme Court decision in *Piper Aircraft v. Reyno*,[29] Pik was "offered no specific reasons of convenience supporting his choice of forum."[30] At the court's request, the defendants confirmed that despite Pik's threat of litigation in the United Kingdom, they had received no notice of any action filed by Pik in any U.K.

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21. 274 F.3d 65 (2d Cir. 2001) (en banc) (guiding district courts' exercise of their broad discretionary authority to apply forum non conveniens) (hereinafter *Iragorri*).

22. *Id.* at 73–74.

23. *Pik*, 2010 WL 2653657, at *3; *see also Iragorri* at 71.

24. 329 F.3d 64 (2d Cir. 2003) (affirming dismissal for forum non conveniens where a foreign plaintiff had sued a U.S. bank in its home forum on claims arising out of conduct occurring mostly in London).

25. *Pik*, 2010 WL 2653657, at *3 (quoting Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 71 (2d Cir. 2003)).

26. *Pik*, 2010 WL 2653657, at *3.

27. *Id.*

28. *Id.*; *see also* Alliance Assur. Co. Ltd. v. Luria Bros. & Co., Inc., No. 86 Civ. 1151, 1987 WL 10031, at *4 (S.D.N.Y. Apr. 22, 1987) (positing that producing certain material witnesses in an alternative forum at the plaintiff's expense weighed against dismissal on grounds of forum non conveniens).

29. 454 U.S. 235 (1981) (holding that the primary purpose of any inquiry into forum non conveniens is to ensure that the trial is convenient).

30. *Pik*, 2010 WL 2653657, at *3; *see also Piper Aircraft*, 454 U.S. at 249.

court.[31] For the aforementioned reasons, the court gave little weight to Pik's choice of New York as a forum.

2. Availability and Adequacy of the United Kingdom as an Alternative Forum

In *Piper Aircraft*, the Supreme Court held that "an alternative forum is adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute."[32] Here, the court found that the defendants were amenable to jurisdiction in the United Kingdom and were expecting to call several New York- or United States-based witnesses to defend against Pik's allegations.[33] The court further found that Pik would find "within U.K. law a cause of action for each of his remaining claims."[34] In addition, the court determined that under U.K. law, the plaintiff's tort claims of invasion of privacy and intentional infliction of emotional distress were subject to a six-year statute of limitations, compared with New York's one-year statute of limitations.[35] The court held that dismissal on grounds of forum non conveniens was conditional on the defendants consenting to submit to service of process and jurisdiction in the United Kingdom.[36]

3. Weighing Public Interests Against Private Interests

To balance the public and private interests at stake, the court examined the respective burdens the New York and U.K. forums would place on the parties, deliberating "on the precise issues that are likely to be actually tried, taking into consideration the convenience of the parties and the availability of witnesses and the evidence needed for the trial of these issues."[37] The court balanced the private interests of the plaintiff and the defendants. The court found that JPMC's alleged negative inferences originated at the London office where Pik and his supervisors worked, and, therefore, both documents and witnesses were located in London.[38] Because the only allegations relating to Chan involved his refusal to respond to Pik's e-mails and that he may have disclosed confidential information about Pik to third parties, the court found that the United Kingdom was still a convenient forum.[39] The court held that because the parties

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31. *Pik*, 2010 WL 2653657, at *3 (referencing *Alliance Assur. Co. Ltd.*,1987 WL 10031, at *4).

32. *Id.* (quoting *Piper Aircraft*, 454 U.S. at 254).

33. *Id.* at *3.

34. *Id.* (referring generally to U.K. precedent set in Botham v. Ministry of Defence, 2010 E.W.H.C. 646 (Queens Bench) (breach of contract); Bank Ag. & Anor v. Scott & Ors, 2010 E.W.H.C. 451 (Queens Bench) (conspiracy to breach contract); M & L Sheet Metals Ltd. v. Willis, No. 0474-09, 2010 WL 889302 (Employment Appeal Tribunal March 12, 2010) (harassment); White v. Whithers LLP, 2009 E.W.C.A. Civ. 1122 (Court of Appeal Civil Division) (invasion of privacy); King v. Bristow Helicopters Ltd., 2002 Lloyd's Rep. 745 (House of Lords) (intentional infliction of emotional distress); Walsh v. Singh, 2009 E.W.H.C. 3219 (Ch. Div. Dist. Registry Birmingham) (unjust enrichment and quantum meruit). Additionally, U.K. law does hold that, as a general matter, employers owe former employees a duty of care when they give references to potential future employers. *See* Rhys-Harper v. Relaxion Group Plc, 2003 I.C.R. 867 (House of Lords).

