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The Evolution and Greater Transparency of Intellectual Property Law in the Russian Federation

Elena Beier*

Introduction

In this era of globalization and innovation, protecting intellectual property (IP) has become vital for a successful and competitive economy.[1] The Russian Federation (RF) has increasingly recognized the importance of effective IP legislation for economic development.[2] The post-Soviet rise of international cooperation and foreign investments has unmasked a previously unmet need for effective IP regulations.[3] Over the past decade, Russia has made significant progress to close legislative gaps in compliance with international IP agreements.[4] As a result, the RF has become well known for foreign investment, economic cooperation, national science development, and innovation.[5] Because the Russian market has become increasingly attractive for many foreign businesses, IP protection is a continuing concern.[6]

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1. *See* CHARLES W. L. HILL & GARETH R. JONES, STRATEGIC MANAGEMENT: AN INTEGRATED APPROACH 243 (8th ed. 2007) (stating that intellectual property protection is seen as a very important driver of economic progress); *see also* SHAHID ALIKHAN, SOCIO-ECONOMIC BENEFITS OF INTELLECTUAL PROPERTY PROTECTION IN DEVELOPING COUNTRIES 1 (2000) (asserting that the intellectual property system is important to modern economic policy and a catalyst for development).

2. *See* Terry A. Young & Dmitri Shulgin, *Intellectual Property Rights in the Russian Federation*, *in* INTELLECTUAL PROPERTY RIGHTS IN AGRICULTURAL BIOTECHNOLOGY 227 (Frederic H. Erbisch & Karim M. Maredia eds., 2d ed., 2004); *see also* UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, INTELLECTUAL ASSETS: VALUATION AND CAPITALIZATION 106 (2003) (showing that the disintegration of the Soviet Union makes the development of intellectual property law important for the Russian Federation).

3. *See* UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, *supra* note 2; *see also* MIRA T. SUNDARA RAJAN, COPYRIGHT AND CREATIVE FREEDOM: A STUDY OF POST-SOCIALIST LAW REFORM 155 (2006) (stating that a number of difficulties resulting from the post-Soviet era made intellectual property reform problematic).

4. *See* GLOBALIZATION AND EMERGING ECONOMIES: BRAZIL, RUSSIA, INDIA, INDONESIA, CHINA AND SOUTH AFRICA 267 (2008) (detailing that Russia made significant progress in 2008); *see also* ECONOMIC PERSPECTIVES: INTELLECTUAL PROPERTY IN THE GLOBAL MARKETPLACE 15 (1998) (opining that Russia has come a long way in changing its legal regime).

5. *See* UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, *supra* note 2 (showing that after the fall of the Soviet Union, Russia has cooperated to a greater degree with foreign countries and foreign investment opportunity has increased); *see also* DOING BUSINESS WITH RUSSIA 39 (Marat Terterov ed., 4th ed. 2004) (indicating that Russia has made progress in eliminating intellectual property obstacles to foreign investment).

6. *See* Young & Shulgin, *supra* note 2 (implying that intellectual property protections are an ongoing concern); *see also* Daria Kim, *Russia Establishes Specialized Court for Intellectual Property Rights,* INTELL. PROP. WATCH, Mar. 1, 2013, http://www.ip-watch.org/2013/03/01/russia-establishes-specialised-court-for-intellectual-property-rights (indicating that intellectual property protection is still an issue in Russia since the Russian government felt the need to establish a specialized court).

* **The author is admitted to practice in Russia and holds a law degree from St. Petersburg State University (Russia) and an LL.M. from the University of Kiel (Germany). She worked at the European Parliament in Brussels, Baker McKenzie in St. Petersburg, and the British Council in St. Petersburg. She is the founder of Beier & Partners law firm, and has been a member of the Moscow Committee of the Cultural Department of Chicago since 2006, the Hermitage Museum Foundation of New York since 2008, and NYSBA since 2011.**

The main objective of this article is to illustrate the present state of Russian IP law, which has evolved dramatically in the last 50 years, making it more transparent for foreign lawyers and investors. Part I of this article gives a brief overview of the transformation of Russian IP law from Imperial Russia to the present. Part II discusses the importance of WTO accession for development and further transparency of Russian IP legislation. Part III illustrates main regulations and recent changes in Copyright and Allied Rights Law, Patent Law, Law on the Means of Individualization, and Untraditional Objects of Intellectual Property Law. Part IV covers recognition as an author. Part V describes types of IP contracts and conditions for their validity. Part VI discusses some cases in which state registration of IP rights is mandatory. Parts VII and VIII examine liability and dispute resolution in IP cases.

I. History and Main Sources of IP Law in Russia

The history of Russian IP law can be divided into three periods: (1) Imperial Russia; (2) the Union of Soviet Socialist Republics (USSR); and (3) Modern Russia.

A. Imperial Russia

The first IP laws in Russian history were the Law on Patents for Inventions of 1812, and Law on Copyright of 1828.[7] In the following years, these laws were significantly improved. In 1911, the Law on Copyright was a very detailed and progressive piece of legislation which incorporated many of the world's leading ideas on copyright.[8] The Russian Revolution of 1917 led to a complete abandonment of imperial legislation, including legislation on intellectual property.[9] Since the Soviet economy was based on administrative planning, the idea of exclusive property rights contradicted prevailing state politics.[10] Authors' rights were recognized in a

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7. *See* THE LONDON JOURNAL OF ARTS AND SCIENCES; REPERTORY OF PATENT INVENTIONS 386 (William Newton ed., 1843) (documenting that the 1812 act was the first time the Russian government considered the subject of patents); *see also* CHARLES A. RUDD, FIGHTING WORDS: IMPERIAL CENSORSHIP AND THE RUSSIAN PRESS, 1804–1906 56 (2009) (documenting that the 1828 copyright act followed similar provisions enacted in Western Europe).

8. *See* Lionel Bently, *People v. the Author: From Death Penalty to Community Service; 20th Annual Horace S. Manges Lecture, Tuesday, April 10, 2007*, 32 COLUM. J.L. & ARTS 1, 99 (2008) (noting that the 1911 codification was a progressive expansion of the scope of copyright); *see also* Christopher Boffey, *Avtorskoye Pravo [Author's Law]: The Reform of Russian Copyright Law Toward an International Standard*, 18 MD. J. INT'L L. & TRADE 77, 98 (1994) (explaining that the 1828 law was replaced with a law in 1911, under which foreign works first published abroad remained in the public realm).

9. *See* Simon Helm, *Intellectual Property in Transition Economies: Assessing the Latvian Experience*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 119, 134 (2003) (pointing out that the 1917 Socialist Revolution encouraged a market-based economy and took measures to correspond with the transpiring world system of intellectual property); *see also* Dan Hunter, *Culture War*, 83 TEX. L. REV. 1105, 1122 (2005) (finding that after the 1917 Revolution, the World Intellectual Property Organization rejected attempts to incorporate intellectual property reform into its decision-making).

10. *See* Professor Minasse Haile, *The New Ethiopian Constitution: Its Impact Upon Unity, Human Rights and Development*, 20 SUFFOLK TRANSNAT'L L. REV. 1, 68 (1996) (noting that the 1917 Soviet Constitution limited the right to own property); *see also* Urs W. Saxer, *The Transformation of the Soviet Union: From a Socialist Federation to a Commonwealth of Independent States*, 14 LOY. L.A. INT'L & COMP. L.J. 581, 630 (1992) (explaining that the system of centralized economic planning created an interdependent economy that was controlled by the Communist party and deprived the republics of all economic and property rights).

very restrictive manner, based almost exclusively on remuneration of rights, and authors' certificates replaced patents.[11]

B. The Union of Soviet Socialist Republics (USSR)

New changes in IP legislation took place after the crash of the USSR and formation of the RF. During the "Perestoika" era in 1992,[12] a new law was issued called the Basics of Civil Legislation.[13] It included regulations on civil law, with a particular focus on intellectual property.[14] In addition, between 1992 and 1993, new patent and copyright laws were issued.[15] The RF's new Constitution of 1993 made the protection of intellectual property a constitutional right.[16] These laws were the first to protect IP in Russia's market economy.[17]

C. Modern Russia

Although the laws of the USSR significantly advanced IP protection, the laws still had many gaps. Later codification of IP law in the Fourth Part of the Russian Civil Code in 2006

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11. *See* Helm, *supra* note 9 at 138 (describing that under the Soviet system, an inventor was allowed to demand recognition of his or her "authorship" through an "Author's Certificate"); *see also* Bella Karakis, *Moral Rights: French, United States and Soviet Compliance with Article 6BIS of the Berne Convention*, 5 TOURO INT'L L. REV. 105, 137 (1994) (maintaining that the recent changes in the Fundamental Principles of Civil Litigation may contain added rules that are more restrictive).

12. *See* Kathryn Hendley, *The Role of Law in the Russian Economic Transition: Coping with the Unexpected in Contractual Relations*, 14 WIS. INT'L L.J. 624, 629 (1996) (noting that the purpose of Perestroika was to delegate power from officials at the ministerial level to managers who were closer to the production process); *see also* Sual H. Mendlovitz & Burns H. Weston, *The United Nations at Fifty: Toward Humane Global Governance*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 309, 321 (1994) (explaining that "Perestroika" is the era of Russian history from 1987 to 1991).

13. *See* Boffey, *supra* note 8 (clarifying that in 1992, a new software law was passed to provide extra protection to computer software); *see also* Peter B. Maggs, *International Trade and Commerce*, 42 EMORY L.J. 449, 459 (1993) (commenting that in 1992, Russian parliament approved legislation that met international standards on trademarks and patents).

14. *See* Lana C. Fleishman, *The Empire Strikes Back: The Influence of the United States Motion Picture Industry on Russian Copyright Law*, 26 CORNELL INT'L L.J. 189, 215 (1993) (explaining that Russia introduced civil legislation reforming copyright law); *see also* Monica B. Vermeer, *Economic, Legal, and Political Dilemmas of Privatization in Russia: A New Era in Russian Copyright Law: Protecting Computer Software in the Post-Soviet Russian Federation*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 147, 158–59 (1995) (demonstrating the enactment of new civil legislation in the Perestroika era including the field of intellectual property).

15. *See* Connie Neigel, *Further Developments: Piracy in Russia and China: A Different U.S. Reaction*, 63 LAW & CONTEMP. PROB. 179, 186 (2000) (providing an example of Russian legislation reforming copyright law in the early 90s); *see also* Susan Tiefenbrun, *Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects Upon International Trade: A Comparison*, 46 BUFF. L. REV. 1, 52 (1998) (exhibiting another example of Russian attempts to reform their intellectual property law after the fall of the Soviet Union).

16. *See* KONSTITUTSIAA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 44 (Russ.).

17. *See* Boris N. Mamlyuk, *Article & Legal Harmonization: An Historical Inquiry into IP Reform as Global Convergence and Resistance*, 10 WASH. U. GLOBAL STUD. L. REV. 535, 568 (2011) (showing that the post-1991 Russian intellectual property legislation was the first instance of the nation recognizing intellectual property rights in the marketplace); *see also* Marina Portnova, Note, *Ownership and Enforcement of Patent Rights in Russia: Protecting an Invention in the Existing Environment*, 8 IND. INT'L & COMP. L. REV. 505, 506–07 (1998) (noting Russia's lack of intellectual property laws prior to 1992).

filled in many of those gaps.[18] Today, the Fourth Part of the Russian Civil Code is the main source of Russian legislation on intellectual property.[19] In addition to the Civil Code there are other federal laws relevant to IP, such as the Law on Commercial Secrets of 2004, and Law on Patent Attorneys of 2008.[20] There are also federal bylaws, including governmental and departmental regulations that protect IP.[21]

Unlike the U.S., where IP legislation exists on both the federal and state levels, Russia's IP legislation is regulated only at the federal level.[22] Subjects of the Federation, known as states or municipalities, are not allowed to issue such laws.[23] Another significant distinction from the U.S. is that Russia, as well as many other European Union countries, uses a civil law system (in Russia it is more often referred to as the continental law system).[24] A civil law system is based

18. *See* Sergey Budylin and Yulia Osipova, *Is All of MP3 Legal? Non-Contractual Licensing Under Russian Copyright Law*, 7 J. HIGH TECH. L. 1, 15–16 (2007) (asserting that the Fourth Part of the Russian Civil Code resolves much of the previous flaws in Russian IP law); *see also* Michael Newcity, *Protecting the Traditional Knowledge and Cultural Expressions of Russia's "Numerically-Small" Indigenous Peoples: What Has Been Done, What Remains To Be Done*, 15 TEX. WESLEYAN L. REV. 357, 395–96 (2009) (describing the aim of recent Russian IP law as to consolidate previous legislation).

19. *See Civil Code of the Russian Federation Part IV*, FEDERAL SERVICE FOR INTELLECTUAL PROPERTY (Feb. 22, 2013, 4:14 PM), http://www.rupto.ru/rupto/nfile/3b05468f-4b25-11e1-36f8-9c8e9921fb2c/Civil_Code.pdf (an unofficial English translation of Part IV); *see also* Mamlyuk, *supra* note 17 at 571 (acknowledging that Part IV of the Russian Civil Code now codifies all of Russian intellectual property law); Trudy S. Martin, *Vicarious and Contributory Liability for Internet Host Providers: Combating Copyright Infringement in the United States, Russia, and China*, 27 WIS. INT'L L.J. 363, 386–87 (2009) (suggesting that Russian IP law is located within Part IV of the Russian Civil Code).

20. *See Federal Law No. 316-FZ of December 20, 2008 on Patent Attorneys*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (July 11, 2008), http://www.wipo.int/wipolex/en/text.jsp?file_id=276926 (displaying the Russian Law on Patent Attorneys of 2008); *see also Federal Law No. 98-FZ of July 29, 2004 on Commercial Secrecy*, LEGISLATIONLINE (July 24, 2007), legislationline.org/ . . . /id/ . . . /RF_law_commercial_secrets_2004_en.pdf (giving an example of the Russian Law on Commercial Secrets).

21. *See* I.A. Bliznets, INTELLECTUAL PROPERTY LAW 14–20 (2011); *see also* Daria Kim, *Special Report: Russia Amends IP Law in Advance of WTO Accession,* INTELL. PROP. WATCH (July 12, 2012), http://www.ip-watch.org/2012/07/12/special-report-russia-amends-ip-law-in-advance-of-wto-accession (noting that IP laws are included in the Fourth Part of the Civil Code, giving the federal government exclusive authority over this area).

22. *See* KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 71 (Russ.) (describing various aspects of the jurisdiction of the Russia Federation); *see also* Susan Tienebrun, *Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects Upon International Trade: A Comparison*, 46 BUFF. L. REV. 1, 52 (1998) (adding that the Russian Federation's intellectual property laws are based on five federal IP laws passed after the fall of the Soviet Union).

23. *See* DLA PIPER, DOING BUSINESS IN RUSSIA 58 (2010) (affirming that Russian intellectual property laws derive from Part IV of the Civil Code, which gives exclusive authority to the federal government in the creation of these laws); *see also* Cynthia Vulle Stewart, *Trademarks in Russia: Making and Protecting Your Mark*, 5 TEX. INTELL. PROP. L.J. 1, 6 (1996) (noting that the primary law for Trademarks in Russia is the Trademarks, Brand Names, and Countries of Origin Act along with a number of Federal antitrust laws and the Russian Constitution).

24. *See* Yuri Labimov, *Introduction to Russian Civil Law*, INTERNATIONAL ASSOCIATION OF LAW LIBRARIES (Sept. 14, 2006), http://www.iall.org/iall2006/iall2006/Yuri_Lubimov.htm (acknowledging that Russia is a civil law country and that the bills the Parliament adopts there are the main source of law); *see also* Murray Raff & Anna Taitslin, *Post-Socialist Civil Law in Historical Perspective*, UNIVERSITY OF CANBERRA FACULTY OF LAW 1, 3 (2011) (confirming that conventional civil law existed in Russia since the 1922 Civil Code after the Communist Revolution).

on laws and codes.[25] Court holdings are not considered sources of law and are only enforced as the result of a particular dispute.[26] However, court holdings do play an important role in understanding the application of IP regulations and may be referred to in legal practice, as they are the rulings of the Constitutional Court, Supreme Court, High Arbitration Court, and lower level courts.[27] A large portion of IP legislation is comprised of international agreements.[28] Unlike the U.S., Russia treats international agreements as self-executing unless international agreement foresees further implementation, and therefore they have priority over Russian legislation.[29] As a result, Russian courts can apply regulations of international agreements directly.[30]

Russia is a signatory of more than 50 international agreements.[31] The Berne Convention for the Protection of Literary and Artistic Works of 1995 and the Universal (Geneva) Copyright Convention of 1952 form a basis for international protection of copyrights.[32] The Copyright Provisions of the Civil Code, Fourth Part, were designed to fully implement Russia's

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25. *See* JAMES G. APPLE & ROBERT P. DEYLING, A PRIMER ON THE CIVIL-LAW SYSTEM 23 (1995) (recognizing that civil law is based on law and codes that are divided between private law and public law).

26. *See* Jurij Fedynsky, *The Role of Judiciary Decisions and Doctrine in Civil Law and Mixed Jurisdictions,* 50 IND. L.J. 636 (1975) (mentioning that statutes are the source of law in civil law systems while precedence is the source of law in common law countries); *see also* Gilian Hadfield, *The Quality of Law in Civil Code and Common Law Regimes: Judiciary Incentives, Legal Human Capital and the Evolution of Law,* UNIVERSITY OF SOUTHERN CALIFORNIA LAW SCHOOL (Mar. 2006), http://www.law.yale.edu/documents/pdf/the_quality_of_law_in_-civil_code.pdf (stating that civil law systems have independent judiciaries that create precedents while common-law courts have judge-made precedent).

27. *See* Hadfield, *supra* note 26 (adding that court decisions in civil law systems play an important role in understanding statutes in a manner that is becoming similar to that of common-law systems); *see also* Kim, *supra* note 6 (noting that courts of general jurisdiction under the Civil Code of the Russian Federation are important in helping to solve intellectual property disputes).

28. *See* Tai-Heng Cheng, *Power, Norms, and International Intellectual Property Law,* 28 MICH. J. INT'L L. 109, 121 (2006) (noting examples of international IP laws); *see also* Rochelle C. Dreyfuss & Jane C. Ginsburg, *Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters,* 77 CHI.-KENT L. REV. 1065, 1065 (2002) (highlighting that private international law encompasses intellectual property).

29. *See* Konstitutsiaa Rossiiskoi Federatsii [Konst. RF] [Constitution] § 15 art. 14 (Russ.) (outlining that international treaty rules apply over domestic law); *see also* TARJA LÅNGSTRÖM, TRANSFORMATION IN RUSSIA AND INTERNATIONAL LAW 388 (2003).

30. *See* COUNCIL OF EUROPE, THE JUDGE AND INTERNATIONAL LAW 57 (1998) (emphasizing that treaties are applied even if they contradict Russian legislation); *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, 264 (2005) (explaining that international law is applied in Russian courts).

31. *See* Mariyetta Meyers, *Russia and the Internet: Russia's Need to Confront and Conquer Trademark Infringement in Domain Names and Elsewhere on the Web*, 9 GONZ. J. INT'L L. 200, 206 (2006) (listing several treaties of which Russia is a signatory).

32. *See* Paul J. Sherman, *The Universal Copyright Convention: Its Effect on United States Law,* 55 COLUM. L. REV. 1137, 1138 (1955) (articulating that various governments drafted the Universal Copyright Convention); *see also* Laura E. Steinfield, Note, *The Berne Convention and Protection of Works of Architecture: Why the United States Should Create a New Subject Matter Category for Works of Architecture Under Section 102(A) of the Copyright Act of 1976*, 24 IND. L. REV. 459, 460 (1991) (stating that the Berne Convention is a multilateral treaty for international copyright protection).

obligations under the Berne Convention.[33] The Paris Convention for the Protection of Industrial Property of 1883, signed by Russia in 1965, is a core document in international industrial property law.[34] This Convention enabled protection in all member states, elaborated unified regulations, specified objects of industrial property, and set up conventional priority.[35] Russia also became a signatory to the following agreements: Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961; Convention Establishing the World Intellectual Property Organization of 1967; Madrid Agreement Concerning the International Registration of Marks of 1891; Patent Cooperation Treaty of 1970; European Patent Convention of 1973; and other international agreements.[36]

II. Intellectual Property Law and World Trade Organization Accession

Russian accession to the World Trade Organization (WTO) remained questionable for over 18 years.[37] One of the main obstacles in this process was related to the low level of IP protection in the RF.[38] Beginning in 2008, Russia undertook multiple changes in IP legislation in an effort to comply with the Agreement on Trade-Related Aspects of Intellectual Property

33. *See* Grazhdanskii Kodeks Rossiiskoi Federatsii [GK RF] [Civil Code] Part 4 § 7, art. 1225 (Russ.); *see also* Daria Kim, Special Report: *Russia Amends IP Law In Advance of WTO Accession*, INTELL. PROP. WATCH (July 12, 2012, 11:36 AM), http://www.ip-watch.org/2012/07/12/special-report-russia-amends-ip-law-in-advance-of-wto-accession (mentioning that the Fourth Part of the Civil Code codified Russian IP laws).