35. *See* Limitation Act 1980, Part I, §§ 2 and 5; *see also* N.Y. Civil Practice Law & Rules 215(3) (McKinney 2006).

36. *Pik*, 2010 WL 2653657, at *3; *see also Pollux Holding Ltd.*, 329 F.3d at 75 (noting the defendant's consent to submit to the alternative forum's jurisdiction as a condition of dismissal).

37. *Pik*, 2010 WL 2653657, at *4 (quoting *Irragori* at 74).

38. *Pik*, 2010 WL 2653657, at *4.

39. *Id.*

were located mainly within the United Kingdom's jurisdiction, the United Kingdom had a greater public interest than the United States in adjudicating Pik's claims.[40] The court also considered its own public interest: the court's correspondence to Pik took, "on average, more than four weeks to reach him, causing considerable confusion and delay."[41] Because there were hardships in continuing to litigate in New York, the court held that private and public interest factors strongly favored the United Kingdom as a forum for Pik's claims.

IV. Conclusion

The district court, after considering the three-step analysis in *Iragorri,* found that New York was an inconvenient forum, and that the United Kingdom was an adequate alternative forum in which to resolve the dispute. The holding in this case demonstrates that dismissal is appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice. By following *Iragorri*, the district court not only ensured a uniform analysis for district courts to exercise their broad discretionary authority to apply forum non conveniens, it expressed a high regard for the U.K. courts' fairness and commitment to the rule of law.

Kristine Antoja

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40. *Id.*
41. *Id.*

S.K.I. Beer Corp. v. Baltika Brewery

612 F.3d 705 (2d Cir. 2010)

The Second Circuit affirms the U.S. District Court for the Southern District of New York's dismissal of a suit based on a forum-selection clause in a written agreement to distribute alcoholic beverages. The decision mandates that disputes arising from the agreement be processed in St. Petersburg, Russia, despite the New York Alcoholic Beverage Control Law providing for a cause of action within New York.

I. Holding

In *S.K.I. Beer Co. v. Baltika Brewery*,[1] the U.S. Court of Appeals for the Second Circuit affirms a dismissal of a claim arising out of a written agreement to distribute alcoholic beverages. The court holds that a mandatory forum-selection clause is enforceable, because New York Alcoholic Beverage Control Law (NYABCL) § 55-c(6)[2] provides a permissive cause of action and the plaintiff-appellant does not provide sufficient evidence to rebut the presumptively valid forum-selection clause.

II. Facts and Procedural History

Plaintiff-appellant S.K.I. Beer Corp. (SKI) is a beer wholesaler located in New York.[3] Defendant-appellee Baltika Brewery ("Baltika") is a beer brewer located in Russia.[4] In May 2003, Baltika and SKI executed a written agreement for the purchase and sale of $200,000 worth of Baltika beverages.[5] The agreement contains a mandatory forum-selection clause[6] specifying the Arbitration Court of St. Petersburg[7] in the Russian Federation.

SKI filed a diversity action in the Eastern District of New York, alleging that Baltika improperly terminated the agreement in June 2003, when it refused to fill SKI's order.[8] SKI asserted two causes of action: (1) a claim under NYABCL § 55-c(6) and (2) a breach of contract claim.

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1. 612 F.3d 705 (2d Cir. 2010).
2. NYABCL § 55-c(6) (establishing a civil cause of action within New York:

   > If a brewer fails to comply with the provisions of this section, a beer wholesaler may maintain a civil action in a court of competent jurisdiction within this state for damages sustained in accordance with the laws of this state which shall govern all disputes arising under an agreement or by reason of its making and performance.)

3. *See S.K.I.*, 612 F.3d at 706.
4. *See id.*
5. *See id.* at 707.
6. All disputes or differences which may arise in the course of fulfillment of, or in connection with, the present Contract, shall be considered by the Arbitration Court of St. Petersburg and the Leningradskaya Oblast." *See id.* at 707.
7. *See id.* at 707 n.3 (indicating that the Russian arbitration courts are state courts, not arbitration tribunals).
8. *See id.* at 707.