34. *See* Hans Peter Kunz-Hallstein, *The United States Proposal for a GATT Agreement on Intellectual Property and the Paris Convention for the Protection of Industrial Property*, 22 VAND. J. TRANSNAT'L L. 265, 266 (1989) (describing that the Paris Convention set standards of industrial property protection); *see also* Joseph Straus, *A Marriage of Convenience: World Economy and Intellectual Property from 1990 to 2012*, 40 AIPLA Q.J. 633, 639 (2012) (confirming the scope of the Paris Convention to protect international IP rights).

35. *See* Paris Convention for the Protection of Industrial Property, *opened for signature* Mar. 20, 1883, 21 U.S.T. 1583 (entered into force in Russia July 1, 1965); *see also Summary of the Paris Convention for the Protection of Industrial Property* (1883), WIPO, http://www.wipo.int/treaties/en/ip/paris/summary_paris.html (last visited Mar. 10, 2013) (outlining the main objectives of the Paris Convention to provide intellectual property protection to its contracting States).

36. *See* International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, *opened for signature* Oct. 26, 1961, 496 U.N.T.S. 493 (entered into force in Russia May 26, 2003); *see also* Convention Establishing the World Intellectual Property Organization, *opened for signature* July 14, 1967, 21 U.S.T. 1749 (entered into force in Russia April 26, 1970); *see also* Madrid Agreement Concerning the International Registration of Marks, *opened for signature* Apr. 14, 1891, 828 U.N.T.S. 389 (entered into force in Russia July 1, 1976); *see also* Patent Cooperation Treaty, *opened for signature* June 19, 1970, 28 U.S.T. 7645 (entered into force in Russia Mar. 29, 1978); *see also* Convention on the Grant of European Patents, *opened for signature* Oct. 5, 1973 1065 U.N.T.S. 199.

37. *See* Press Release, European Commission, EU Welcomes Russia's WTO Accession After 18 Years of Negotiations (Aug. 22, 2012); *see also In at Last?*, THE ECONOMIST, Nov. 5, 2011, http://www.economist.com/node/21536649 (suggesting that Russia would finally join the WTO after 18 years of negotiations).

38. *See Special Report: Russia Amends IP Law in Advance of WTO Accession,* INTELL. PROP. WATCH, http://www.ip-watch.org/2012/07/12/special-report-russia-amends-ip-law-in-advance-of-wto-accession (July 12, 2012) (reporting that Russia amended its intellectual property rights law before its accession to the WTO); *see also Legal Protection of Intellectual Property*, RUSSIAN-EUROPEAN CHAMBER OF COMMERCE, http://www.ruscham.com/en/rossinfo/db/15.html (last visited Mar. 10, 2013).

Rights (TRIPS) and other WTO agreements.[39] Among those WTO agreements were the Federal Law on Amendments to Part IV of the Civil Code of the Russian Federation, which introduced some restrictions on the free use of content in Internet for personal needs and strengthened liability for Internet providers,[40] and the Federal Law on Ratification of the Agreement on Unified Regulations in Intellectual Property Protection, which established a unified protection of IP rights in the Custom Union comprised of Russia, Kazakhstan and Belarus.[41] Finally, on December 16, 2011 Russia signed the WTO Accession Protocol, which was ratified by the Russian Parliament on July 10, 2012.[42] On August 22, 2012, Russia became a fully fledged WTO member.[43]

Despite some criticism expressed by Russian political and business circles towards Russia's accession to the WTO, it has provided multiple advantages for the Russian economy. For example, it makes Russia more attractive and predictable for foreign investors and Russian products more competitive in the international market.[44] It also enables international mechanisms of trade dispute resolution and Russian participation in the development of international trade principles.[45]

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39. *See* Office of the U.S. Trade Representative, How Russia's Membership in the World Trade Organization Strengthens Intellectual Property Rights Protection and Enforcement in the Russian Federation, *available at* http://www.ustr.gov/sites/default/files/How%20Russia%20Membership%20in%20the%20WTO%20Strengthens%20IPR%20Protection%20and%20Enforcement.pdf (reiterating that Russia must comply with all the obligations of the WTO TRIPS agreement); *see also Intellectual Property: Protection and Enforcement*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited Mar. 27, 2013) (stressing that the TRIPS agreement establishes minimum levels of protection that each government can give to WTO members); *see also* Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 980 (2009) (explaining that TRIPS sets the minimum standards for intellectual property rights protection).

40. FEDERAL'NYI ZAKON O GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code], art. 4. (Russ.) 2010, No. 259.

41. FEDERAL'NYI ZAKON YEDINYKH PRAVIL V SFERE INTELLEKTUAL'?NOY SOBSTVENNOSTI [Federal Law of the Agreement on Unified Regulations in Intellectual Property], (Russ.) 2011, No. 179.

42. *See Law on Ratification of the Protocol in Russia's Accession to the Marrakesh Agreement Establishing the WTO*, OFFICIAL SITE OF THE PRESIDENT OF RUSSIA (July 12, 2012), http://eng.news.kremlin.ru/acts/4208 (revealing that the federal law on ratification was signed in Geneva on December 16, 2011 and passed by the State Duma on July 10, 2012).

43. *See WTO Membership Rise to 157 With the Entry of Russia Vanuatu*, WORLD TRADE ORGANIZATION (Aug. 22, 2012), http://www.wto.org/english/news_e/pres12_e/pr671_e.htm (reporting that on August 22, 2012, Russia became the 156th WTO member).

44. *See* Abdur Chowdhury, *Russia's Accession to the WTO*, EAST ASIA FORUM (Jan. 28, 2012), http://www.eastasiaforum.org/2012/01/28/russia-s-accession-to-the-wto (noting that the largest gains from WTO membership will come from increased foreign investment in the Russian market for services); *see also New Russia/WTO Accession: Opportunities for Foreign Investors Will Rest in Part on How Russia Respects WTO Rules*, CHARTIS (Aug. 1, 2012), http://www.chartisinsurance.com/Russia-WTO-Accession_2590_440375.html (estimating that 85% of gains from accession will be captured via the opening up of business services to foreign competition).

45. *See* Chowdhury, *supra* note 44 (highlighting that trade disputes between Russia and its trading partners will be brought to the WTO for resolution rather than being addressed bilaterally); *see also WTO Accession Puts Russia in a Better Position to Address Its Domestic Challenges—Lamy*, WORLD TRADE ORGANIZATION, Jan. 18, 2013, http://www.wto.org/english/news_e/sppl_e/sppl263_e.htm (explaining that the WTO works to settle trade disputes among its members and has the most effective system of dispute resolution in international law).

III. Russian IP Law Protections

According to Russian legal theory, every legal relationship consists of two elements. The first is a "subject," who is the holder of rights and responsibilities.[46] Some examples of subjects are physical persons, legal entities, and states.[47] The second element is an "object," on which the legal relationship is directed,[48] such as money, securities, property rights, services, information, results of intellectual activities, and non-material values.[49] The Civil Code of the RF states that Russian IP law protects intellectual activity and the individualization of legal entities, goods and services, introducing an exclusive list of IP objects: scientific, literary, artwork, computer programs, databases, performances, phonograms, broadcasting, inventions, utility models, industrial design, trademarks, company names, trade names, appellation of origin, selection attainment, topography of integrated circuit, trade secrets.[50] Based on this list of objects, Russian IP law can be divided into several main areas of law.

With respect to the main areas of Russian IP law, the classifications introduced by Professor I.A. Bliznets are the most accurate.[51] Professor Bliznets divides Russian IP law into four categories: (1) copyright and allied rights law, (2) patent law, (3) law on individualization, and (4) untraditional objects of intellectual property law.[52] Some of the objects of Russian IP law are completely unknown to American lawyers, such as copyright and allied rights, and untradi-

46. *See* Dr. Natalia N. Karpova, Report, *Legal Protection and Commercialisation of Intellectual Property in Russia*, UNECE.ORG, http://www.unece.org/fileadmin/DAM/ie/enterp/documents/panel2.pdf (remarking that historically Russian subjects proved their rights through inventor's certificates).

47. *See Intellectual Property,* JUS PRIVATUM, http://www.jusprivatum.com/int-property/ (confirming that both individuals and foreign entities can protect their intellectual property rights in Russia).

48. *See* Zhanna Mingalera & Irina Mirskikh, Report, *The Problems of Legal Regulation of Intellectual Property Rights in Innovation Activities in Russia (Institutional Approach)*, INT'L J. SOC. SCI. 56, 56 (2010) (discussing the various objects of intellectual property law).

49. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 128 (Russ.) (stating that the objects of civic rights include, among other things, money, securities and other property); *see also* Mingalera & Mirskikh, *supra* note 48 (noting that the objects of intellectual property can be any creation, invention or innovation).

50. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1225 (Russ.) (illustrating the types of goods and works that are to be afforded protection under the Russian Civil Code); *see also* Sergey Budylin & Yulia Osipova, Legislative Development, *Total Upgrade: Intellectual Property Law Reform in Russia*, 1 COLUM. J. E. EUR. L. 1, 9 (2007) (citing article 1225 of the Russian Federation Civil Code and listing specific works that the statute covers).

51. *See* I.A. BLIZNETS, INTELLECTUAL PROPERTY TUTORIAL, 6–7 (Prospekt 2010) (confirming that Professor Bliznets is the chancellor of the Russian State Institute of Intellectual Property, Member of the Court Chamber on International Disputes by the President of the Russian Federation, and Member of the Journalist Union of the Russian Federation); *see also Russian Expert Says Fakes on Decline in Russia*, RIANOVOSTI, (Aug. 7, 2005, 4:09 PM), http://en.rian.ru/russia/20050708/40871482.html (demonstrating that Professor Bliznets is a well-respected authority on Russian intellectual property law).

52. *See generally* Sergey Budylin & Yulia Osipova, Legislative Development, *Total Upgrade: Intellectual Property Law Reform in Russia*, 1 COLUM. J. E. EUR. L. 1, 12, 15, 17, 27 (2007) (discussing the main categories of intellectual property law in the Russian Federation).

tional objects of intellectual property law.[53] The legal nature of Professor Bliznets's four categories are described below.

A. Copyright and Allied Rights Law

Copyright law and allied rights law form a complex system of legal norms dealing with the protection of scientific works, literature, and art, as well as performances, phonograms, broadcasting, databases, and publishing of works in the public domain.[54] The following sub-sections discuss some basic regulations on the objects of these areas of IP law and conditions for their protection.

1. Copyright Law

Copyright law protects scientific, literary, and artistic works.[55] The Civil Code provides a number of examples of such works, including literary works, dramatic and musical-dramatic works, screenplay works, choreographic works and pantomimes, musical works with or without text, paintings, sculpture, graphics, design, comics, and other works of visual art, works of decorative-applied and stage-set art, audiovisual works, works of architecture, city planning, park and garden art, photographic works and works analogous to photography, geographic works, geological maps, plans, sketches, and other works related to geography, topography, and other sciences.[56] The main function of this list is to illustrate objects of copyright law and to avoid excluding any objects from copyright protection.[57] However, the list is not exhaustive because there will likely be new results of intellectual activity that are not on the list, but are nevertheless deserving of protection.[58] For example, special provisions relate to computer pro-

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53. *See* Julian Zegelman, *Researching Intellectual Property Law in the Russian Federation*, LAW AND TECHNOLOGY RESOURCES FOR LEGAL PROFESSIONALS, (Feb. 14, 2009), http://www.llrx.com/features/russiaiplaw.htm (discussing the differences between Russian and American intellectual property law and the complications that result); *see also* Nadezhda Nikonova, *Lessons from the Symposium, "Russian Market: Legal and Business Perspectives,"* THE NETWORK: BUSINESS AT BERKELEY LAW (Feb. 11, 2013, 8:28 AM), http://thenetwork.berkeleylawblogs.org (stating the difference between laws of Russia and United States and the subsequent issues that arise when dealing with legal matters between both countries).

54. *See* Alina Ng, *The Author's Rights in Literary and Artistic Works,* 9 J. MARSHALL REV. INTELL. PROP. L. 453, 478 (2010) (stating that copyright law protects a wide range of works that fall into eight categories, including literary, musical, art, architectural, and sound works); *see also* NICOLE R. SMITH & LISA M. TITTEMORE, PROTECTING AND ENFORCING COPYRIGHT (2008) (finding that federal copyright laws protect many different types of works).

55. *See* Scott Turow, *Would the Bard Have Survived the Web?*, N.Y. TIMES (Feb. 14, 2011), www.nytimes.com/2011/02/15/opinion/15turow.html?_r=1&.

56. [GK RF] [Civil Code] § 1259.1 (stating that copyright law also protects derivative and compound works in the form of remaking another work or selection of materials in a creative manner).

57. *See* Jeffrey L. Harrison, *A Positive Externalities Approach to Copyright Law: Theory and Application*, 13 J. INTELL. PROP. L. 1, 58 (2005) (holding that various doctrines help avoid exclusivity with copyright law protections without disincentivizing anyone); *see also* Yutaka Nakamura, *Recent Developments in Copyright Protection for Computer Software in the United States and Japan*, 2 PAC. RIM L. & POL'Y J. 221, 222 (1993) (finding that courts have slowly broadened the scope of what is protected under copyright laws).

58. *See* Nakamura, *supra* note 57 at 223 (holding that the list of copyrightable work has broadened as significant changes in technology have occurred); *see also* Neil F. Siegel, *The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory,* 93 DICK. L. REV. 1, 15 (1988) (stating that the government broadened the scope of copyright laws to encourage creativity).

grams which are currently protected under copyright law as literary works.[59] However, copyright law does not protect ideas, concepts, principles, methods, processes, systems, inventions, facts, programming languages, or solutions of technical, organizational or other tasks.[60] In order to become a protected work, that work must meet the following specific criteria: (1) creativity; and (2) expression in objective form, such as in writing, publicly oral, picture, sound, or video recording.[61] Publication is not a formative factor.[62]

In international cases, one of the main concerns is the protection of foreign authors within the territory of the Russian Federation.[63] This issue has been solved by the Berne Convention for the Protection of Literary and Artistic Works, to which Russia is a party,[64] as well as provisions of the Russian Civil Code (Civil Code) which incorporated the provisions of the Berne Convention.[65] Based on these principles of nationality and territoriality, published or unpublished works are protected if they exist in some objective form: (1) within the territory of the Russian Federation irrespective of the citizenship of the author; (2) outside the territory of the Russian Federation if author has Russian citizenship; or (3) outside the territory of the Russian

59. *See* {GK RF] [Civil Code] §1261 (holding that copyrights to all types of programs for electronic computers that can be expressed in any form or language as protected as a literary work); *see also* Lisa C. Green, *Copyright Protection and Computer Programs: Identifying Creative Expression in A Computer Program's Nonliteral Elements*, 3 FORDHAM ENT. MEDIA & INTELL. PROP. L.F. 89 (1992) (finding that Congress chose to include computer programs within the definition of literary work); *see also* Edward R. Hyde, *Legal Protection of Computer Software*, 59 CONN. B.J. 298, 308 (1985) (stating that a computer program is considered a literary work for the purposes of copyright protection).

60. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSI [GK RF] [Civil Code] art. 1259 (5) (Russ.) (noting that copyright law protects expressions but not ideas).

61. *See id.* at art. 1259(3) (establishing that there are two criteria for establishing copyright protection).

62. *See* Vitaly Kalyatin, *Problems of Database Protection in the Russian Federation* 4–5 (Nat'l Res. Univ. Higher Sch. of Econ., Working Paper No. 01, 2011) (stressing that a work does not receive copyright protection merely because it is published); *see also* WIPO Copyright Treaty art. 2, 4, 5, Dec. 20, 1996, 36 I.L.M 65 (explaining copyright protection for works extends to expressions in any form and not to ideas).

63. *See* Federal'nyi Zakon RF o Grazhdanstve Rossiiskoi Federatsii [Federal Law of the Russian Federation on Citizenship of the Russian Federation], SOBRAINE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2002, No. 115-FZ. (noting that a foreign citizen is guaranteed the same protection as a Russian citizen); *see also* Gennady M. Dannilenko, *Implementation of International Law in Russia and Other CIS States* 22–23 (Institute of State and Law, Russian Academy of Sciences 1998) (stating that the Russian Constitution guaranteed foreigners all the protections of Russian law).

64. *See* Berne Convention for the Protection of Literary and Artistic Works art. 3 (1), Sept. 9, 1886, http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html (establishing that the Berne Convention guarantees copyright protection in any state that adopts the treaty); *see also Berne Notification No. 162 Berne Convention for the Protection of Literary and Artistic Works: Accession by the Russian Federation,* WIPO (last visited Mar. 9, 2013), http://www.wipo.int/treaties/en/notifications/berne/treaty_berne_162.html (reporting that Russia adopted the Berne Convention on March 13, 1995).

65. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSI [GK RF] [Civil Code] art. 1256 (Russ.) (noting Russia law has adopted the protections afforded by the Berne Convention); *see also* SWISS BUSINESS HUB RUSSIA, RUSSIA LEGAL PROVISIONS 20 (Business Network Switzerland 2012) (confirming that Russia ratified the Berne Convention).

Federation if the author has a foreign citizenship upon international agreements of the RF and foreign countries.[66]

2. Allied Rights Law

Allied rights derive from copyrights.[67] While allied rights are similar to copyrights, they are not identical.[68] For example, allied rights can exist even when works are not protected by copyright law if they are in the public domain.[69] The Civil Code specifies five main groups of objects in allied rights law: (1) performances, (2) phonograms, (3) broadcasting, (4) databases, and (5) works published in the public domain.[70] Performances are defined as presentations of performing artists and conductors, or productions of directors of performances if they are expressed in a form allowing their reproduction and distribution by technical means.[71] Phonograms are defined as the first fixation of the sounds of performances or other sounds or representations thereof, with the exception of a sound recording included in an audiovisual work.[72] Broadcasting refers to communications of transmissions of broadcasting and cable casting organizations, including broadcasts created by a broadcasting or cable casting organization itself or on its order.[73] The Civil Code defines databases as a totality of independent materials, such as articles, accounts, normative acts, judicial decisions, and other similar materials, which are presented in an objective form and systematized so that they may be found and processed by a computer.[74] These provisions relate only to the protection against unauthorized extraction and

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66. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSI [GK RF] [Civil Code] art. 1231 (Russ.) (incorporating provisions of the Berne Convention for the Protection of Literary and Artistic Works); *see also* WORLD INTELLECTUAL PROP. ORG., Berne Convention for the Protection of Literary and Artistic Works art. 5, Sept. 9, 1886, No. WO001EN, http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf (providing a basis for the codification of copyright laws into the Civil Code).

67. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSI [GK RF] [Civil Code] art. 1303 (Russ.) (stating that related rights are contiguous to the copyright [this article refers to "allied rights" but the term is also translated as "related rights"]); *see also Understanding Copyright and Related Rights*, WORLD INTELLECTUAL PROP. ORG., http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.html#related_rights (last visited Mar. 10, 2013) (explaining that related rights are 'copyright-like' rights).

68. *See* WORLD INTELLECTUAL PROP. ORG., *Berne Convention for the Protection of Literary and Artistic Works*, Sept. 9, 1886, No. WO001EN, http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf (providing an example of how related rights and copyright are treated differently as evidenced by different provisions for each); *see also* WORLD INTELLECTUAL PROP. ORG. INTELLECTUAL PROPERTY HANDBOOK 46–47 (2d ed. 2004), http://www.wipo.int/freepublications/en/intproperty/489/wipo_pub_489.pdf (commenting that there is a difference between copyright and related rights).

69. *See* SÉVERINE DUSOLLIER, SCOPING STUDY ON COPYRIGHT AND RELATED RIGHTS AND THE PUBLIC DOMAIN 46 (annex 2011), http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_7/cdip_7_inf_2.pdf; *see also* AMERICAN BAR ASSOCIATION, *International Legal Developments in Review: 2007 Regional and Comparative Law*, 42 INT'L LAW. 1083, 1087 (2008).

70. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSI [GK RF] [Civil Code] art. 1304 (Russ.), http://www.gk-rf.ru/statia1304 (setting out five categories of materials covered by the related rights provisions).

71. *See id.* (defining performance as the execution of conductors or performers).

72. *See id.* (referring to the intellectual property right of sound recordings).

73. *See id.* (defining broadcasting as one of the exclusive, personal non-property rights in the Civil Code).

74. *See id.* (indicating that both the compiler of a collection and the author of the database own copyrights in the compilation).

repeated use of the data in the databases.[75] According to the same Code, a work published in the public domain is defined as the publication or organization of a work of science, literature, or art.[76] These provisions relate only to the protection of the publishers of such works.[77]

B. Patent Law

Russian patent law protects results of intellectual activity in science, technology, and artistic design, provided they meet specific requirements of the Civil Code.[78] Unlike copyright law, patent law protects the essence of the solution and not its objective form.[79] There are three main groups of objects of patent law: (1) inventions, (2) utility models, and (3) industrial designs.[80] Patent law does not protect solutions contrary to public interest, principles of humanity and morality, discoveries, scientific theories or mathematical methods, solutions satisfying only esthetical demands, architectural objects, industrial or other buildings, objects with unstable form such as liquid, or gas or free-running material.[81]

According to the Civil Code, an invention is a technical solution in any area related to a product (e.g., apparatus, substance, microorganism, cell culture of plants or animals), or method (e.g., actions on material objects by material means).[82] In order to be protected, an invention must satisfy the criteria of novelty, presence of inventive step, and industrial applicability.[83] The element of novelty is present when essential features of the invention are not known from a technical level (i.e., are not accessible in the world of information on solutions

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75. *See* Daniel J. Gervais, *The Protection of Databases*, 82 CHI.-KENT L. REV. 1109, 1156 (2007) (referring to the absence of a misappropriation right to intellectual property databases); *see also* Vitaly Kalyatin, *Problems of Database Protection in the Russian Federation* 8 (Nat'l Research Univ. Higher Sch. Econ., Working Paper No. 01/LAW/2011, 2011), http://dx.doi.org/10.2139/ssrn.2002715 (stating that Russian courts confirmed that the use of database content per se does not constitute a copyright violation).

76. *See* Sergey Budylin & Yulia Osipova, *Total Upgrade: Intellectual Property Law Reform in Russia,* 1 COLUM. J.E. EUR. L. 1, 12–13 (2007) (discussing the intellectual rights an author has in works of science, literature, and art).

77. *See* Trudy S. Martin, *Vicarious and Contributory Liability for Internet Host Providers: Combating Copyright Infringement in the United States, Russia, and China*, 27 WIS. INT'L L.J. 363, 374 (2009) (indicating that once a copyright expires, the work falls into the public domain); *see also* IPR Toolkit, EMBASSY OF THE UNITED STATES, MOSCOW, RUSSIA, http://moscow.usembassy.gov/ipr-copyright.html (last visited Mar. 20, 2013) (stating that composite works are afforded copyright protection even if the individual works are not protected).

78. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1349(1) (Russ.) (discussing the objects of Russian patent rights); *see also Patent System in Russia*, WORLD INTELLECTUAL PROP. ORG., (http://www.wipo.int/wipolex/en/text.jsp?file_id=206380#LinkTarget_585) (last visited Mar. 9, 2013) (explaining that Russia grants patents in design, technology, and science).

79. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1259 (2013) (Russ.) (listing the objective works given copyright protection); *see also id.* at art. 1375(2) (stating that Russian patent applications require a description expressing the "essence of the invention").

80. *See id.* at art. 1345 (naming the three patent rights categories).

81. *See id.* at art. 1349(4) (codifying some of the objects that are not granted patent rights); *see also id.* at art. 1350(5) (discussing objects that are not considered patentable inventions).

82. *See id.* at art. 1350(1) (defining a technical solution for patent purposes).

83. *See id.* at art. 1350(2), (4) (defining the requirement and criteria for an invention's novelty); *see also id.* at art. 1351(2), (4) (explaining the requirement of inventive applicability); *see also id.* at art. 1352(2), (3) (providing an overview of the requirements for novelty of an industrial design).

with the same function).[84] Inventive step is satisfied when the invention is non-obvious from a technical level.[85] Finally, industrial applicability is defined as the possibility of the invention's use in the economic or social spheres.[86]

A utility model is a technical solution related to an apparatus[87] (in the RF, the word "apparatus" can be interpreted as an organizational structure or device).[88] The conditions for the protection of utility models are novelty and industrial applicability.[89]

An industrial design refers to the artistic and design presentation of an industrial or crafts article which defines its outward appearance.[90] Originality is present when an industrial design's essential features are determined by the creative nature of the article.[91]

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84. *See* J.W. BAXTER, WILLIAM JOSEPH COTREAU & JESSICA M. SINNOT, WORLD PATENT LAW & PRACTICE § 16.19 (2012) (showing that to meet the criteria for novelty, the invention must be unknown from the state of the art); *see also* Mark Douma & Rudolph Chistyakov, *The First Patent Law of the Russian Federation*, 1 U. BALT. INTELL. PROP. L.J. 162, 165 (1993) (establishing an invention is novel when it is not anticipated by prior art).

85. *See* VLADIMIR ORLOV, INTRODUCTION TO BUSINESS LAW IN RUSSIA 260 (2011) (maintaining that a specialist in the relative field must be of the opinion that an invention is not the product of technological advancements); *see also* UNITED NATIONS, INTELLECTUAL ASSETS: VALUATION AND CAPITALIZATION 107 (2003) (illustrating the inventive level requirement is satisfied when an expert concludes the invention does not derive from previous art).

86. *See* Andrew A. Baev, *Recent Changes in Russian Intellectual Property Law and Their Effect Upon the Protection of Intellectual Property Rights in Russia*, 19 SUFFOLK TRANSNAT'L L. REV. 361, 372 (1996) (indicating that industrial applicability refers to an invention's utility in different sectors such as industrial, agricultural, and public health); *see also* Christopher Osakwe, *Russian Federation: Patent Law*, 32 INT'L LEGAL MATERIALS 1614, 1617 (1993) (establishing that an invention is industrially applicable if functional in a particular social sector).

87. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1351(1) (Russ.) (codifying what is protected as a utility model).

88. *See Modernisation of the State Apparatus*, Human Development Report Russian Federation 2002/2003: The Role of the State in Economic Growth and Socio-Economic Reform 88 (2003), http://hdr.undp.org/en/reports/national/europethecis/russia/name,3259,en.html (using the word "apparatus" when referring to a state organization in Russia); *see also* Vitaly Lipavskiy, *Explosion Protected Electrical Apparatus in the Russian Federation*, EX-MAGAZINE 14, 14 (2006), http://www.rstahl.com/fileadmin/Dateien/tgus/Documents/2005-ExProt_Apparatus_Russia.pdf (utilizing the word "apparatus" when referring to machines or appliances).

89. *See* Valery Medvedev & Valery Jermakian, *Patents in the Russian Federation*, PATENT CLAIM INTERPRETATION—GLOBAL EDITION (2012) (indicating utility models are provided protection only if innovative and industrially applicable); *see also Petty Patents and Utility Models*, PATENT LAW FUNDAMENTALS (2d ed. 2013) (reiterating that utility patents are enforceable if inventions are new and industrially useful).

90. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1352(1) (Russ.) (codifying the definition of an industrial design within Russian Law).

91. *See* Yuri Monstyrsky, WTO & IP RIGHTS PROTECTION IN RUSSIA (citing to the Civil Code which states a sample is original if the essential features are attributed to the creativity of the product's characteristics); *see also Russian Federation: Patent System in Russia*, WORLD INTELLECTUAL PROP. ORG. (Aug. 2010), http://www.wipo.int/wipolex/en/text.jsp?file_id=206380#LinkTarget_512 (explaining that a claimed patent is deemed original if its significant features are caused by the creative nature of the article's characteristics).

C. Law on the Means of Individualization

Trademark law protects signs and symbols that designate the individualization of goods, legal entities, or individual entrepreneurs.[92] Trademarks can be categorized in two ways: (1) by the number of applicants and (2) by form.[93] A single applicant may register for a trademark as an individual or as a legal entity, or a group of applicants may register for a collective trademark.[94] Trademarks can take verbal, pictorial, three-dimensional, and/or acoustic form, among others.[95] Trademark law does not protect signs that are indistinguishable or signs that are already generally accepted symbols or terms.[96] These include flags, state symbols, official signs, hallmarks of control and warranty, seals, awards, or abbreviations or full names of international and intergovernmental organizations.[97] However, in some cases such elements may be included in a trademark as non-protected elements, provided there is consent from an appropriate authority.[98] The obligation of Russia under WTO agreements to provide uniform trademark protection for the Customs Union of Russia, Belarus and Kazakhstan (discussed in Part II of this article) has made Russian trademark legislation more transparent.[99]

Trade names are distinguishable from company names. A company name is defined in the founding documents of the company and included in the state register of legal entities upon

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92. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1477 (Russ.) (describing trademarks as a "sign capable of individualizing of goods of legal entities or individuals").

93. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1482 (Russ.) (detailing types of trademarks as words, figurative or three-dimensional signs, or any combination which may be registered in any color or color combination).

94. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1510 (Russ.) (asserting that there is a right to collective marks within the Russian patent system); *see also Trademarks, Company Names, Trade Names, and Domain Names*, CAPITAL LEGAL SERVICES (stating that the trademark may be registered to a sole applicant or a group of applicants). A "collective trademark" is a trademark or servicemark used by an association, union, or other group either to identify the group's products or services or to signify membership in the group. *See* BLACK'S LAW DICTIONARY (9th ed. 2009).

95. *See Intellectual Property in Moscow, St. Petersburg, Russia*, TO RUSSIA WITH EASE, http://torussia.org/intellectual_property_in_moscow,_st._petersburg (last visited Mar. 10, 2013) (detailing the means of individualization equated with the products of intellectual property).

96. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1483(1) (Russ.) (listing grounds for refusal of a trademark).

97. *See id.* (describing grounds for refusal of a trademark using unoriginal items and exceptions for partial integration with consent); *see also Grounds for Refusal of Trademark Registration*, WORLD INTELLECTUAL PROP. ORG., http://www.wipo.int/sct/en/comments/pdf/sct21/ref_russian_federation_en.pdf (explaining the policy concerns banning trademarks of government symbols, which center around preservation of a State's rights symbols of its sovereignty).

98. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1483(2) (noting a limited exception where government symbols can be included in a trademark application, as non-protected marks, where there is consent of the sovereign).

99. *See* FEDERAL'NYI ZAKON RF O TOVARNIKH ZNAKAKH [Federal Law of the Russian Federation on Trademarks], SOBRANIE ZAKONODATEL'STVA ROSSIIKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2011, NO. 179 (detailing Russia's WTO agreement obligations to update its IP laws in conformity with other WTO states); *see also Accessions: Working Party Seals the Deal on Russia's Membership Negotiations*, WORLD TRADE ORG., (Nov. 10, 2011) http://www.wto.org/english/news_e/news11_e/acc_rus_10nov11_e.htm (describing Russia's intellectual property obligations for accession to the WTO and transparency requirements).

the registration of the company.[100] In comparison, trade names are not included in the state register and serve rather for the individualization of legal entities or groups of entities.[101] Trade names may be included (partly or in full) in the name of a trademark.[102] However, trade names are more often used in holdings or groups of companies for the purposes of unified branding.[103] For example, a well-known Russian oil holding, called Gazprom, consists of multiple affiliated companies, including Gazmash JSC, Beltransgaz LLC, Gazprom Avia JSC, and Arm-Rusgazprom JSC.[104]

An appellation of origin is a unique object of IP law that enables manufacturers of a particular location to include the name of that location in its brand.[105] According to the Civil Code, an appellation of origin is a sign that contains the contemporary/historical, official/unofficial, or full/abbreviated name of a country, city, rural settlement, or other geographical location, if it became well-known because of its designation of the special properties of a product, and if that product is mainly characterized by natural conditions/human factors specific to that geographic location.[106] For example, Russian Palekh lacquer miniature paintings originate from the village of Palekh in the Ivanovo region of Russia,[107] a well-established Borjomi min-

100. *See* Ekaterina Tilling, *Brand Protection in Russia: Vital Issues to Consider*, BRANDS IN THE BOARDROOM 2011, 19, 20, http://www.iam-magazine.com/issues/article.ashx?g=cb883282-169b-4887-a49b-e8cf7611df12 (noting that trade names can be the same as company names only where the two are one and the same, a matter that is lost in translation from Russian to English); *see also Providing Legal Protection of the Means of Individualization*, CENTER OF INTELLECTUAL PROPERTY, http://community.sk.ru/foundation/ipcenterskolkovo/b/services/p/ips3_4.aspx (defining company name and trademark separately).

101. *See* Natalia N. Karpova, *Legal Protection and Commercialization of Intellectual Property in Russia*, *in* INTELLECTUAL ASSETS: VALUATION AND CAPITALIZATION 102, 118 (U.N. Pub., 2003) (stating trade names do not require mandatory filing of an application or special registration); *see also* Tilling, *supra* note 100 at 20–21 (reiterating the main purpose of protecting trade names is to identify each member of the commercial market which incentivizes improvements in quality).

102. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1541 (Russ.) (outlining the relationship between commercial names, trade names, and trademarks).

103. *See* EKATERINA MARKOVA, LIBERALIZATION AND REGULATION OF THE TELECOMMUNICATIONS SECTOR IN TRANSITION COUNTRIES: THE CASE OF RUSSIA 50 (2009) (detailing AFK Systema's operations in the Russian telecommunications market through its subsidiary Sistema Telecom); *see also To Make Sure That Trademarks Do Not Become Problematic*, RUSSIAN SURVEY (June 2012), http://www.russian-survey.com/from-problem-to-solution/138-to-make-sure-that-trademarks-do-not-become-problematic (noting the practices of foreign holding companies and their Russian subsidiaries).

104. *See Companies with Gazprom's Participation and Other Affiliated Entities—By Share Percent*, GAZPROM, http://www.gazprom.com/about/subsidiaries/subsidiary (last visited Mar. 5, 2013) (listing Gazprom's subsidiaries and other affiliated companies).

105. *See* Sergey Budylin & Yulia Osipova, *Total Upgrade: Intellectual Property Law Reform in Russia*, 1 COLUM. J. E. EUR. L. 1, 32 (2007) (describing the rights associated with the appellations of origin of goods); *see also* John R. Renaud, *Can't Get There from Here: How NAFTA and GATT Have Reduced Protection for Geographical Trademarks*, 26 BROOK. J. INT'L L. 1097, 1121 (2001) (describing the qualities and characteristics of appellation of origin).

106. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1516 (Russ.) (defining appellation of origin).

107. *See Palekh Miniature*, RUSSIA-INFOCENTRE (Aug. 6, 2009, 2:32 PM), http://www.russia-ic.com/culture_art/visual_arts/951/#.UTYHzDBtjxQ.

eral water brand originates from the town of Borjomi in Georgia,[108] and Pavlovo-Posadsk scarfs originate from the district of Pavlovo Posadsky in the Moscow region of Russia.[109]

D. Untraditional Objects of Intellectual Property Law

According to Professor Bliznets, untraditional objects of intellectual property law consist of all the objects of IP law that are not copyrights, allied rights, or industrial property, but are nevertheless protected under Russian IP Law.[110] Such untraditional objects include: (1) selection attainment, (2) topography of integrated circuits, and (3) trade secrets law.[111]

1. Selection Attainment

Selection attainments protected by intellectual property are plant varieties and animal breeds.[112] Plant varieties are groups of plants with special characteristics typical for their genotype that are different from other groups of plants of the same botanic taxonomy.[113] Animal breeds are groups of animals with specific biological and morphological characteristics different from other groups of animals.[114] Selection attainments must be registered in the relevant state register and satisfy the criteria of novelty, distinctness, uniformity and stability.[115] Plant varieties and animal breeds are considered new if, on the date of the patent application, they were not sold or transferred in any way by the breeder.[116] Distinctness is defined by the Civil Code as the

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108. *See Springs*, BORJOMI (2011), http://www.borjomi.com/int_en/water/.

109. *See Moscow Region: Pavlovo-Posadsky District*, TRADE DELEGATION RUSS. FED'N U.K. (2012), http://rus-trade.org.uk/eng/?p=1165 (last visited Mar. 26, 2013).

110. *See* IVAN BLIZNETS, INTELLECTUAL PROPERTY LAW 35 (2011).

111. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1225 (Russ.) (listing legally protected results of intellectual activity); *see also id.* at art. 1349 (providing the results of intellectual activity in the scientific and technical areas shall be objects of patent rights).

112. *See id.* at art. 1412 (outlining the scope of intellectual rights to selection attainment, which includes varieties of plants and breeds of animals); *see also* R. Page Heller, *Russian Patent Law Considerations for Business*, LES NOUVELLES 216, 223 (Sept. 2012) (explaining that "selection attainment" refers to the technologies of breeding animals and obtaining selective plant varieties).

113. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1412 (Russ.) (deeming a group of plants distinct from other groups of plants of the same botanical taxonomy as a variety of plants), *see also* International Convention for the Protection of New Varieties of Plants art. 1, adopted Dec. 2, 1961, S. TREATY DOC. NO. 104-17 (1991) (defining variety as a plant grouping within a single botanical taxon that can be distinguished from any other plant grouping by the expression of at least one of the said characteristics).

114. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1412(3) (Russ.) (defining a breed as a group of animals that possesses genetically specific biological and morphological properties); *see also* Terry A. Young & Dmitri Shulgin, *Intellectual Property Rights in the Russian Federation*, *in* INTELLECTUAL PROPERTY RIGHTS IN AGRICULTURAL BIOTECHNOLOGY 227, 236 (Frederic H. Erbisch & Karim M. Maredia, eds., 2004) (explaining that Russian intellectual property law provides for the protection of animal breeds).

115. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1412(1) (Russ.) (stating that objects of intellectual rights to breeding achievements are registered in the State Register of Protected Breeding Achievements); *see also id*. at art. 1413(2) (listing the criteria for protectability of a breeding achievement).

116. *See id.* at art. 1413(3) (indicating that the novelty of a plant variety or animal breed for the purposes of a patent application is affected by the sale of seeds or breeding material).

qualitative difference of the new selection result and registered selection attainment.[117] Uniformity means that the plant varieties and animal breeds must be morphologically, cytologically and chemically solid.[118] Selection attainments are considered stable if their main characteristics remain the same after reproduction.[119]

2. Topography of Integrated Circuits

Topography of integrated circuits is a three-dimensional disposition of all the elements constituting an integrated circuit and the interconnections fixed on a physical medium.[120] An integrated circuit is a microelectronic article in its final or intermediate form intended to perform an electronic function, the elements and interconnections of which are integrated in the interior and/or on the surface of its material.[121]

3. Trade Secrets Law

Trade secrets law, also known as know-how law, protects information of any kind (e.g., manufacturing, technical, economical, organizational, etc.), including information on the results of intellectual activity in the area of science and technology and information on methods of professional activity, provided such information is commercially valuable by the virtue of being unknown to third persons and has been recognized by the right holder as a trade secret.[122]

IV. Recognition as an Author

In Russian IP law, authors are persons who own copyrighted works, patents, or intellectual property through work for hire or licensing agreements.[123] However, unlike the United States,

117. *See id.* at art. 1413(2) (listing distinctness as a criteria of protectability)*; see also id.* at art. 1413(4) (Russ.) (demonstrating that distinctiveness can be established if the breeding achievement is clearly different from any other known breeding achievement in existence as of the filing of the patent application).

118. *See id.* at art. 1413(5) (noting that uniformity requires that plants of the same variety and animals of the same breed be sufficiently uniform in terms of their traits, taking individual deviations into account).

119. *See id.* at art. 1413(6) (specifying that the stability of a breeding achievement can be established if its basic traits remain unchanged after several reproduction cycles).

120. *See id.* at art. 1448(1) (defining integrated topography); *see also Integrated Circuit Topographies,* CAN. INTELL. PROP. OFFICE, http://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr00005.html (last visited Mar. 7, 2013) (explaining what an Integrated Circuit Topography is, and does).

121. *See* GRAZHDANSKII KODEKS ROSSIIKOI FEDERATSII [GK RF] [Civil Code] art. 1448 (Russ.) (describing an integrated circuit).