Baltika moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(6).[9] The district court granted the motion to dismiss, holding that § 55-c does not apply and that the mandatory forum-selection clause is enforceable because SKI failed to show that enforcement would impair its rights.[10]

On appeal, SKI argues three points: (1) that NYABCL governs its relationship with Baltika; (2) that "'applying *section 55-c* . . . would not violate the dormant *Commerce Clause*'; and (3) [that] 'the forum selection clause is unenforceable' because . . . 'the public policy [of providing rights under § 55-c] is sufficient[] . . . to overcome the presumed validity of the forum selection clause.'"[11]

III. Discussion

A. Enforceability of the Forum-Selection Clause

The court reiterates the four part analysis it developed in *Phillips v. Audio Active Ltd.*[12] to determine the nature of a forum-selection clause.[13] The first step set out in *Phillips* is to examine the communications between the parties to determine "whether the clause was reasonably communicated to the party resisting enforcement."[14] The second step is to determine whether the parties are required to use the designated forum (a mandatory clause) or merely permitted to do so (a permissive clause).[15] The third step is to consider the claims and parties involved in the suit and determine whether they are subject to the forum-selection clause.[16] If the forum-selection clause is communicated to the resisting party, is classified as mandatory, and is applicable to the claims and parties in the suit, it is considered presumptively valid.[17] The fourth step is to evaluate whether the resisting party successfully rebutted this presumption by showing that "'enforcement of the forum selection clause would be unreasonable or unjust, or that the clause was invalid'"[18] because of fraud, overreaching, or similar reasoning.[19]

In applying the *Philips* analysis, the court notes that SKI contends that "the forum selection clause was not reasonably communicated to it."[20] However, the court acknowledges that

9. FED. R. CIV. P. 12(b)(6) (providing a defense where the opposing party fails to state a claim upon which relief can be granted). Baltika argued that the mandatory forum-selection clause required dismissal. *See S.K.I.*, 612 F.3d at 707.

10. *See S.K.I.*, 612 F.3d at 707.

11. *Id.* at 708.

12. 494 F.3d 378, 383–84 (2d Cir. 2007).

13. *See S.K.I.*, 612 F.3d at 708 (citing Phillips v. Audio Active Ltd., 494 F.3d 378, 383–84 (2d Cir. 2007)).

14. *Id.* (quoting *Phillips*, 494 F.3d at 383–84).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* (quoting *Phillips*, 494 F.3d at 383–84).

19. *S.K.I.*, 612 F.3d at 708.

20. *See id.* at 708–09.

neither SKI nor Baltika disagrees about the mandatory nature of the clause.[21] Additionally, the parties agree that SKI's claims stem from the agreement containing the forum-selection clause and both parties to the agreement are parties to the suit. Thus, the court affirms the district court's conclusion that the forum-selection clause is presumptively enforceable.[22]

B. New York Alcoholic Beverage Control Law § 55-c

SKI argues that NYABCL § 55-c grants it a nonwaivable right to sue in New York, and that the agreement stripped it of that right.[23] Using the simple meaning of words, the court parses the language in NYABCL § 55-c to determine the underlying legislative intent.[24] It compares the permissive language used in NYABCL § 55-c(6) with the mandatory language used in NYABCL § 55-c(11)[25] and reasons that the legislature intended to provide a permissive right to sue.[26]

The court concludes that the language of the statute does not provide a nonwaivable right to maintain a civil action within New York.[27] Keying in on the permissive language of NYABCL §55-c(6),[28] the court stresses that NYABCL §55-c provides only that a wholesaler "may" maintain a civil action within New York.[29] Additionally, the court explains that NYABCL §55-c does not indicate that a wholesaler is prevented from agreeing to maintain an action in a different forum.[30]

Having concluded that NYABCL § 55-c does not bar the forum-selection clause, the court elects not to consider the question whether the Dormant Commerce Clause would have been violated had the agreement been subject to NYABCL § 55-c.[31]

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21. *See id.* at 708.
22. *See id.* at 709.
23. *See id.*
24. *See id.* at 709, 2010 U.S. App. LEXIS 14822, at *8.
25. NYABCL § 55-c(11) (providing that "[t]he requirements of this section may not be altered, waived or modified by written or oral agreement in advance of a bona fide case or controversy arising under a written agreement complying with this section. ").
26. *See S.K.I.*, 612 F.3d at 710.
27. *See id.* at 709.
28. NYABCL § 55-c(6), *supra* note 2.
29. *See S.K.I.*, 612 F.3d at 709–10.
30. *See id.* at 710.
31. *See id.* at 711. The modern dormant Commerce Clause is concerned with "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 333–38 (2008) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-274 (1988)).