122. *See id.* at art. 1465 (defining and explaining the significance of "trade secrets" in Russian intellectual property law).

123. *See* Matthew Mertens, *Thieves in Cyberspace: Examining Music Piracy and Copyright Law Deficiencies in Russia as It Enters the Digital Age*, 14 U. MIAMI INT'L & COMP. L. REV. 139, 164 (explaining that Russian IP law operates through the purchasing of licensing agreements); *see also* Marina Portnova, *Ownership and Enforcement of Patent Rights in Russia*, 8 IND. INT'L & COMP. L. REV. 505, 515 (noting the significance of licensing agreements in Russian IP Law).

Russia does not recognize legal entities as authors.[124] The Russian approach is instead based on the division of IP rights into two categories: (1) moral rights, and (2) exclusive rights.[125] This is the typical approach followed by countries with a Civil Law System,[126] deriving from the "droit d'auteur" ("right of the author") doctrine that first emerged in France in the 18th century.[127] Among moral rights are the right of authorship and right of name.[128] In comparison, the approach followed by countries with a Common Law System, such as the United States, is based on "copyright" doctrine according to which moral rights are attached only to works of visual art.[129] Exclusive rights in the Civil Law System are property rights and can be transferred upon agreement.[130] More generally, the Russian Civil Code defines an exclusive right as a right to use works in any form and any manner not contrary to law.[131] Such usage can be classified into several groups: copying (e.g., reproduction, sale, rent, import), demonstration in public,

124. *See* Mertens, *supra* note 123, at 139, 170 (displaying key differences between Russian and United States IP Law); *see also* William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383, 394 (providing a hypothetical where a Russian author maintains rights to an article she initially writes and publishes in Russia).

125. *See* GRAZHDANSKII KODEKS ROSSIIKOI FEDERATSII [GK RF] [Civil Code] art. 1228 (2), 1229. (Russ.) (articulating the division of Russian IP rights into "moral" and "exclusive" rights).

126. *See* Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 67–68 (2007) (explaining how a civil law system has moral rights designed to protect non-economic interests that common law systems generally do not protect).

127. *See* Todd Shuster, *Originality in Computer Programs and Expert Systems: Discerning the Limits of Protection Under Copyright Laws of France and the United States*, 5 TRANSNAT'L LAW. 1, 17–18 (1992) (explaining how the *droit d'auteur* doctrine emerged in France after the passage of two laws in 1791 and 1793). According to this doctrine authors' moral rights cannot be transferred to any other person. *See* WORLD INTELLECTUAL PROP. ORG., RIGHTS, CAMERA, ACTION! IP RIGHTS AND THE FILM-MAKING PROCESS 16 (2008), http://www.wipo.int/freepublications/en/copyright/869/wipo_pub_869.pdf (indicating that under *droit d'auteur*, countries' moral rights cannot be assigned to, or waived in favor of, the author).

128. *See* Carol G. Ludolph & Gary E. Merenstein, *Author's Moral Rights in the United States and the Berne Convention*, 19 STETSON L. REV. 201, 208 (1989) (recognizing France's statutory grant of moral rights, including right to authorship and respect of name); *see also* Craig A. Wagner, *Motion Picture Colorization, Authenticity, and the Elusive Moral Rights*, 64 N.Y.U. L. REV. 628, 691 (1989) (indicating that moral rights include an artist's personal rights such as his right to authorship, name, and the integrity of her work).

129. *See* Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A (2012) (conferring moral rights only on authors of works of visual art); *see also* Laura Flahive Wu, Massachusetts Museum of Contemporary Art v. Buchel: *Construing Artists' Rights in the Context of Institutional Commissions*, 32 COLUM. J.L. & ARTS, 151, 157 (2008) (characterizing the Visual Artists Rights Act as the United States' response to the need for greater moral rights protections for artists).

130. *See* 2 Copyright Throughout the World § 30:31 (2012) (illustrating how Russia's Civil Code's transfer of exclusive rights does not include the right to amend or terminate a license contract); *see also* Sergey Budylin & Yulia Osipova, *Is All of MP3 Legal? Non-Contractual Licensing Under Russian Copyright Law*, 7 J. HIGH TECH. L. 1, 3 (2007) (indicating that property rights are transferable upon an "author's contract").

131. *See* GRAZHDANKSII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1270 (Russ.) (stating that the author has the exclusive right to use the work according to Article 1229); *see also* VLADIMIR ORLOV, INTRODUCTION TO BUSINESS LAW IN RUSSIA 243 (2011) (providing that exclusive rights allow a work to be used in any manner not contrary to law and in accordance with Article 1229).

communication of works by technical means (e.g., radio, TV), and additional types of usage (e.g., translation or any other remake, realization of architectural, or design project).[132]

V. IP Contracts

According to Russian legislation, a right holder can use his or her exclusive right by any legal means, including alienation to another party in full or in part.[133] If exclusive rights are transferred in full, the right holder transfers or undertakes a commitment to transfer such rights on the results of intellectual activity or means of individualization to the recipient in full scope.[134] If exclusive rights were registered, such agreement also needs state registration and must contain provisions on price.[135] In contrast, the partial transfer of exclusive rights occurs through a license agreement.[136] If exclusive IP rights are partially granted, the holder of the right grants the recipient permission to use the property within the limits of the contract.[137] Similar to a full transfer, if exclusive rights have previously been registered, the agreement also needs state registration.[138] The license agreement should contain provisions on the territory

132. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1484 (Russ.) (stating that the exclusive right to a trademark involves the ability to dispose of the trademark by circulating it for sale among the public, and use in advertising); *see also* Submitted by Gorodissky & Partners, *Year-in-Review, Copyright Law, Russia*, ABA SECTION OF INTERNATIONAL LAW, INTERNATIONAL INTELLECTUAL PROPERTY RIGHTS COMMITTEE, http://meetings.abanet.org/webupload/commupload/IC750000/sitesofinterest_files/ALX1_-GENERAL_C.pdf (last visited Mar. 21, 2013) (noting that the exclusive right was narrowed due to Article 13 of the TRIPS Agreement).

133. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1484 (Russ.) (stating that a trademark holder can use it in any way so long as it is not contrary to law); *see also* Ekaterina Tilling & Igor Motsnyi, *Dealing with Trademarks in Russia*, IP VALUE 2009: BUILDING AND ENFORCING INTELLECTUAL PROPERTY VALUE, 2008, at 173, 173, http://www.iam-magazine.com/issues/Article.ashx?g=0b457231-4c68-4438-bd22-c4e9c6f27f6e (showing how a trademark user can use a trademark in Russia).

134. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1234 (Russ.) (setting the requirements for transfer of an exclusive right).

135. *See* Tilling & Motsnyi, *supra* note 133, at 173, 174, http://www.iam-magazine.com/issues/Article.ashx?g=0b457231-4c68-4438-bd22-c4e9c6f27f6e (explaining that all license agreements in Russia must be registered to be valid).

136. *See* Ekaterina Tilling & Igor Motsnyi, *Recent IP Developments: Hot Topics and Key Court Decisions,* IP VALUE 2010: BUILDING AND ENFORCING INTELLECTUAL PROPERTY VALUE, 2009, 147, 147, http://www.iam-magazine.com/issues/Article.ashx?g=3cb40f6b-f144-4dd0-948b-1bd76de52a61 (noting the general rules concerning licensing agreements); *see also* Rodl & Partner, *IP Law Guide*, RODL & PARTNER (June 2012), http://www.roedl.com/fileadmin/user_upload/Roedl_Russia/Broschueren___PM/englischIP_Law_Guide_2012_eng.pdf (recognizing that a license agreement is used to give limited access to intellectual property).

137. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1235 (Russ.) (noting that the license contract provides limitations on the licensee's use of the intellectual property).

138. *See* Eugene Arievich, Margarita Divina & Marina Sharaeva, *Russia Revises the Rules Applicable to State Registration of License: Agreements and Other Forms of Disposal of Rights in Intellectual Property*, 14 NO. 7 CYBERSPACE LAW. 7 (2009) (listing agreements concerning the transfer of exclusive rights that require registration); *see also Russian Federation Patent and Trade-Mark Procedures*, GOWLINGS INTERNATIONAL INC., at 4–5 (Sept. 2010), http://www.gowlings.com/knowledgeCentre/publicationPDFs/01_PatentTradeMarkProcedures.pdf (stating the procedures one needs to follow to register their licensing and assignment agreements in the Russian federation).

where the rights can be used.[139] If such provisions are not included, rights will apply throughout the entire Russian Federation.[140] Furthermore, the duration of the license agreement cannot be longer than the duration of the owner's exclusive rights.[141] Otherwise, the agreement will automatically expire in five years.[142] In addition, if there are no provisions on price, the agreement is deemed invalid.[143] Last, there are two types of license agreements: (1) exceptional licenses, which provide the right to grant licenses, and (2) non-exceptional licenses, which do not provide the right to grant licenses.[144] Unless otherwise provided by the license agreement, the license is considered non-exclusive.[145]

VI. Registration of IP Rights

The registration of intellectual property varies depending on type. Copyrights and allied rights do not need registration and are protected upon creation.[146] Moral rights are protected

139. *See* Tilling & Motsnyi, *supra* note 133 at 173, 175 (discussing the fact that the territory is material to the licensing agreement); *see also Russian Federation Patent and Trade-Mark Procedures*, GOWLINGS INTERNATIONAL INC., at 5 (Sept. 2010), http://www.gowlings.com/knowledgeCentre/publicationPDFs/01_PatentTradeMarkProcedures.pdf (noting that a licensing agreement must specifically note the territory in the contract).

140. *See* MICHIEL ELST, COPYRIGHT, FREEDOM OF SPEECH, AND CULTURAL POLICY IN THE RUSSIAN FEDERATION 449 (2005) (citations omitted) (noting that if the territory is unspecified, the contract regards the territory as the Russian Federation); *see also* Dmitry Golovanov, *Transformation of Authors' Rights and Neighbouring Rights in Russia*, IRIS PLUS LEGAL OBSERVATIONS OF THE EUROPEAN AUDIOVISUAL OBSERVATORY, at 5 (2008), http://merlin.obs.coe.int/iris/2008/2/article1000.en.html (recognizing that if the territory in the license agreement is not specified, then it applies to the entire Russian Federation).

141. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1235 (Russ.) (stating that the term of the licensing contract cannot be for a period that goes beyond the licensor's valid exclusive right).

142. *See* ELST, *supra* note 140 at 449 (citations omitted) (stating that if no term is specified, an author may revoke the contract after five years with six months' notice); *see also* Dmitry Golovanov, *Transformation of Authors' Rights and Neighbouring Rights in Russia*, IRIS PLUS LEGAL OBSERVATIONS OF THE EUROPEAN AUDIOVISUAL OBSERVATORY, at 5 (2008) (citations omitted), http://merlin.obs.coe.int/ iris/2008/2/article1000.en.html (specifying that if the term of a licensing agreement is not specified, then the implied term will be five years).

143. *See* GRAZHDANKSII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1235 (Russ.) (recognizing that absent a fixed price amount, a valid contract has not been formed).

144. *See* id at art. 1236 (describing the various kinds of license contracts used in Russia).

145. *See id.* (noting that by default, a license is non-exclusive).

146. *See* Sergey Budylin & Olena Kibenko, *Russia and Ukraine*, 42 INT'L LAW. 1083, 1087 (2008) (indicating that literary works, musical works, and computer programs do not need to be registered for protection); *see also* Sergey Budylin & Yulia Osipova, *Total Upgrade: Intellectual Property Law Reform in Russia*, 1 COLUM. J. E. EUR. L. 1, 12–13 (2007) (discussing copyrights and noting that registration is not a requirement for protection).

interminably, and property rights on copyright are protected for seventy years after the author's death.[147]

While computer programs can be registered at the Federal Agency on Intellectual Property (Rospatent) on a voluntary basis,[148] most objects of intellectual property related to patent law require registration.[149] Patent registration for inventions, useful models, and industrial designs takes roughly a year.[150] The process includes the filing of an International, Russian, or Eurasian patent application, patent expertise (consideration of application by Rospatent), state registration, and procurement of the patent itself.[151] The author, or any other entitled person or legal entity, can submit a patent application.[152] For foreign citizens and legal entities, applications must be submitted through a patent attorney.[153] Depending on the registered object, the application must contain descriptions, drawings, formulas, etc.[154] Consideration of the application

147. *See* Budylin & Osipova, *supra* note 146 at 10 (discussing an author's moral rights in a work and how such rights cannot be transferred to others); *see also* Joshua M. Green, *The Russian IPR Problem: How Accession to the WTO Is Not the Magical Solution, Rather a Step in the Right Direction*, 3 AM. U. INTELL. PROP. BRIEF 57, 60 (2011) (citations omitted) (detailing the laws concerning copyrights and noting that copyright protection lasts for "life plus 70 years").

148. *See* Eugene Arievich, Margarita Divina & Marina Sharaeva, *Russia Revises the Rules Applicable to State Registration of License: Agreements and Other Forms of Disposal of Rights in Intellectual Property*, 14 NO. 7 CYBERSPACE LAW. 7, (2009) (listing computer programs among the intellectual property that require registration of any agreement to transfer exclusive rights); *see also* Rospatent, Official Publications of Rospatent: "Computer Programs. Databases. Topographies of Integrated Circuits," FEDERAL SERVICE FOR INTELLECTUAL PROPERTY (ROSPATENT) (2012), http://www.rupto.ru/rupto/portal/1625ee79-458f-11e1-caaf-9c8e9921fb2c (stating that information regarding registered computer software can be found in the Official Gazette of Rospatent).

149. *See* GRAZHDANSKII KODEKS ROSSIIKOI FEDERATSII [GK RF] [Civil Code] art. 1353, 1414, 1452, 1479, 1480, 1518 (describing the steps and various legal consequences of the registration process).

150. *See* Young & Shulgin, *supra* note 2 at 227, 232 (noting that applications for patents are published about eighteen months after the application is filed); *see also* Marina Portnova, Comment, *Ownership and Enforcement of Patent Rights in Russia: Protecting an Invention in the Existing Environment*, 8 IND. INT'L & COMP. L. REV. 505, 512–13 (1998) (citations omitted) (explaining that Russian patent law follows a first-to-file system and it generally takes about eighteen months for the patent to be made available to the public once the application is submitted).

151. *See* Budylin & Osipova, *supra* note 146 at 20–21 (describing the examination process after the filing as lengthy and focused on an "information search" and the "patentability of the invention"); *see also Patent System in Russia: Russian National Filing vs. Euroasian Regional Filing*, WORLD INTELLECTUAL PROP. ORG. RESOURCES (2010), http://www.wipo.int/wipolex/en/text.jsp?file_id=206380#LinkTarget_570 (noting that applicants can also obtain a patent in the Russian Federation by filing with the regional Eurasian patent office).

152. *See* Arievich, Divina & Sharaeva, *supra* note 148 at 7 (noting that under recent changes to the Russian registration process, an applicant can be an individual or a legal entity); *see also Patent System in Russia: How to Obtain Patent Protection in Russia*, WORLD INTELLECTUAL PROP. ORG. RESOURCES (2010), http://www.wipo.int/wipolex/en/text.jsp?file_id=206380#LinkTarget_570 (stating that inventors or their successors may apply for patents).

153. *See* GRAZHDANSKII KODEKS ROSSIIKOI FEDERATSII [GK RF] [Civil Code] art. 1247 (indicating that people permanently living outside of Russia must file their applications through registered patent attorneys); *see also* Young & Shulgin, *supra* note 2 at 227, 232 (reporting that foreign applicants must file their applications through a registered Russian IP lawyer).

154. *See* Young & Shulgin, *supra* note 2 at 231 (discussing the patent application requirements for industrial designs and how it is necessary to include drawings and descriptions); *see also* Andrew A. Baev, *Recent Changes in Russian Intellectual Property Law and Their Effect Upon the Protection of Intellectual Property Rights in Russia*, 19 SUFFOLK TRANSNAT'L L. REV. 361, 374 (1996) (citations omitted) (detailing the specific content that must be included in a patent application).

is based on patent priority.[155] There are five main priorities: (1) application (date of the first application), (2) conventional (date of the first application in any member state of the Paris Convention for the Protection of Industrial Property),[156] (3) the submission date of additional documents, (4) the submission date of any earlier applications, and (5) priority of the selected application.[157] Beginning on the filing date, registration for inventions is valid for 20 years, registration for useful models is valid for ten years, and registration for industrial designs is valid for 15 years.[158] However, the time may be extended upon application.[159] Temporary protection is granted during the period between application and registration.[160]

Similar to patents, trademark registration takes approximately one year.[161] The trademark procedure includes application, expertise, state registration, and issuance of a certificate.[162] The application must contain a picture of the trademark in both black/white and color, as well as a description of the sign, and a list of goods or services the trademark will be used for.[163] Trade-

155. *See* Baev, *supra* note 154 at 374 (citations omitted) (noting that the examination of a patent application is divided into two different steps, namely preliminary examination and substantive examination); *see also* Budylin & Osipova, *supra* note 146 at 19 (declaring that the Russian priority system is based on who files first, rather than who invents first).

156. *See* Paris Convention for the Protection of Industrial Property art. 4, Mar. 20, 1883, 828 U.N.T.S. 305 (recognizing applications in other members of the union); *see also* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1382 (Russ.) (describing Convention Priority).

157. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1381 (Russ.) (outlining the steps necessary for the establishment of patent priority in an invention, utility model or industrial design); *see also* VLADIMIR ORLOV, INTRODUCTION TO BUSINESS LAW IN RUSSIA 268 (2011) (observing priority of inventions, utility models, or industrial designs will be determined by the filing date of the application).

158. *See* Sergey Budylin & Olena Kibenko, *Russia and Ukraine*, 42 INT'L LAW. 1083, 1088 (2008) (citations omitted) (detailing the protection period for inventions, utility models and industrial designs); *see also Patent System in Russia: Terms of Protection*, WORLD INTELLECTUAL PROP. ORG. RESOURCES (2010), http:/www.wipo.int/wipolex/en/text.jsp?file_id=206380#LinkTarget_570 (noting the period of protection for inventions, utility models and industrial designs).

159. *See* Sergey Budylin & Yulia Osipova, *Total Upgrade: Intellectual Property Law Reform in Russia*, 1 COLUM. J. E. EUR. L. 1, 19 (2007) (citations omitted) (stating that the protection over inventions, utility models and industrial designs may be extended); *see also Patent System in Russia*, WORLD INTELLECTUAL PROP. ORG. RESOURCES (2010), http://www.wipo.int/wipolex/en/text.jsp?file_id=206380#LinkTarget_570 (observing that the term of protection for a utility model and industrial design may be extended).

160. *See Patent System in Russia: Enforcement of Patent Rights in Russia*, WORLD INTELLECTUAL PROP. ORG. RESOURCES (2010), http://www.wipo.int/wipolex/en/text.jsp?file_id=206380 (explaining that an invention patent application has temporary legal protection once the application is published).

161. *See Russian Federation Patent and Trade-Mark Procedures*, GOWLINGS INT'L INC., at 3 (Sept. 2010), http://www.gowlings.com/knowledgeCentre/publicationPDFs/01_PatentTradeMarkProcedures.pdf (finding that the Rospatent's two-stage examination process can take up to approximately 12 months to complete)*; see also* Anna Kakurnikova, Anton Levin & Vladimir Slyshchenkov, *Legal Regulations on Trademarks and Patents in Russian Pharmaceutics*, BALTIC LAW OFFICES (Aug. 31, 2009), http://www.balticlaw.com/bin/Legal_Regulations.pdf (recognizing that the entire Rospatent process for examining a registration application currently takes up to two years).

162. *See* Harry F. Manbeck, Jr., *Notice Regarding Patent and Trademark Rights in the Russian Federation*, RIGHTS IN THE RUSSIAN FEDERATION (Mar. 2, 1992), http://www.uspto.gov/web/offices/com/sol/og/con/files/cons212.htm (citing a letter from V. Rossokhin, Chairman of Rospatent, and illuminating that after submitting an application, examiners decide on the propriety of the patent before issuing a certificate).

163. *See International Classification of Goods and Services Under the NICE Agreement, Tenth Edition,* WORLD INTELLECTUAL PROP. ORG. RESOURCES, http://www.wipo.int/classifications/nivilo/nice/index.htm?lang=EN (last visited Mar. 19, 2013) (setting forth the proper serial number and indication for classes of goods and services).

mark expertise is also based on priority.[164] There are three main priorities: (1) application (date of first application), (2) conventional (date of first application in any member state of the Paris Convention), and (3) exhibition (in case of exhibition in any member state of the Paris Convention).[165] Trademark registration is valid for ten years from the filing date.[166] This time may also be extended upon application.[167] However, if a registered trademark is not used for three years, the registration may be cancelled.[168]

VII. Liability

The violation of IP rights creates liability under Russian legislation.[169] There are three main types of liability in Russian law: (1) administrative; (2) civil; and (3) criminal.[170]

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164. *See* Alexander Nesterov, *Taking a Commercial Approach to Protection*, WORLD TRADEMARK REV., Dec. 2012/Jan. 2013, at 86, 86, http://www.worldtrademarkreview.com/issues/article.ashx?g=42bbe09b-6d0a-4c27-8160-f98c9f288d6f (stating that Russian trademark registration operates on a first-to-file system).

165. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1495 (Russ.) (setting forth how the priority of a trademark shall be determined); *see also See* I.A. BLIZNETS, INTELLECTUAL PROPERTY LAW 35, at 352–55 (2011), http://u-3d.ru/3368-pod-redakciey-i-a-blizneca-pravo-intellektualnoy-sobstvennosti/ (discussing the modification of trademark priorities as a result of new Russian legislation).

166. *See* VLADIMIR ORLOV, INTRODUCTION TO BUSINESS LAW IN RUSSIA 274 (2011), http://www.ashgate.com/default.aspx?page=637&calcTitle=1&isbn=9780754677550&lang=cy-GB (stating that a trademark remains valid for ten years after filing an application for state registration); *see also* OECD, THE ECONOMIC IMPACT OF COUNTERFEITING AND PIRACY 247 (2008), http://www.oecdbookshop.org/oecd/display.asp?lang=EN&sf1-=identifiers&st1=9789264045521(noting that trademark protection lasts ten years from the date of filing).

167. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1491 (Russ.) (highlighting that the rights owner of a valid trademark can extend the effective term period by ten years for an infinite number of times); *see also* VLADIMIR ORLOV, INTRODUCTION TO BUSINESS LAW IN RUSSIA 274 (2011), http://www.ashgate.com/default.aspx?page=637&calcTitle=1&isbn=9780754677550&lang=cy-GB (stating that the right holder can request a renewal period of ten years).

168. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1486 (Russ.) (delineating the consequences of the non-use of a trademark); *see also* OECD, THE ECONOMIC IMPACT OF COUNTERFEITING AND PIRACY 247 (2008), http://www.oecdbookshop.org/oecd/display.asp?lang=EN&sf1=identifiers&st1=9789264045521 (cautioning that trademark protection lapses if the mark is not used for three consecutive years after the initial issuance).

169. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1225 (Russ.) (establishing legal protection for intellectual activities); *see also* UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code] art. 146 (Russ.) (citing the criminal sanctions for infringing on copyrights).

170. *See* Trudy S. Martin, *Vicarious and Contributory Liability for Internet Host Providers: Combating Copyright Infringement in the United States, Russia, and China*, 27 WIS. INT'L L.J. 363, 372 (2009) (emphasizing that infringers face civil, criminal and administrative sanctions under copyright law); *see also Patent System in Russia, Enforcement of Patent Rights in Russia*, WORLD INTELLECTUAL PROP. ORG., http://www.wipo.int/wipolex/en/text.jsp?file_id=206380#LinkTarget_362 (last visited Mar. 8, 2013) (indicating that civil, criminal and administrative enforcement procedures secure patent rights).

A. Administrative Liability

Administrative liability for infringement of IP rights is set in articles 7.12 and 7.28 of the Administrative Offenses Code of the Russian Federation.[171] Article 7.12 concerns infringements, while Article 7.28 covers violations.

1. Infringement of Copyright and Allied Rights, Inventors', and Patent Rights

The Administrative Offenses Code imposes administrative fines for the import, sale, rental, or any other unlawful use of copies of works or phonograms with the purpose of obtaining revenue if they are counterfeit in accordance with Russian copyright law.[172] An administrative fine is also levied where copies of works (phonograms) provide false information about manufacturers, sites of their production, or the holders, or infringe on any other rights to obtain revenue.[173] The fine varies from 15 to 400 times the minimum wage, depending on the status of the offender.[174] In addition to the fine, infringement will also result in confiscation of counterfeited copies of works and phonograms, the materials and equipment used for the reproduction, and any other instruments used to commit the offense.[175] Furthermore, the unlawful use or disclosure of essential information of an invention, utility model, or industrial design, without the author's/applicant's consent and prior to the official publication of information in the state register, entails the imposition of an administrative fine; appropriation of authorship and coercion to co-authorship also results in an administrative fine.[176] The severity of the administrative fine ranges from 15 to 20 times the minimum wage for citizens, 30 to 40 times the minimum wage for officials, and 300 to 400 times the minimum wage for legal entities.[177]

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171. *See* KODEKS ROSSIISKOI FEDERATSII RF OB ADMINISTRATIVNYKH PRAVONARUSHENIIAKH [KOAP RF] [Code of Administrative Violations] art. 7.12 (Russ.) (providing administrative fines and confiscation of counterfeited copies for violations of copyright and patent rights); *see also* KODEKS ROSSIISKOI FEDERATSII RF OB ADMINISTRATIVNYKH PRAVONARUSHENIIAKH [KOAP RF] [Code of Administrative Violations] art. 7.28 (Russ.) (imposing an administrative fine for violating the established procedure for patenting objects of industrial property in foreign states).

172. *See* KODEKS ROSSIISKOI FEDERATSII RF OB ADMINISTRATIVNYKH PRAVONARUSHENIIAKH [KOAP RF] [Code of Administrative Violations] art. 7.12 (Russ.) (providing for the punishment of intellectual property infringements).

173. *See id.* (citing that copyright infringement entails the imposition of an administrative fine).

174. *See id.* (outlining fines of 15–20 times the minimum wage for citizens, 30–40 times the minimum wage for officials, and 300–400 times the minimum wage for legal entities); *see also* Martin, *supra* note 170 at 373 (calculating between $675 and $900 after converting to the U.S. dollar).

175. *See id.* at art. 7.12 (stating that fines are accompanied by confiscation of copyrighted works as well as other instruments used in reproductions and administration of the offense); *see also* WILHELMINA SHAVSHINA, CORPORATE COUNSEL'S GUIDE TO DOING BUSINESS IN RUSSIA § 20:31 (clarifying that customs authorities may initiate cases and administrative proceedings for violations of Article 7.12).

176. *See* KODEKS ROSSIISKOI FEDERATSII RF OB ADMINISTRATIVNYKH PRAVONARUSHENIIAKH [KOAP RF] [Code of Administrative Violations] art. 7.12 (Russ.) (detailing actions that infringe upon intellectual property rights).

177. *See id.* (emphasizing the increase in liability as professional status increases); *see also* Arina Sharipova, *Minimum Wages are Willing to Increase*, KOMMERS., Dec. 11, 2006, http://www.kommersant.ru-/doc/729126 (indicating an increase in minimum wage, which would impact the amount of fines).

2. Violation of Patenting Procedure of Industrial Property Objects in Foreign States

According to the Administrative Offences Code, violating the established procedure for patenting industrial property objects in foreign countries is punishable by an administrative fine of 10 to 20 times the minimum wage for citizens and 500 to 800 times the minimum wage for legal entities.[178]

B. Civil Liability

Two types of civil liability exist for the infringement of IP rights. The first, general civil liability, is regulated by the General Part of the Civil Code.[179] The second, special civil liability, is regulated by the Fourth Part of the Civil Code.[180] General liability includes recognition of exclusive rights, suppression of actions that infringe or threaten to infringe upon exclusive rights, damages compensation, and moral damages compensation.[181] Special liability includes: the potential for special compensation for the infringement of exclusive rights instead of damages; withdrawal from circulation of counterfeit material carriers and their destruction upon the court's decision; withdrawal from circulation of equipment, devices, and materials used for infringement of rights and destruction upon the court's decision; and/or publication of the court's decision on the infringement with an indication of the appropriate right holder.[182] In the case of repeated or gross infringement of exclusive rights, a court may render a decision liquidating a legal entity or terminating a citizen's right to conduct business as sole proprietor.[183]

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178. *See* KODEKS ROSSIISKOI FEDERATSII RF OB ADMINISTRATIVNYKH PRAVONARUSHENIIAKH [KOAP RF] [Code of Administrative Violations] art. 7.28 (Russ.) (excluding liability for officers committing such violations).

179. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 12 (Russ.) (enumerating the ways of protecting civil rights).

180. *See id.* at art. 1252(3), (5), 1253 (recognizing the protection of exclusive rights and emphasizing the specific responsibilities of legal persons and sole traders).

181. *See id.* at art. 1099–1101 (defining the grounds and methods for compensation of moral damages); *see also* Trudy S. Martin, *Vicarious and Contributory Liability for Internet Host Providers: Combating Copyright Infringement in the United States, Russia, and China*, 27 WIS. INT'L L.J. 363, 372 (2009) (noting the additional civil remedies afforded by the Law of the Russian Federation on Copyright and Neighboring Rights).

182. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1252 (Russ.) (listing the enforcement remedies and penalties available upon a finding of exclusive rights infringement); *see also* EUROPEAN PATENT OFFICE, EUROPEAN UNION, PATENT SYSTEM IN RUSSIA 16 (2010) (asserting that patent owners can request compensation for loss profits in addition to actual damages and litigation expenses).

183. *See* GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1253 (Russ.) (noting that a court order can subject a legal entity or a citizen entrepreneur to dissolution for infringing on exclusive rights); *see also* Anne Fiero, *Russia Shuts Down Counterfeit Software Provider in Krasnodar*, EURASIAN LAW (Feb. 13, 2003), http://eurasian-law-breaking-news.blogspot.com/2013/02/russia-shuts-down-counterfeit-software.html (reporting that a Russian court enforced Article 1253 when it issued a verdict closing down a private business that sold counterfeit software disks).

C. Criminal Liability

Chapter 19 of the Criminal Code establishes criminal liability for crimes against constitutional rights and freedoms of men and citizens, while crimes in the sphere of economic activity are regulated under Chapter 22 of the Criminal Code.[184] In Russia, only natural persons are subject to criminal liability.[185] It is important to note that, in the last 10 years, Russian legislation has stiffened the penalties for IP crimes.

1. Violation of Copyright and Allied Rights

Chapter 19 of the Criminal Code of the Russian Federation mandates the imposition of a fine of up to 200,000 rub, income (salary) for up to 18 months, compulsory labor for 480 hours to one year, or arrest for a period of up to six months for any appropriation of authorship (plagiarism) causing significant damages to the author or another right holder.[186]

Any illegal use of copyrighted objects or objects of allied rights, as well as the acquisition, storage or carriage of counterfeited copies of works or phonograms valued at more than 100,000 rub for the purposes of sale, entails a fine of up to 200,000 rub, income (salary) up to 18 months, compulsory labor for 480 hours to two years, or imprisonment up to two years.[187] When the aforementioned acts are committed by a group of persons in preliminary collusion, an organized group, or a person with the use of his official position, this can result in compulsory labor for up to five years, or imprisonment for up to six years with an attendant fine of up to 500,000 rub or income (salary) up to three years.[188]

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184. *See* UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code] art.136, \ 169–70 (Russ.) (noting that constitutional or economic crimes are punishable by fine or incarceration); *see also* F.M. RUDINSKY, CIVIL HUMAN RIGHTS IN RUSSIA: MODERN PROBLEMS OF THEORY AND PRACTICE 230 (2008) (specifying that Chapter 19 of the CCRF reinforce civil rights safeguards by criminalizing invasions on personal privacy); *see also* KAY GOODALL, MARGARET MALLOCH & BILL MUNRO, BUILDING JUSTICE IN POST-TRANSITION EUROPE: PROCESSES OF CRIMINALIZATION WITHIN CENTRAL AND EASTERN EUROPEAN SOCIETIES 99 (2013) (stating that Chapter 22 of CCFR emerged from Russian politicians' historical concerns in providing economic protection).

185. *See* UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code] art. 19–20 (Russ.) (limiting the application of the code to sane natural individuals that also meet the age requirement established by statute); *see also* INT'L INTELLECTUAL PROP. ALLIANCE, *2012 Special 301 Report on Copyright Enforcement and Protection* (Feb. 10, 2012) (acknowledging that corporate entities are not subjected to criminal liability for infringement due to the difficulties of establishing a claim against them).

186. *See* UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code] art. 146 (Russ.) (detailing the damages a defendant could be subjected to if found guilty of committing plagiarism).

187. *See id.* (noting that unlawful use and storage of copyrights or associated rights are punishable by fine, compulsory labor or incarceration); *see also* EUROPEAN PATENT OFFICE, EUROPEAN UNION, PATENT SYSTEM IN RUSSIA 16 (2010) (asserting that infringers can face large monetary fines or imprisonment for up to two years).

188. *See* UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code] art. 146 (Russ.) (stating that crimes conducted by groups of individuals in concert or organized groups are exposed to penalties entailing fines, involuntary labor, and incarceration); *see also* EUROPEAN PATENT OFFICE, EUROPEAN UNION, PATENT SYSTEM IN RUSSIA 16 (2010) (listing the infringement consequences when conducted by an organized group or a group of people working together according to a plan).

2. Violation of Inventors' Rights and Patent Rights

According to Chapter 22 of the Criminal Code of the Russian Federation, the illegal use of an invention, useful model, or industrial design, which causes significant damages, can result in a fine of up to 200,000 rub, income (salary) up to 18 months, compulsory labor for a period of 480 hours to two years, or imprisonment for the same period.[189] This same fine is also imposed for the disclosure of essential information about an invention, useful model, or industrial design, without the author's/applicant's consent and before its official publication in the state register.[190] The illegal acquisition of authorship or compulsion of co-authorship also carries the same fine.[191] Acts committed by a group of persons in preliminary collusion, or by an organized group, entail a fine from 100,000 to 300,000 rub, income (salary) for one to two years, arrest up to six months, or imprisonment for up to five years.[192]

3. Illegal Use of a Trademark

Chapter 22 of the Criminal Code of the Russian Federation also regulates trademark violations.[193] Chapter 22 mandates that any illegal use of a trademark or appellation of origin, committed repeatedly or which caused substantial damage, be punishable by a fine of up to 200,000 rub, income (salary) for up to 18 months, or compulsory labor for 480 hours to two years.[194] Similarly, the illegal use of a special marking with respect to a trademark or appellation of origin not registered in the Russian Federation, committed repeatedly or which caused substantial damage, can result in a fine of 500,000 to 1,000,000 rub, income (salary) for three to five years, or imprisonment up to six years with an attendant fine of up to 500,000 rub or income (salary) up to three years.[195] Acts committed by a group of persons in preliminary col-

189. *See* UGOLOVNYI KODEKS ROSSIIKOI FEDERATSII [UK RF] [Criminal Code] art. 147 (Russ.) (stating that illegal use of an author's work without his consent is punishable by law via fine or imprisonment).

190. *See id.* (describing the applicable punishments for inappropriate disclosure of essential information).

191. *See id.* (detailing the punishment levied for plagiarism).

192. *See id.* (stating that illegal use of an author's work without his consent, when committed by a group of people, is punishable via a fine of 400 to 800 minimum wages, or by imprisonment); *see also* M. Piotr P. Serkov, *Advisory Committee on Enforcement*, WORLD INTELLECTUAL PROP. ORG. 1 (Oct. 8, 2007), http://www.google.com/url?sa=t&rct-=j&q=&esrc=s&source=web&cd=1&ved=0CDIQFjAA&url=http%3A%2F%2Fwww.wipo.int%2Fedocs%2Fmdocs%2Fenforcement%2Fen%2Fwipo_ace_4%2Fwipo_ace_4_6.doc&ei=7zM9UanONuWy0AGQIHwDA&usg=AFQjCNEXIUz4GkH0wY_xqtaq7aECU9K6LA&sig2=UloKTR4L7rHFLtUO5-iJhQ&bvm=bv.43287494,d.dmQ (discussing that Article 147 of the Criminal Code of the Russian Federation provides for criminal liability for the infringement of an inventor's patent rights).

193. *See* UGOLOVNYI KODEKS ROSSIIKOI FEDERATSII [UK RF] [Criminal Code] art. 146 (Russ.) (noting that illegal use of another's trademark is punishable by fine or imprisonment).

194. *See id.* at art. 180 (noting that illegal use of another's trademark, where it results in "heavy damage" to the author or other possessor of those rights, is punishable by fine or imprisonment).

195. *See id.* at art. 147, 180 (enacting a stricter penalty for the illegal use of special marking in respect to a trademark or appellation of origin not registered in the Russian Federation, which was committed repeatedly or caused substantial damage, for up to six years of imprisonment).

lusion, or by an organized group, entail a fine of 100,000 to 300,000 rub, income (salary) for one to two years, arrest up to six months, or imprisonment for up to five years.[196]

4. The Illegal Receipt and Disclosure of a Commercial, Tax or Banking Secret

The last article dealing with IP rights in Chapter 22 covers the illegal receipt and disclosure of information classified as a commercial, tax, or banking secret.[197] A violation of the provisions of this article can result in a fine of up to 80,000 rub, income (salary) for 1 to 6 months, compulsory labor for up to two years, or imprisonment for the same period.[198] Any illegal disclosure or use of information classified as a commercial, tax, or banking secret, without the owner's consent and which was entrusted or became known as a result of service or work, entails a fine of up to 120 000 rub, income (salary) up to one year with a restriction on executing professional activities for up to three years, compulsory labor for up to three years, or imprisonment for the same period.[199] Acts causing significant damage, or that were committed in the pursuit of a mercenary interest, carry a fine up to 200,000 rub, income (salary) for up to 18 months with a restriction on executing professional activities for up to three years, compulsory labor for up to five years, or imprisonment for the same period.[200] Acts resulting in severe consequences can be punished with compulsory labor for up to five years, or imprisonment for up to seven years.[201]

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196. *See id.* (discussing illegal use of another's trademark, when committed by an organized group of people, is punishable by fine or imprisonment); *see also* M. Piotr P. Serkov, *Advisory Committee on Enforcement*, WORLD INTELLECTUAL PROP. ORG. 1 (Oct. 8, 2007), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0-CDIQFjAA&url=http%3A%2F%2Fwww.wipo.int%2Fedocs%2Fmdocs%2Fenforcement%2Fen%2Fwipo_ace_4%2Fwipo_ace_4_6.doc&ei=7zM9UanONuWy0AGQIHwDA&usg=AFQjCNEXIUz4GkH0wY_xqtaq7aECU9K6LA&sig2=UloKTR4L7rHFLtUO5iJhQ&bvm=bv.43287494,d.dmQ (discussing that Russia's Criminal Code provides criminal liability for illegal use of a trademark belonging to another person, where such act has caused "major" damage).

197. *See* UGOLOVNYI KODEKS ROSSIIKOI FEDERATSII [UK RF] [Criminal Code] art. 183 (Russ.) (discussing the illegality of receiving and/or disclosing classified information regarding commercial, tax, or banking secrets).

198. *See id.* (establishing that a violation will result in a fine, a period of obligatory work, or imprisonment).

199. *See id.* (stating that an illegal disclosure of commercial information that became known through service or work will result in a fine with a restriction on exercising professional activities, or imprisonment); *see also* N. Stephan Kinsella, *Protection of Industrial Property: Russian Patent and Intellectual Property Law*, RUSS. OIL & GAS GUIDE, July 1994, at 21 (discussing that illegal disclosure of information about a patented invention can result in criminal liability).

200. *See* UGOLOVNYI KODEKS ROSSISKOI FEDERATSII [UK RF] [Criminal Code] art. 183 (Russ.) (discussing the penalties for acts which caused significant damage or were committed in the pursuit of a mercenary interest); *see also* E. Moiseeva, *Protection of Intellectual Property Rights in the Russian Federation and the Latest Changes in Legislation in the Fight Against Counterfeiting and Piracy,* WORLD INTELLECTUAL PROP. ORG. (May 19, 2004), http://www.wipo.int/meetings /en/doc_details.jsp?doc_id=29552 (stating that the Code provides for liability for the dissemination of information with limited access by a person who has received access to such information in connection with the performance of employment of professional duties).

201. *See* UGOLOVNYI KODEKS ROSSISKOI FEDERATSII [UK RF] [Criminal Code] art. 183 (Russ.) (declaring that acts which caused heavy consequences will be penalized by obligatory work or imprisonment for up to five years); *see also* Moiseeva, *supra* note 201 (explaining that the criminal law in force in the Russian Federation protects copyright, trade service marks, and know-how protected as part of trade secrets).