C. Public Policy Considerations

A resisting party can rebut the presumption of enforceability of a forum-selection clause by clearly showing "'that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.'"[32]

SKI put forth two policy arguments. First, NYABCL § 55-c contradicts the general presumption of enforceability and public policy in regulating the relationship between brewer and distributor under the Twenty-first Amendment renders the clause unenforceable. Second, SKI will be unjustly prevented from asserting its right under NYABCL § 55-c in a Russian forum operating under Russian substantive law.[33]

The court reiterates its ruling in *Roby v. Corp. of Lloyd's*,[34] where it explains that the enforceability exception is to be interpreted narrowly.[35] Under *Roby*, a forum-selection clause is unreasonable only: (1) if it is incorporated into an agreement through fraud or overreaching; (2) if the inconvenience or unfairness of the selected forum will, for all practical purposes, deprive the complaining party of his day in court; (3) if the fundamental unfairness of the chosen law deprives the plaintiff of a remedy; or (4) if the clause contravenes a strong public policy of the forum state.[36]

In support of its arguments, SKI asserts that NYABCL §55-c was enacted "pursuant to the powers reserved to the states under the *21st Amendment*, to promote the public's interest in fair, efficient and competitive distribution of malt beverage products via regulating the relationship between brewer and distributor."[37] The court deems this contention insufficiently argued and considers the argument waived.[38] Additionally, SKI asserts that it will be denied a remedy, because New York law will not be applied in Russia, and it will "not have a substantive remedy in St. Petersburg."[39] The Second Circuit affirms the district court's finding that SKI does not present sufficient evidence in support of this contention. Specifically, the district court emphasizes the lack of evidence presented regarding the laws of St. Petersburg and the absence of an indication that SKI's rights will not be protected under the terms of the agreement.[40]

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32. *See id.* at 711 (quoting Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972)).

33. *See id.* at 711-12.

34. 996 F.2d 1353 (2d Cir. 1993). The court in *Roby* interpreted the enforceability exception as set forth in Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). *See S.K.I.*, 612 F.3d at 712.

35. *See S.K.I.*, 612 F.3d at 711.

36. *See id.* (citing *Roby*, 996 F.2d 1353, at 1363.

37. *Id.* at 712.

38. *See id.*

39. *Id.*

40. *See id.*

The Second Circuit also affirms the district court's application of *Roby* and agrees that a presumptively valid forum-selection clause will not be rebutted by mere speculation as to the rights that would or would not be maintained in a foreign forum.[41]

IV. Conclusion

With the internationalization of the beer industry[42] as a backdrop, the court implicitly rebuffs the xenophobic notion that a U.S. company will be treated unjustly by the Russian judicial system. It also implicitly recognizes that beer production and distribution is a sophisticated industry whose actors are entitled to the benefit of their bargain. Finally, the court expressly reminds us all that unsupported allegations, even if they invoke constitutional amendments, are not sufficient to disturb agreements between knowledgeable commercial actors.

Michael Murray

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41. *See id.*

42. *See generally* Michael J. de la Merced, *Anheuser-Busch Agrees to Be Sold to InBev*, N.Y. TIMES (July 14, 2008) http://www.nytimes.com/2008/07/15/business/worldbusiness/15inbev.html# (reporting the merger of Anheuser-Busch, an American beer brewer, with InBev, a Belgian beer brewer, into Anheuser-Busch InBev a leading global beer brewer.) Andrew Martin, *Merger for SABMiller and Molson Coors*, N.Y. TIMES (Oct. 10, 2007) http://www.nytimes.com/2007/10/10/business/worldbusiness/10beer.html (reporting the merger of SABMiller, a global beer brewer headquartered in South Africa, with Molson Coors, a global beer brewer headquartered in Canada, into Miller Coors).