VIII. Dispute Resolution

The development of IP law in Russia, as well as an increase in the amount of related cases, has revealed a significant demand for both educated IP lawyers capable of solving issues both nationally and internationally as well as a specialized judicial institution in the system of Russian courts. Until now, IP disputes have been resolved either in courts of general jurisdictions (copyright and related rights disputes) or in arbitral courts (industrial property disputes).[202] For industrial property disputes related to decisions of Rospatent, a dispute resolution option exists at the Chamber of Patent Disputes of Rospatent.[203] IP disputes related to unfair competition are considered by the Federal Antimonopoly Service (FAS).[204]

However, this system is about to change. On November 29, 2011, the Federal Assembly approved the Federal Law on Amendments to the Constitutional Law on Judicial System of the Russian Federation and Constitutional Law on Arbitrational Courts in the Russian Federation.[205] According to this law, specialized arbitration courts will be established to consider IP disputes at the first and cassation levels.[206] Russian accession to the WTO, as well as an economic priority to stimulate innovation, influenced the decision to incorporate IP courts into the system of Russian arbitrational courts.[207] These courts began considering cases February 1, 2013. They were expected to be located in Skolkovo.[208] However, these courts will consider

202. *See* Ekaterina Tilling & Elena Polevaya, *Significant Developments in the Russian Court System: Creation of the Intellectual Property Court*, INTELL. PROP. REP. (Baker Botts LLP, New York, N.Y.), Jan. 2012 (stating the IP disputes in Russia are currently resolved by courts of general jurisdiction and state arbitrazh courts); *see also Intellectual Property Litigation in Russian Arbitration Courts* (Gowlings LLP, Moscow, Russ.) 2010, at 1, http://m.gowlings.com/knowledgeCentre/publicationPDFs/01_Moscow_IPLitigation_Apr09_final.pdf (stating that the vast majority of Russian intellectual property disputes are heard in arbitration courts).

203. *See* DR. NICOLAI V. FÜNER, WORLD INTELLECTUAL PROP. ORG., RUSSIAN FEDERATION: PATENT SYSTEM IN RUSSIA (2010) (explaining that the Chambers for Patent Disputes handles appeals to decisions by Rospatent and nullity actions filed against an issued patent); *see also* David Aylen & Dmitry Semenov, *The Gradual Acceptance of ADR in Russia*, INTERNATIONAL TRADEMARK ASSOCIATION (2013) (establishing that the Chambers of Patent Disputes is the body empowered to hear trademark and patent cancellation and revocation proceedings in Russia).

204. *See Unfair Competition Report,* INTERNATIONAL TRADEMARK ASSOCIATION, EUROPEAN & CENTRAL ASIA LEGISLATION AND REGULATORY SUB-COMMITTEE 85 [INTA] (stating the role of the FAS against unfair competition); *see also Protecting and Enforcing Intellectual Property Rights in Today's Russia, Case: City of St. Petersburg, in* THE BALTIC INSTITUTE OF FINLAND 15 (2006) (reciting the responsibilities of the FAS).

205. *See* FEDERAL'NYI KONSTITUTSIONNYI ZAKON [FKZ] [CONSTITUTION], N 4-FKZ (Russ.), http://www.rg.ru/2011/12/09/sudi-dok.html (depicting the approval date for the Federal Law).

206. *See id.* at art. 43, http://www.rg.ru/2011/12/09/sudi-dok.html (establishing the jurisdiction of the court to include appeals).

207. *See* Richard Connolly, *The Economic Significance of Russia's Accession to the WTO*, EUROPEAN PARLIAMENT, POLICIES DEPARTMENT DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION, at 19 (June 13, 2012), http://www.europarl.europa.eu/committees/en/inta/studiesdownload.html?languageDocument=EN&file=74511 (reciting Russia's commitment to IPR by applying provisions of the WTO Agreement on Trade-related Aspects of Intellectual Property Rights); *see also* Katinka Barysch et al., *Russia and the WTO*, CTR. FOR EUROPEAN REFORM, at 20 (Dec. 2002) (stating that Russia's accession into the WTO encourages increased investment).

208. *See INTABulletin,* 67 INT'L TRADEMARK ASS'N. 11 (2012) (stating that the IPR Court will be established no later than Feb. 1, 2013); *see also* Timur Djabbarov & Elvira Danilova, *Russia on Its Way to Establishing a Specialized IPR Court*, IP FRONTLINE (Mar. 7, 2012), https://www.ipfrontline.com/depts/article.aspx?id=26543&deptid=7 (reiterating the start date for the IPR Court in Skolkovo).

only industrial property disputes, while copyright and related rights disputes will remain in the courts of general jurisdiction.[209]

Conclusion

This article, which gives an overview of Russian IP law, aims to help American lawyers in relevant international cases, especially given the lack of information on Russian law in the English language. Russian IP law has been constantly changing since the crash of the Soviet Union, and there are many more changes to come in light of Russian accession to the WTO and the development of global technology. In the last ten years, Russia has made positive improvements in its national legislation on intellectual property, bringing it in line with international standards and making it more transparent for foreign trade and investment.

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209. *See The IPReport*, COALITION FOR INTELLECTUAL PROPERTY RIGHTS, at 1 (2001) (stating that the copyright infringement cases will still be resolved by courts of general jurisdiction); *see also* Kim, *supra* note 6 (emphasizing that courts of general jurisdiction hear cases on IP infringement).

The Legal Service Market in China: Implementation of China's GATS Commitments and Foreign Legal Services in China

Liyue Huang*

Introduction

This article examines the legal service market in China, especially the market share of foreign legal service providers (FLSP), in the context of China's membership with the World Trade Organization (WTO). China joined the WTO on 11 December 2001.[1] As part of accession commitments, China agreed to open its service market, gradually and conditionally, to its fellow WTO members under the General Agreement on Trade in Services (GATS).[2] The commitments are documented in GATS/SC/135 (GATS Commitments).[3] The first commitment documented on the schedule is legal services.[4]

China's fast growing economy relies heavily on foreign investments and international trading.[5] The involvement of foreign legal services is indispensable, particularly because the language barriers between the East and West business partners are a major obstacle.[6] From a foreign investor or trading partner's perspective, it is simply too risky to leave matters of legal

1. *See China—Member Information*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/countries_e/china_e.htm (last visited Mar. 17, 2013) (stating that China joined the World Trade Organization on December 11, 2001 and providing relevant documents related to the accession).

2. *See* Karen Halverson, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319, 327 (2004) (explaining that China made a commitment to open various sectors covered by GATS, including the legal services market).

3. *See* General Agreement on Trade in Services, Apr. 15, 1994, The People's Republic of China: Schedule of Specific Commitments, Feb. 14, 2002, http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/SCHD/GATS-SC/SC135.doc (detailing the specific commitments that China made in acceding to the World Trade Organization).

4. *See id.* (listing legal services as the first commitment that China agreed to undertake).

5. *See* Peng Sun & Almas Heshmati, *International Trade and its Effects on Economic Growth in China* 3, INST. FOR THE STUDY OF LABOR, Aug. 2010 Discussion Series, Discussion Paper No. 5151 (2010), http://ftp.iza.org/dp5151.pdf (expressing that China's entry onto the global market and international trade have been factors in the country's economic growth); *see also* Kevin H. Zhang, *Foreign Direct Investment and Economic Growth in China: A Panel Data Study for 1992-2004* at 2, UNIV. OF INT'L BUS. & ECON. WTO, China and Asian Economies Conference, http://faculty.washington.edu/karyiu/confer/beijing06/papers/zhang.pdf (commenting that while China's economic growth has been steady, China's economy mainly depends on foreign investment).

6. *See* Catherine Sun, *Negotiating Business Transactions in China*, ASPATORE, 2009, at *7, WL 1007717 (discussing language barriers and cultural differences as some of the most common obstacles U.S. attorneys in China face); *see also* Kelly Charles Crabb, *Providing Legal Services in Foreign Countries: Making Room for the American Attorney,* 83 COLUM. L. REV. 1767, 1768 (1983) (highlighting the importance of the English language as the international language of commercial negotiations and contracts).

* **JD, University of Kansas Law School; LLB Second Class Honors, University of London.**

consequence to lawyers who do not speak the same language.[7] Furthermore, the Chinese legal system and profession have not reached the level of maturity that could command the confidence of foreign investors and trading partners.[8]

Foreign legal services are a necessary supplement to the legal services provided by Chinese legal professionals.[9] However, they threaten to derail or at least forestall the development of the infantile Chinese legal industry with overwhelming financial and organizational strength.[10] A struggle between the Chinese legal profession and its foreign counterparts is bound to ensue.[11] State intervention will be vital for the survival of the Chinese legal profession, if it can be balanced with its WTO obligations.

Cross-border delivery is realized by four modes of supply, all of which are incorporated into GATS.[12] This discussion will focus on one of those modes of supply—Commercial Presence. Commercial Presence is the delivery of legal services through direct foreign investment.[13] Since the delivery of legal services on aspects other than Chinese law does not rely on the access to Chinese legal service market, our discussion will be confined to legal services concerning

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7. *See* RICHARD A. DANNER & JULES WINTERON, THE IALL INTERNATIONAL HANDBOOK OF LEGAL INFORMATION MANAGEMENT 249 (2012) (indicating the importance of knowledge of the national language when dealing in depth with a foreign legal system); *see also* Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference,* 54 UCLA L. REV. 999, 1024 (2007) (stating the danger in complicating the ability of the lawyer to understand and effectuate the client's goals and wishes).

8. See Ding Xiangshun, Chinese Corporate Lawyers Face Challenges in Maintaining Corporate Social Responsibility in the Age of Globalization, 21 IND. INT'L & COMP. L. REV. 509, 517 (2011) (referring to the competition presented by Western attorneys equipped with a developed legal ethics system and higher professional standards); see also Randall Peerenboom, China's Legal System: A Bum Rap, UCLA INTERNATIONAL INSTITUTE, http://www.international.ucla.edu/article.asp?parentid=2878 (last updated Jan. 06, 2003) (stating that the portrait of China's legal system in the West remains to be overwhelmingly negative).

9. *See* Mark A. Cohen, *International Law Firms in China: Market Access and Ethical Risks,* 80 FORDHAM L. REV. 2569, 2574 (2012) (arguing that the integration of foreign law firms into China will continue to attract foreign investors); *see also* Misasha Suzuki, Note, *The Protectionist Bar Against Foreign Lawyers in Japan, China, and Korea: Domestic Control in the Face of Internationalization*, 16 COLUM. J. ASIAN L. 385, 402 (2003) (discussing the importance of foreign lawyers in encouraging domestic Chinese firms to adopt a more international outlook in their practices).

10. *See* Jane J. Heller, *China's New Foreign Law Firm Regulations: A Step in the Wrong Direction*, 12 PAC. RIM L. & POL'Y J. 751, 775–76 (2003) (warning of the competition presented by large foreign firms capable of taking advantage of economies of scale and scope); *see also* Sida Liu, *Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market,* ACADEMIA.EDU, http://www.academia.edu/199082/Globalization_as_Boundary-Blurring_International_and_Local_Law_Firms_in_Chinas_Corporate_Law_Market (last visited March 13, 2013) (highlighting the dependency that local Chinese firms have on foreign firms for business in the marketplace).

11. This is a statement of the author's opinion.

12. *See* RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE: DOCUMENT SUPPLEMENT 26 (3d ed. 2008) (stating the four modes of supply: Mode 1. Cross-Border Supply; Mode 2. Consumption Abroad; Mode 3. Commercial Presence; and Mode 4. Temporary Movement of Natural Persons).

13. *See Guide to Reading the GATS Schedules of Specific Commitments and the List of Article II (MFN) Exemption*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited Mar. 17, 2013) (listing the definition of commercial presence under the GATS as the opportunities for foreign suppliers to establish business in a member country).

only Chinese law. We will take a close look at the effect of the presence of FLSP in the Chinese legal service market, and the discrepancies between China's WTO commitments and their real-life implementations.

The context of this article is set after China's Cultural Revolution and subsequent adoption of the open door policy. Part I provides background information, including the development of China's legal profession alongside its economic reform. Part II examines the challenges the Chinese authorities face under the mounting pressure between globalization and China's WTO obligations to liberalize its service market, and the State's interest to protect an infant industry and maintain society under the tight grip of the Communist Party. Part III examines the scope of China's GATS Commitments. Part IV examines China's domestic legislative measures for the implementation of its GATS Commitments. Part V looks at the effect of those implementations, including the current status of the legal service market, and whether or not China has delivered on its promises. Part VI looks at the unique position of legal service providers from China's Special Administrative Regions (SAR), and its implication on the future of FLSP in China. Last are concluding comments on the future of China's legal reform and its legal profession.

I. Background

A legal system must be assessed within its historical and cultural context.[14] To assess the Chinese legal system, one must take into consideration the effect of China's Cultural Revolution because its impact is still present in every aspect of China's public and private life.[15] The Cultural Revolution was a period of ten years between 1966 and 1976.[16] During that period, to the extent this article is concerned, legal scholars and professionals, along with other intellec-

14. *See* JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 5–6 (2008) (explaining that Chinese law must first be examined through a historical discussion).

15. *See id.* at 50 (asserting that during the Chinese cultural revolution all of society's laws were destroyed and that this event affected the foundation of the legal system); *see also* XING LU, RHETORIC OF THE CHINESE CULTURAL REVOLUTION: THE IMPACT ON CHINESE THOUGHT, CULTURE, AND COMMUNICATION 2 (2004) (claiming that the cultural revolution continues to have an effect on the collective Chinese memory).

16. *See* LOUISE CHIPLEY SLAVICEK, THE CHINESE CULTURAL REVOLUTION 8 (2010) (stating the Cultural Revolution began in 1966 and ended a decade later); *see also* Jemimah Steinfeld, *Consuming China's Cultural Revolution in Beijing*, CNN.COM (Sept. 27, 2012, 8:00 PM), http://www.cnn.com/2012/09/27/world/asia/china-cultural-revolution-nostalgia (commenting the Chinese Cultural Revolution took place from 1966 to 1976).

tuals, were brutally persecuted by the state-sanctioned act of Red Guards.[17] The Cultural Revolution practically reduced China to a lawless society, making it more difficult to restore law and order in the subsequent reconstruction of the nation.[18]

As a result of the Cultural Revolution, legal services as a free standing profession were not commonly known to the Chinese people until the end of twentieth century.[19] Traditionally, the legal system in China was an insignificant executive organ.[20] Lawyers and judges were state employees who were under the duty to serve the interest of the state.[21] In modern China, state interest is virtually indistinguishable from the interest of the ruling Communist Party.[22] Law and the legal system were not orientated to facilitate the everyday life of the common people,

17. *See* LAWRENCE R. SULLIVAN, HISTORICAL DICTIONARY OF THE CHINESE COMMUNIST PARTY 133 (2012) (explaining that after the Anti-Rightist Campaign in China many intellectuals were killed or exiled); *see also* Jerome A. Cohen, "*Rightist" Wrongs*, COUNCIL ON FOREIGN RELATIONS (June 26, 2007), http://www.cfr.org/china/rightist-wrongs/p13688 (indicating the Communist Party launched a campaign to eliminate the "bourgeois rightist," which included democratic activists, journalists, scholars, lawyers, students, and artists, through administrative punishment or by re-educating them thorough hard labor). The Red Guards were organized Chinese youth in the form of paramilitary, mobilized by the founding father of modern China, Mao Zedong, to persecute opponents in a political power struggle. *See also* PAUL CLARK, YOUTH CULTURE IN CHINA: FROM RED GUARDS TO NETIZENS 11 (2012) (showing Mao Zedong mobilized the youth to rise against their elders and teachers to purge China of values that obstructed Mao's revolution); *see also Introduction to the Cultural Revolution*, SPICE DIGEST (Fall 2007), http://iis-db.stanford.edu/docs/115/CRintro.pdf (stating the Red Guards were instructed to attack anything that did not fit into the established socialist system).

18. *See Mao's "Cultural Revolution" in 1967: The Struggle to "Seize Power,"* CENTRAL INTELLIGENCE AGENCY (May 24, 1968), http://www.foia.cia.gov/sites/default/files/document_conversions/14/polo-19.pdf (reporting that after the Cultural Revolution China was left in a state of anarchy); *see also* Jerome A. Cohen, *China's Legal Reform at the Crossroads*, FAR EAST ECON. REV. (Mar. 2006), http://www.cfr.org/china/chinas-legal-reform-crossroads/p10063 (explaining that the heading of the People's Editorial in 1968 called "In praise of lawlessness" captures the state of affairs of China during that decade).

19. *See* Benjamin L. Liebman, *Legal Aid and Public Interest Law in China*, 34 TEX. INT'L L.J. 211, 214 (1999) (claiming the term "legal aid" was foreign in China before 1993); *see also China Strives to Provide More Legal Aid to Ordinary Chinese*, EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE UNITED STATES OF AMERICA (Sept. 30, 2004), http://us.china-embassy.org/eng/zt/zgrq/t163026.htm (reporting that clauses permitting legal aid were incorporated into China's Criminal Procedural Law and the Lawyers Law in 1996).

20. *See* PITMAN B. POTTER, THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE 10 (2001) (explaining the Chinese legal system operated as a policy enforcing tool whose main function was to protect the state's political power); *see also* Mo Zhang, *The Socialist Legal System with Chinese Characteristics: China's Discourse for the Rule of Law and a Bitter Experience*, 24 TEMP. INT'L & COMP. L.J. 1, 35 (2010) (indicating the primary function of the Chinese legal system was to preserve the totalitarian or imperial power structure).

21. *See* Sida Liu, *Lawyers, State Officials, and Significant Others: Symbiotic Exchange in the Chinese Legal Services Market*, THE CHINA Q., June 2011, at 282 (informing the reader that as late as the 1990s, all Chinese lawyers were employed by the state); *see also* JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK 73 (ABA Section of International Law, 2010) (describing a lawyer in 1997 China as a functionary of the State with a duty to protect the interests of the State).

22. *See* CHEN, *supra* note 14 (quoting Peng Zhen, former Chairman of the Standing Committee of the National People's Congress of China, as saying that law is an important and necessary tool for implementing Party policies); *see also* SUSAN V. LAWRENCE & MICHAEL F. MARTIN, UNDERSTANDING CHINA'S POLITICAL SYSTEM 3 (Congressional Research Serv., Jan. 31, 2013) (explaining that the Communist Party dominates both state and society in China).

but rather as an instrument to safeguard the stability and harmony of the society so as to perpetuate the control of the Communist Party.[23]

China's recovery effort started with the open door policy. After 10 years of failed attempts to build an ideal communist society, China's leadership realized that isolation from the rest of the world community was not in China's best interest as a nation with a worldly ambition.[24] Immediately after the conclusion of the Cultural Revolution, Communist China adopted the so-called open door policy under the leadership of Deng Xiaoping, and began its effort to rejoin the global society through economy reforms.[25] Unexpectedly, the open door policy unleashed the world's most powerful economy.[26] At an unprecedented pace, China threatens to overtake the United States of America – the world's largest economy.[27] With fast growing cross-border transactions, legal infrastructure became critical.[28]

China has proven that separation of economy and politics is possible.[29] China's economic reforms adopted a capitalist approach, to shift from having an economy with strictly state

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23. *See* Leïla Choukrune, *Global "Harmonious Society" and the Law: China's Legal Vision in Perspective*, 13 GERMAN L.J. 497, 502–03 (2012) (stating that the legal system's goals are to maintain stability, but are used to legitimize power for the state); *see also* Qin Shao, *Bridge Under Water: The Dilemma of the Chinese Petition System*, CHINA CURRENTS at 3 (Nov. 27, 2008) (asserting that the Chinese petition system, a new addition to the legal system, simply promoted Communist Rule).

24. *See* H.A. HYNES, CHINA: THE EMERGING SUPERPOWER (Federation of American Scientists, 1997–98) (discussing that after Mao's death, China ceased to act as an isolated country and started to work in the global economy); *see also* Kostas Balkamos, *Tianamen Reform Movement and PRC Foreign Policy* at 2, http://www.academia.edu/415830/Tianamen_Reform_Movement_and_PRC_foreign_policy (observing that it did not take a long time for Deng Xiaoping to realize that isolationist policies are impractical and that he needed a more pragmatic approach to foreign affairs).

25. *See* HYNES, *supra* note 24 (stating that Deng Xiaoping commenced radical reforms that ended with the encouragement of international trade and allowance of foreign capital investment); *see also* Kostas Balkamos, *supra* note 24 at 2 (asserting that Deng Xiaoping was the leader who led China into the global economy).

26. *See Inside China's Ruling Party: Open Door Policy*, BBC NEWS, http://news.bbc.co.uk/2/shared/spl/hi/asia_pac/02/china_party_congress/china_ruling_party/key_people_events/html/open_door_policy.stm (last visited Mar. 18, 2013) (discussing the advent of China's open door policy); *see also* Shang-Jin Wei, *The Open Door Policy and China's Rapid Growth: Evidence from City-Level Data*, 4 NBER 73, 73 (1995) (attributing China's unprecedented ascent to economic power to its export-oriented industrialization).

27. *See* JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 5–6, 621 (2008) (citing the legal development of the laws of China over the past few decades as the cause of economic reform); *see also China Overtakes Japan as World's Second-Biggest Economy*, BBC NEWS (Feb. 14, 2011, 6:19 AM), http://www.bbc.co.uk/news/business-12427321 (detailing China's rise to the world's second-largest economy and projecting it to overtake the United States as the world's top economy).

28. *See* Lamia Kamal-Chaoui, Edward Leman, & Zhang Rufei, *Urban Trends and Policy in China*, OECD REGIONAL DEVELOPMENT WORKING PAPERS 9 (2009), http://www.oecd-ilibrary.org/docserver/download/5ksm2qsv7k37.pdf?expires=1363584522&id=id&accname=guest&checksum=2CBE2D3EB6EFB24E2DD8E8D5D7304009 (2009) (discussing China's incapacity to absorb millions of industry workers back to urban, underdeveloped cities which served as hubs for export production); *see also* James K. Galbraith & Jiaqing Lu, *Sustainable Development and the Open Door Policy in China,* COUNCIL ON FOREIGN RELATIONS 10 (2000) (asserting that Chinese leaders understood that capital flowing from their open-door policy would help fund internal developments).

29. In the later part of this article, the author will explain how this will be a short-lived phenomenon because without proper political structure, sustainable economy growth is impossible.

owned enterprises, to one with privatization and free trade in an open market.[30] To maintain consistency with its socialist political structure, China labeled its economy a "socialist market economy with Chinese characteristics."[31] In other words, it implemented a capitalist-style economy, but not a democratic political system, which often associated with capitalist societies.[32] China maintains a single party political system: a dictatorship with a dictator.[33] As we will see in part III, this seemingly brilliant invention of China's Communist Party is becoming problematic as China endeavors to fulfill WTO obligations, especially in its legal services.

II. The Challenges

Chinese culture is uniquely rooted in Confucian philosophy.[34] According to this philosophy, law enforcement is seen as inherently confrontational, violent, and repugnant to an orderly society, in which harmony and stability may be achieved through people's adherence to man's good nature.[35] Coupled with a profound distrust towards the impartiality of state officials, acceptance of the rule of law by the general public would be slow.[36] However, China's

30. *See* Fred Goldstein, *Global Economic Slowdown & Leadership Struggle in China*, WORKERS WORLD (May 16, 2012, 9:06 PM), http://www.workers.org/2012/world/china_0524 (comparing China's recent choice of a capitalist structure to the Communist Party's plan of allowing a few select state-owned enterprises to dominate China's international trade); *see also* Keith Campbell, *State Capitalism: Is It a Rival to Market Capitalism?*, MINING WEEKLY (Mar. 30, 2012), http://www.miningweekly.com/article/state-capitalism-is-it-a-rival-to-market-capitalism-2012-03-30 (defining China's capitalism as a shift from State capitalism, privatization and free trade).

31. *See* Guiguo Wang, *China's FTAs: Legal Characteristics and Implications*, 105 AM. J. INT'L L. 493, 494 n.10 (2011) (describing the economic reforms adopted by the Chinese Communist Party's Fourteenth National Assembly).

32. *See* Kai Wang, *Whatever-Ism with Chinese Characteristics: China's Nascent Recognition of Private Property Rights and Its Political Ramifications*, 6 E. ASIA L. REV. 43, 46 (2011) (commenting on China's ability to maintain a market economy without following the liberal democratic development model); *see also* Tony Karon, *Why China Does Capitalism Better than the U.S.*, TIME (Jan. 20, 2011), http://www.time.com/time/world/article/0,8599,2043235,00.html (comparing and contrasting the economic performance of China with that of the U.S.).

33. *See* Evan Osnos, *Letter From China: A Dictatorship Without A Dictator*, NEW YORKER (Jan. 18, 2011), http://www.newyorker.com/online/blogs/evanosnos/2011/01/a-dictatorship-without-a-dictator.html (noting the seemingly inverse relationship between China's national strength and its leader's strength); *see also How China Is Ruled*, BBC NEWS, http://news.bbc.co.uk/2/shared/spl/hi/in_depth/china_politics/government/html/1.stm (last visited Mar. 6, 2013) (detailing the political structure of the Chinese Communist Party); *see also Rep. Smith: China is a "Brutal Dictatorship,"* CNN (May 21, 2012, 8:38 AM), http://cnnpressroom.blogs.cnn.com/2012/05/21/rep-smith-china-is-a-brutal-dictatorship/?iref=allsearch (discussing comments made by a U.S. congressman concerning the suppression of a Chinese dissident).

34. *See* Ying Zhu, *The Confucian Tradition and Chinese Television Today*, N.Y. TIMES, http://www.nytimes.com/ref/college/coll-china-media-003.html (last visited Mar. 7, 2013) (elaborating on the influence of Confucian thought on Chinese culture).

35. *See* QING-YUN JIAN, COURT DELAY AND LAW ENFORCEMENT IN CHINA: CIVIL PROCESS AND ECONOMIC PERSPECTIVE 25 (2006) (expounding on the way Confucian thought has led to a dim view of the law in China); *see also* Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43, 52 (2001) (elucidating how Confucian thought has shaped the rule of law in China).

36. *See* Chengyan Lu, *Legal Services in China*, 20 UCLA PAC. BASIN L.J. 278, 288 (noting criticism of the current regulatory structure in place which many believe fails to effectively regulate Chinese lawyers); *see also Distrust of Chinese Gov't on Display*, ARIZ. DAILY STAR (Oct. 29, 2012), http://azstarnet.com/news/science/environment/distrust-of-chinese-gov-t-on-display/article_9c919e6d-79e4-5da9-96a1-9689a77702c6.html (reporting a large protest by citizens distrustful of the government's statement not to expand a petrochemical factory).

WTO obligations, requiring it to implement its GATS Commitments and open the legal service market left it no choice but to reform its legal system.

Factors that must be considered in determining what reform measures to adopt are pulling in two opposite directions. From China's perspective, it has to recognize the fact that foreign capital often comes with the foreign state's legal advisers so that the foreign state can ensure the protection of their economic investment.[37] Because legal services have their own economic value, the exchange of legal services can be an additional source of income for China.[38] More importantly, liberalizing the legal service market is in conformity with China's effort to further integrate itself into global society.[39] On the other hand, permitting the entry of foreign legal services also means inviting foreign ideologies, which the Chinese government perceives as a threat to its political autonomy.[40] The Chinese authority has made an enduring effort to keep such information beyond the reach of China's social media, and in turn, the general public.[41]

The Chinese authority faces multifold challenges, with tensions between protectionism and liberalization at the top of the list. Due to the short history of modern China and disrup-

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37. *See* U.S. INT'L TRADE COMM'N, INVESTIGATION NO. 332-168, CHINA'S ECONOMIC DEVELOPMENT STRATEGIES AND THEIR EFFECTS ON U.S. TRADE (1985) (distinguishing the United States system in which lawyers and government have a strong influence over one another); *see also* Kevin Livingston, *The China Syndrome*, THE RECORDER (Nov. 15, 1999), http://www.law.com/jsp/article.jsp?id=900005513659&The_China_Syndrome&slreturn=20130218101956 (indicating that part of China's reluctance to invite foreign lawyers is their distrust of foreign ownership).

38. *See* Elizabeth M. Lynch, Article, *China's Rule of Law Mirage: The Regression of the Legal Profession Since the Adoption of the 2007 Lawyers Law*, 42 GEO. WASH. INT'L L. REV. 535, 542 (2010) (describing the change in China's economy as more market oriented and its impact on the independence of the legal profession); *see also* Richard Qiang Guo, Article, *Piercing the Veil of China's Legal Market: Will GATS Make China More Accessible for U.S. Law Firms?*, 13 IND. INT'L & COMP. L. REV. 147, 165 (2002) (explaining how China's open-door policies created a greater demand for legal services).

39. *See* Lu, *supra* note 36 at 294–96 (highlighting the recent development of cooperative law firms, partnership law firms, and grass-roots institutes that are distinct from state-funded firms); *see also* Charles Chao Liu, Note & Comment, *China's Lawyer System: Dawning upon the World Through a Tortuous Process*, 23 WHITTIER L. REV. 1037, 1096 (suggesting that as a rapidly emerging economic epicenter, China must align its domestic law with international norms).

40. *See* U.S. INT'L TRADE COMM'N, INVESTIGATION NO. 332-168, *supra* note 37 (finding that the Chinese system of government is distrustful of a legalistic approach to matters); *see also* Lynch, *supra* note 38 at 538 (articulating the view that China's leaders are struggling to keep lawyers docile and beholden to the Chinese government).

41. *See* Provisional Regulations on the Setting Up of Offices by Foreign Law Firms Within the Territory of China, Regulations of the Hong Kong Special Administrative Region for the year 1992 (Legal Supplement No. 2 to The Government of the Hong Kong Special Administrative Region Gazette) (setting up multiple restrictions for foreign law firms in China); *see also* Justin W. Evans, *The Magic Confluence: American Attorneys, China's Rise, and the Global Value Chain*, 18 IND. INT'L & COMP. L. REV. 277, 287 (2008) (mentioning crackdowns by the Chinese government against foreign legal service providers).

tion of the Cultural Revolution, the legal profession is still in its infancy.[42] State intervention is needed to safeguard against its sophisticated foreign competitors.[43] However, WTO obligations require member states to provide a level playing field, which requires the state to restrain from any form of intervention.[44] Although the WTO leaves the scope of market access to the determination of member states,[45] its expectation of further liberalization is loud and clear.[46]

The concern over national security is especially problematic. Western-style, especially American-style, litigation emphasizes creative thinking, critical analysis, and a readiness to challenge authority.[47] These characteristics do not fit well with Chinese-style governance. In western democratic countries, the concept of national security is normally narrowly defined in order to facilitate free flow of information. In contrast, in China, anything that potentially threatens the stability of society or political power of the Communist Party may be considered a matter of national security.[48] This makes certain areas of economic interest potentially sensi-

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42. *See* Gerard J. Clark, *An Introduction to the Legal Profession in China in the Year 2008*, 41 SUFFOLK U. L. REV. 833, 840 (2008) (noting that the legal profession in China still continues to struggle with issues of competence); *see also* Hongming Xiao, *Legal Profession in China: Past, Present, and Future,* PERSPECTIVES (Feb. 29, 2000), http://www.oycf.org/Perspectives2/4_022900/legal_profession_in_china.htm (suggesting that the legal profession in China is still at its fledgling stage and behind in comparison to its counterparts in developed countries).

43. *See* MING XIA, THE PEOPLE'S CONGRESSES AND GOVERNANCE IN CHINA: TOWARD A NETWORK MODE OF GOVERNANCE 207 (2008) (arguing that state intervention from the legal system is necessary to provide assistance with the development of a market economy); *see also* Jane J. Heller, *China's New Foreign Law Firm Regulations: A Step in the Wrong Direction*, 12 PAC. RIM L. & POL'Y J. 751, 756, 776 (2003) (explaining that China's legal services providers are not yet competitive with their foreign counterparts in a number of areas, requiring the nation to further liberalize its legal services market).

44. *See* JOSEPH A. CONTI, BETWEEN LAW AND DIPLOMACY: THE SOCIAL CONTEXTS OF DISPUTING AT THE WORLD TRADE ORGANIZATION 11–12 (2011) (demonstrating how WTO rules governing trade and economic policy level the playing field among nations); *see also* Gabrielle Marceau, *General Presentation of the WTO Agreement*, AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (2008), http://untreaty.un.org/cod/avl/pdf/ls/Marceau_RelDoc4.pdf (suggesting that the principle of free competition in trade is a fundamental GATT principal not to be distorted by governmental intervention).

45. *See* General Agreement on Trade in Services art. 16, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1125 (establishing that commitments concerning market access in specifically designated sectors are laid down in individual country schedules); *see also* ORG. ECON. COOPERATION & DEV., EDUCATION POLICY ANALYSIS 107 (2002) (indicating that WTO members retain the freedom to determine the content and scope of market access commitments).

46. *See* Rafael Leal-Arcus, *The Resumption of the Doha Round and the Future of Services Trade,* 29 LOY. L.A. INT'L & COMP. L. REV. 339, 343 (noting that it is a core policy of the WTO to promote external liberalization within its member states); *see also* Chiedu Osakwe, *Developing Countries and GATT/WTO Rules: Dynamic Transformations in Trade Policy Behavior and Performance*, 20 MINN. J. INT'L L. 365, 368 (showing the WTO policy shift in the 1980s towards liberalization).

47. *See* Robert L. Haig & Robert S. Getman, *Does "Hardball" Litigation Produce the Best Result for Your Client?,* 65 N.Y. ST. B.J. 24, 26 (1993) (noting that tenacity and persistence are important qualities of an American litigator); *see also* RANDALL KISER, HOW LEADING LAWYERS THINK: EXPERT INSIGHTS INTO JUDGMENT AND ADVOCACY 44 (2011) (highlighting that effective trial attorneys must be deductive thinkers who can create a story that paints a big picture for the jury).

48. *See* Denny Roy, *Human Rights as National Security Threat: The Case of the PRC*, STRATEGIC AND DEFENSE STUDIES CENTER AUSTRALIAN NATIONAL UNIVERSITY (1996) (showing that political instability is a threats to National Security in China); s*ee also* Jacques deLisle*, Security First? Patterns and Lessons from China's Use of Law To Address National Security Threats*, 4 J. NAT'L SECURITY L. & POL'Y 397, 398 (explaining that any threat to national or political stability are treated as national security issues).

tive, including the governmental procurement of cultural products as well as legal services where legitimacy of authority or fairness of legal procedure becomes an issue and determines the outcome of a conflict. Therefore, legal service providers will find themselves walking a fine line between zealous representation for the interest of their clients and being accused of violating Chinese national security.

Potential loss of talent and market share to foreign competitors is a practical concern. Once the Chinese legal service market is accessible, those foreign law firms with strong economic backgrounds will be the front-runners for claiming a market share. Foreign investors and trading partners are likely to go to well-established foreign law firms for their services for reasons including pre-existing lawyer-client relationships and the language barrier. In the meantime, China's newly established legal profession is filled with freshly qualified Chinese lawyers who, although legally qualified, may nevertheless lack international practice experience and managerial skills. Moreover, the higher incomes and prestigious profiles offered by foreign law firms will undoubtedly be more attractive than their Chinese counterparts to young Chinese lawyers. Thus, in time, the market will be dominated by large foreign law firms.

Inherent inconsistency among different pieces or areas of legislation is a constant challenge to those within the legal system.[49] So far, legal reforms in China are largely dictated by the practical need to facilitate economic reforms.[50] To keep up with the fast growth of the economy, many laws are produced within limited time, resulting in fragmentation and ad hoc legislation. Lack of systematic legislative structure and training further exacerbate legislative inconsistencies.[51]

The above are just some of the challenges and concerns that might fetter China's ability to fulfill its WTO obligations. In the following Parts, I will discuss how China should balance these competing interests, and overcome these obstacles.

III. Scope of China's GATS Commitments

Practically speaking, China's accession to WTO was imperative. Without the preferential treatment afforded to all WTO signatories, China would have made less money on its

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49. *See* Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1136 (proposing that legal inconsistencies can be found in every aspect of the law); *see also* Ashlee Smith, *Legally Inconsistent Jury Verdicts Should Not Stand in Maryland*, 35 U. BALT. L. REV. 395, 395 (displaying that inconsistencies are found in the law, and subsequently courts give out inconsistent verdicts as well).

50. *See* Paul Gewirtz, *The U.S.-China Rule of Law Initiative*, 11 WM. & MARY BILL RTS. J. 603, 604 (2003) (acknowledging China's view that developing a strong legal system is an important element to its economic development); *see also* Benjamin L. Liebman, *Assessing China's Legal Reforms*, 23 COLUM. J. ASIAN L. 17, 18 (2009) (recognizing that surveys of China's legal reforms reveal a trend towards facilitating economic development and balancing efforts to address inequality).

51. *See* JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 5–6 (2008) (discussing China's "piecemeal approach" to lawmaking where different regions create their own statutes and regulations); *see also* Hui Huang, *The Regulation of Foreign Investment in Post-WTO China: A Political Economy Analysis*, 23 COLUM. J. ASIAN L. 185, 203 (2009) (noting how China's "piecemeal ad hoc approach" is attuned to its constantly shifting political and economic regime).

exports.[52] At the same time, without the participation of the world's largest exporter and consumer population, the WTO would prove less influential than it had hoped.[53] WTO needed China as much as China needed the WTO. At the celebration of China's tenth year of membership, the Director-General of the WTO, Pascal Lamy, stated, "China has been and should remain important for WTO. WTO has been and should remain important for China."[54]

China's commitment to access of legal service market is stated in the Schedule of Specific Commitments (GATS/SC/135)[55] dated 14 February 2002 and amended by Corrigendum (GATS/SC/135/Corr.1).[56] The Schedule focuses on legal services provided through Mode 3—Commercial Presence, i.e. services provided through direct foreign investment.[57] The only permissible form of such establishment through which FLSP may operate in China's legal service market is through representative offices.[58]

The scope of services permitted is as follows:

> (a) To provide clients with consultancy on the legislation of the country/region where the lawyers of the law firm are permitted to engage in lawyer's professional work, and on international conventions and practices;

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52. *See* Jose F. Demedeiros, *Global Trade Law—China's Export Restraints Found to Be Inconsistent with Its Obligations as a Member of the World Trade Organization—China—Measures Related to the Exportation of Various Raw Materials*, 35 SUFFOLK TRANSNAT'L L. REV. 203, 204 (2012) (noting that an advantage to WTO-membership is a more preferential trading status, but how China still has a strained trading relationship with other members); *see also* Karen Halverson, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319, 320 (2004) (indicating how during their negotiations China emphasized that it should be covered by the WTO's developing country protections).

53. *See* Javade Chaudhri, *Chinese Industrial Policies: Indigenous Innovation, Intellectual Property Rights, and the Trade Issues of the Next Decade*, 34 T. JEFFERSON L. REV. 1, 28 (2011) (demonstrating how China's accession to the WTO signaled a "milestone" since most of the disputes filed at the WTO involve China); *see also* Peter Ford, *How WTO Membership Made China the Workshop of the World*, THE CHRISTIAN SCIENCE MONITOR (Dec. 14, 2011), http://www.csmonitor.com/World/Asia-Pacific/2011/1214/How-WTO-membership-made-China-the-workshop-of-the-world (asserting that China's membership in the WTO is seminal to the world's economy and that China's economy has also greatly benefited).

54. *See* Pascal Lamy, Director-General, WTO, *A New Chapter in China's Reform and Opening Up to the World* (Dec. 11, 2011), http://www.wto.org/english/news_e/sppl_e/sppl211_e.htm (commending China's impact on the WTO in promoting fair and open trade, while mentioning the WTO's effect on China's economic growth).

55. *See* The People's Republic of China: Schedule of Specific Commitments, Feb. 14, 2002, GATS/SC/135, General Agreement on Trade in Services, 1869 U.N.T.S. 183 (providing China's guidelines under GATS).

56. *See* The People's Republic of China: Schedule of Specific Commitments—Corrigendum, Feb. 20, 2003, GATS/SC/135/Corr.1, General Agreement on Trade in Services (listing the changes to China's Schedule of Specific Commitments).

57. *See* RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE: DOCUMENT SUPPLEMENT 26 (3d ed. 2008). China places no restriction on Mode 1: Cross-Border Supply, and Mode 2: Consumption Abroad; but makes no commitment on Mode 4: Temporary Movement of Natural Persons except those stated in the Horizontal Section. *See* The People's Republic of China: Schedule of Specific Commitments, *supra* note 55 (showing how China has not made any additional commitments in the area of legal services).

58. *See* The People's Republic of China: Schedule of Specific Commitments, *supra* note 55 (limiting foreign law firms to working in representative offices).

> (b) To handle, when entrusted by clients or Chinese law firms, legal affairs of the country / region where the lawyers of the law firm are permitted to engage in lawyer's professional work;
>
> (c) To entrust, on behalf of foreign clients, Chinese law firms to deal with the Chinese legal affairs;
>
> (d) To enter into contracts to maintain long-term entrustment relations with Chinese law firms for legal affairs;
>
> (e) To provide *information on the impact of the Chinese legal environment*.
>
> Entrustment allows the foreign representative office to directly instruct lawyers in the entrusted Chinese law firm, as agreed between both parties.[59]

Further restrictions are placed on personnel who work in such representative offices.[60] For example, foreign law firms may not employ Chinese practicing lawyers.[61] As it appears, the description of business scope within which foreign representative offices may operate is stated in positive language, which means, instead of excluding certain areas, it provides access only to enumerated areas.[62]

An examination of China's commitments under GATS reveals a substantially limited scope for representative offices of foreign law firms to operate in the Chinese legal service market. Clause (a) and (b) address the application of foreign and international law.[63] Clause (c) addresses the application of Chinese law.[64] Clause (d) permits foreign law firms to form long-term contractual relationship with Chinese law firms to provide legal services jointly.[65] The precise meaning of Clause (e) is not immediately clear;[66] in order to decipher the peculiar language, the author will devote adequate effort in her ensuing discussion to this clause alone. As

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59. *See id.* (providing the scope of services for a representative office).

60. *See id.* (identifying qualifications that representatives of foreign law firms must possess—such as membership in a bar or law society in a WTO member country, and practicing outside of China for at least two years).

61. *See id.* (limiting foreign law firms from employing Chinese national lawyers, who are registered in China, outside of China).

62. *See id.* (minimizing the scope of business to only what is listed in the Schedule of Specific Commitments by listing only what a business may do).

63. *See id.* (allowing foreign representative offices to use and offer guidance on the law in which the particular representative is certified to practice).

64. *See id.* (indicating that a foreign representative office may enlist the help of Chinese law firms to handle issues concerning the law in China).

65. *See id.* (describing the permissible scope of legal conduct in China by foreign legal providers). This clause falls outside the scope of this article, as it is unrelated to the market share.

66. *See id.* (noting that foreign legal entities may "provide information on the impact of the Chinese legal environment"); *see also* Jane J. Heller, *China's New Foreign Law Firm Regulations: A Step in the Wrong Direction*, 12 PAC. RIM L. & POL'Y J. 751, 764 (2003), Comment (citations omitted) (commenting on the ambiguity of clause (e) and the resultant "gray area" created as an impact of this provision).

it turns out, Clause (e) is the key provision which stages the battleground for the competing sides of the market share, namely the FLSP and their Chinese counterparts.[67]

According to Clauses (a) through (c), in a typical cross border transaction between a foreign and Chinese commercial party, the foreign aspect of the transaction is to be handled by the foreign lawyers of a representative office, and the Chinese aspect of the transaction is to be handled by Chinese law firms through the method of entrustment.[68] Because this article's discussion focuses on the operation of FLSP as business entities and not individual foreign lawyers, it will not consider the possibility that individual foreign lawyers may provide legal services through employment within a Chinese law firm. At best, such an employment arrangement is highly uncommon.[69] That leads to the conclusion that issues of Chinese law are to be handled only by Chinese lawyers who work in Chinese law firms. This analysis demonstrates that there is a clear demarcation in a cross-border transaction between the foreign aspect of the transaction and the Chinese aspect. Correspondingly, there is a similar line between foreign law firms and Chinese law firms.

Many believe that such arbitrary allocation of business opportunities would seem unreasonably restrictive, especially in the eyes of FLSP who were planning to expand their business in this newly opened market.[70] Thankfully, this is not the end of the story. Clause (e) permits one type of service that concerns Chinese law to be directly provided by a foreign law firm, that is: to provide information on the impact of the Chinese legal environment (Environment Clause).[71] However, foreign law firms are not permitted to hire practicing Chinese lawyers.[72] Since legal certification

67. *See* The People's Republic of China: Schedule of Specific Commitments, Feb. 14, 2002, GATS/SC/135, General Agreement on Trade in Services, 1869 U.N.T.S. 183 (recognizing the foreign representative office's rights in China); *see also* Mark A. Cohen, *International Law Firms in China: Market Access and Ethical Risks,* 80 Fordham L. Rev. 2570 (2012) (citations omitted) (explaining how even in light of clause (e) foreign lawyers rarely get to attend meetings with Chinese government agencies).

68. *See* Ding Xiangshun, *Chinese Corporate Lawyers Face Challenges in Maintaining Corporate Social Responsibility in the Age of Globalization*, 21 IND. INT'L & COMP. L. REV. 509, 515 (2011) (citations omitted) (describing a foreign lawyer's limitation on practicing law in China and how it has resulted in the collaboration between foreign and Chinese lawyers).

69. *See id.* at 515 (citations omitted) (describing how rigid limitations impact the representation of foreign lawyers across the Chinese legal landscape); *see also* Yujie Gu, *Entering the Chinese Legal Market: A Guide for American Lawyers Interested in Practicing Law in China*, 48 DRAKE L. REV. 173, 200 (1999) (citations omitted) (commenting on how China does not allow non-Chinese citizens to practice law in China).

70. *See* Heller, *supra* note 66 (observing one of China's goals—to protect the Chinese legal services industry); *see also Legal Services*, THE AMERICAN CHAMBER OF COMMERCE IN SHANGHAI, http://www.amcham-shanghai.org/AmChamPortal/MCMS/Presentation/Publication/WhitePaper/WhitePaperDetail.aspx?Guid=%7BF8FDB95F-0699-439A-9228-B1BC66876589%7D (last visited Mar. 25, 2013) (describing the constraints on foreign firms in China as prohibitive and abundant with obstacles).

71. *See* Mark A. Cohen, *International Law Firms in China: Market Access and Ethical Risks,* 80 Fordham L. Rev. 2570 (2012) (pointing out that although foreign lawyers are allowed to supply information about the Chinese legal environment, they are restricted from participating in any government meetings); *see also Business Scope*, THE AMERICAN CHAMBER OF COMMERCE IN SHANGHAI, http://www.amcham-shanghai.org/AmChamPortal/MCMS/Presentation/Publication/WhitePaper/WhitePaperDetail.aspx?Guid=%7BF8FDB95F-0699-439A-9228-B1BC66876589%7D (last visited Mar. 25, 2013) (noting that China agreed to allow foreign firms to provide advice with respect to the impact of the Chinese legal environment).

72. *See* The People's Republic of China: Schedule of Specific Commitments—Corrigendum, Feb. 20, 2003, GATS/SC/135/Corr.1, General Agreement on Trade in Services (declaring that all residents must live in China for at least six months out of the year and that Chinese nationals registered as lawyers may not be hired).

in China is not open to foreign nationals,[73] the possibility of foreign lawyers providing legal service regarding Chinese law virtually does not exist.[74] Moreover, a Chinese lawyer who works in a foreign law firm to provide information on Chinese law must forgo the right to practice law.[75] Here, a word of caution is in order: it should be kept in mind that the majority of GATS signatories, like China, have committed themselves to similar limitations.[76]

As discussed above, the allowance given to foreign law firms to actually participate in the Chinese legal service market is extremely limited.[77] In terms of Chinese lawyers, foreign law firms may only hire lawyers who do not practice or are willing to forgo their right to practice.[78] Moreover, in terms of Chinese law, foreign law firms may only provide "information on the impact of the Chinese legal environment,"[79] which is a vague clause at best. Although the Environment Clause is somewhat ambiguous, it is unable to disguise China's protectionist intent to preserve a significant market share for its own legal profession.[80]

As a result of these narrowly drafted Commitment Clauses, the application of Chinese law is almost exclusively within the domain of practicing Chinese lawyers. Since foreign law firms

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73. *See* Measures for the Implementation of the National Judicial Examination (2008 Revision) (promulgated by the Ministry of Justice, effective Aug. 14, 2008) (Lawinfochina) (China) (requesting that all lawyers be of Chinese nationality in order to enroll in the National Judicial Examination).

74. *See* Richard Qiang Guo, *Piercing the Veil of China's Legal Market: Will GATS Make China More Accessible for U.S. Law Firms?*, 13 IND. INT'L & COMP. L. REV. 147, 175 (2002) (citations omitted) (explaining that foreign law firms in China must entrust Chinese firms to manage Chinese legal issues); *see also* Heller, *supra* note 66 at 765 (implying that China's new rules regarding liberalization of its domestic legal industry have proven to be somewhat restrictive).

75. *See* Cohen, *supra* note 71 at 2570 (citations omitted) (stating that a PRC lawyer who works for a foreign legal entity in China must "suspend his or her license and may not practice PRC law"); *see also* Anna Stolley Persky, *Despite Globalization, Lawyers Find New Barriers to Practicing Abroad*, ABA J. (Nov. 1, 2011, 5:19 AM), http://www.abajournal.com/magazine/article/the_new_world_despite_globalization_lawyers_find_new_barriers_to_practicing (declaring that Chinese lawyers who work for U.S. firms must forfeit their licenses for at least some period of time).

76. *See* Philip Raworth, *Legal Services: Background Note by the GATS Secretariat*, *in* INTERNATIONAL REGULATION OF TRADE IN SERVICES § 36 ¶ 55 (2012); *see also* Persky, *supra* note 75 (noting that India and Brazil have similar restrictions on foreign lawyers and law firms).

77. *See* THE INTERNATIONALIZATION OF THE PRACTICE OF LAW 135 (Jens Drolshammer & Michael Pfeifer eds., 2001) (mentioning that representative offices are restricted from giving advice on Chinese law); *see also* Cohen, *supra* note 71 at 2570–71 (citations omitted) (outlining some of the barriers foreign law firms face when trying to enter the Chinese market).

78. *See* Terry Carter, *A Chinese Puzzle*, ABA J. (June 5, 2007, 3:09 AM), http://www.abajournal.com/magazine/article/a_chinese_puzzle (indicating that Chinese lawyers can only play the role of "superparalegals" at a foreign law firm); *see also* Guo, *supra* note 74 at 169 (citations omitted) (noting how, "theoretically," Chinese lawyers who work for representative offices must surrender their right to practice Chinese law).

79. *See* The People's Republic of China: Schedule of Specific Commitments, Feb. 14, 2002, GATS/SC/135, General Agreement on Trade in Services, 1869 U.N.T.S. 183 (affirming that foreign law firms are limited in what information it may provide).

80. *See* RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 358 (2002) (explaining how China limits the ability of foreign firms to provide information on Chinese law); *see also* Letter from Thomas M. Susman, Dir. of Gov't Affairs Office, American Bar Association, to Donald W. Eiss, Office of the U.S. Trade Rep. (Sept. 24, 2012), http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012sept24_marketaccessbarriers_l.authcheckdam.pdf (arguing that U.S. law firms are at a disadvantage because Chinese lawyers hired by U.S. firms are prohibited from practicing law in China).

may not employ Chinese practicing lawyers, a foreign client with an issue of substantive Chinese law must engage a Chinese law firm for advice either directly or via a foreign representative office through the Entrustment Clause. Either way, the profit of such services will go to the Chinese law firm.

Balancing competing interests is never an easy task, and China is no exception. China wants to show the WTO that it is fulfilling its membership obligations by opening its legal service market, while at the same time withholding access to this market by imposing stringent conditions on foreign law firms so as to keep a significant share of the market beyond the reach of foreign competitors. China's sincerity to truly open its market is questionable. The permitted scope of operation is so disproportionate to the expectation of the FLSP that the official allocation of market share has not only failed to guide the FLSP into the market as smoothly as it was designed to, but also incited a war between foreign and Chinese legal service providers.[81] The ambiguity of the Environment Clause is the perfect battleground.

IV. Domestic Legislation on Legal Profession

A. A Brief History on the Modern Chinese Legal Profession

Unsurprisingly, economic reforms created a demand for a functioning and identifiable legal system. As discussed above, the absence of law and a legal system at the beginning of the open door policy posed a serious challenge to China's ambitious economic reforms.[82] The legal profession did not develop at the same pace as China's economy because China's unique socialist ideology paired with its existing political structure meant that legal reforms would be at odds with its plan to rejoin the global society.[83]

For approximately the first two decades of the modern Chinese legal profession, its fundamental development grew, but remained unimpressive to countries that had long-established

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81. *See* Andrew Godwin, *The Professional "Tug of War": The Regulation of Foreign Lawyers in China, Business Scope Issues and Some Suggestions for Reform*, 33 MELB. U. L. REV. 132, 133 (2009) (noting the tension between the strict limitations placed on foreign firms and their loose enforcement by authorities); *see also* U.S.-China Business Council Brief, The US-China Business Council, Legal Market Access Issues in China (Feb. 2013), https://www.uschina.org/files/public/documents/2013/02/legal-market-briefer.pdf (suggesting that the discrepancies in tax laws as applied to foreign and local firms create a hostile, uneven playing field).

82. *See* Joel B. Blank, Note, *Remolding China's Iron Rice Bowl: An Opportunity for United States Agricultural Commodities Behind the Great Wall of China*, 18 AM. U. INT'L L. REV. 753, 781 (2003) (proclaiming that China experiences a lot of "broken trade agreements," and that one factor leading to this is the absence of a rule of law); *but see* Randall Peerenboom, *Seek Truth From Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249, 253–54 (2001) (discussing how China's economy grew, despite a "weak legal system"). Both sources do not speak to the period of the "beginning of the open door policy," but do speak to the legal system and the economy.

83. *See* MINXIN PEI, CHINA'S TRAPPED TRANSITION: THE LIMITS OF DEVELOPMENTAL AUTOCRACY 65 (2009) (stating that although there has been some legal reform, it has been limited due to the Chinese Communist Party's reluctance in constraining its powers); *see also* Mary E. Gallagher, *"Reform and Openness": Why China's Economic Reforms Have Delayed Democracy,* 54 WORLD POLITICS 338, 338–39 (Apr. 2002), http://himalayancrossings.com/pdf/course/g459/10_reform_and_openness.pdf (addressing the fact that China has grown economically for over 20 years without "political liberalization").

and mature legal systems.[84] Traditionally, in China, lawyers were perceived as state officials.[85] In 1980, the Interim Regulations of the People's Republic of China on Lawyers ("Lawyers' Law") defined Chinese lawyers as "state legal workers."[86] It was not until 1996, when the official version of the Lawyers' Law was passed and replaced the Interim Regulations, that Chinese lawyers were considered legal professionals.[87] During those 16 years between 1980 and 1996, the All-China Lawyers' Association was founded, the licensing examination for lawyers was introduced,[88] and the first law firm was established in Shanghai.[89]

The first Lawyers' Law redefined Chinese lawyers as legal professionals whose services, for the first time in Chinese history, were made generally available for the protection of private interests.[90] Nevertheless, China's legal profession did not really take off until the late 1980s

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84. *See generally* Peerenboom, *supra* note 80 (describing the development of the rule of law in China). *See* Eric Chiyeung Ip, *Judicial Corruption and its Threats to National Governance in China*, 3 JOAAG 80, 87 (2008), http://joaag.com/uploads/8_IpFinal.pdf (suggesting that western countries have more safeguards against judicial corruption than China).

85. *See* Timothy A. Gelatt, *Lawyers in China: The Past Decade and Beyond*, 23 N.Y.U. J. INT'L L. & POL'Y 751, 752–53 (1991) (explaining that the first mention of lawyers in China was in 1954, after a series of state "legal advisory offices" were established); *see also* Benjamin L. Liebman, *Legal Aid and Public Interest Law in China*, 34 TEX. INT'L L.J. 211, 216–17 (1999) (stating that lawyers in China were still considered state legal workers through the 1980s).

86. *See* JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 162 (2008) (noting that lawyers were deemed state legal workers under the 1980 Provisional Regulations); *see also* Charles C. Liu, Note and Comment, *China's Lawyer System: Dawning upon the World Through a Tortuous Process*, 23 WHITTIER L. REV. 1037, 1058 (2002).

87. *See* Law on Lawyers and Legal Representation (promulgated by the Standing Comm. Nat'l People's Cong., May 15, 1996, effective Jan. 1, 1997), http://novexcn.com/lawyers_legal_represent.html (China) (delineating the guidelines for lawyers in establishing a socialist legal system); *see also* Yujie Gu, *Entering the Chinese Legal Market: A Guide for American Lawyers Interested in Practicing Law in China*, 48 DRAKE L. REV. 173, 191 (1999) (citations omitted) (1999) (stating that the 1996 Lawyers' Law established conditions for the operation of private law firms).

88. *See* Weng Li, *Philosophical Influences on Contemporary Chinese Law*, 6 IND. INT'L & COMP. L. REV. 327, 328 (1996) (explaining that the introduction of the Chinese National Bar Examination has supplied a continuous flow of thousands of new attorneys to the Chinese judicial system); *see also* Charles C. Liu, Note and Comment, *China's Lawyer System: Dawning Upon the World Through a Tortuous Process*, 23 WHITTIER L. REV. 1037, 1066–67 (2002) (stating that the Ministry of Justice offered the first National Lawyer Qualification Examination in 1986).

89. *See* Joseph W. Dellapenna, *The Role of Legal Rhetoric in the Failure of Democratic Change in China*, 2 BUFF. J. INT'L L. 231, 252 (1996) (describing the first law firm founded in Shanghai in 1988); *see also* Yujie Gu, *supra* note 87.

90. *See* Melissa S. Hung, Comment, *Obstacles to Self-Actualization in Chinese Legal Practice*, 48 SANTA CLARA L. REV. 213, 218–19 (2008) (emphasizing the designations of lawyers as professionals in service for society, instead of state workers); *see also* Chengyan Lu, *Legal Services in China: Facing the WTO*, 20 UCLA PAC. BASIN L.J. 278, 285 (2003) (noting that the redefinition of Chinese lawyers was a significant development in China's legal service sector).

when China had dozens of state-owned law firms and hundreds of lawyers.[91] Today, China's legal community consists of a staggering 600,000 members.[92]

B. Initial Legislation Implementing GATS Commitments

China's GATS Commitments are not directly applicable, nor do they have a "self-executing effect."[93] Therefore, domestic legislation incorporating the Commitments was necessary for their implementation.[94] The first implementing legislation was the Regulations on Administration of Foreign Law Firms' Representative Offices in China ("Administrative Regulations") in 2001, which stated:

> **Article 15**. A representative office and its representatives may only conduct the following *activities that do not encompass Chinese legal affairs*:
>
> (1) To provide clients with the consultancy on the legislation of the country where the lawyers of the law firm are permitted to engage in lawyer's professional work, and on international conventions and international practices;
>
> (2) To handle, when entrusted by clients or Chinese law firms, legal affairs of the country where the lawyers of the law firm are permitted to engage in lawyer's professional work;
>
> (3) To entrust, on behalf of foreign clients, Chinese law firms to deal with the Chinese legal affairs;
>
> (4) To enter into contracts to maintain long-term entrustment relations with Chinese law firms for legal affairs;
>
> (5) To provide information on the impact of the Chinese legal environment.
>
> Representative offices may directly instruct lawyers in the entrusted Chinese law firms, as agreed between both parties.

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91. *See* Chen, *supra* note 86 (2008) (indicating roughly 300 lawyers working in about a dozen law firms); *see also* Gerard J. Clark, *An Introduction to the Legal Profession in China in the Year 2008*, 41 SUFFOLK U. L. REV. 833, 838 (2008) (discussing the state's ownership of the law advisory offices in the 1980s).

92. *See* Roderick O'Brien, *China Law: Towards a Legal Professional Community in China*, 41 HONG KONG L.J. 573, 574 (2011) (including 200,000 judges, 180,000 procurators, 20,000 notaries, and 200,000 lawyers) *compare with* Sida Liu, *Palace Wars over Professional Regulation: In-House Counsel in Chinese State-Owned Enterprises*, 2012 WIS. L. REV. 549, 556 (2012) (estimating 122,585 legal staff in the Chinese legal community in 2001).

93. *See* Jane J. Heller, *China's New Foreign Law Firm Regulations: A Step in the Wrong Direction*, 12 PAC. RIM L. & POL'Y J. 766 (2003) (stressing that the GATS commitments alone are not binding on Chinese government or courts).

94. *See* 外国律师事务所驻华代表机构管理条例 [Regulations on Administration of Foreign Law Firms' Representative Offices in China] (promulgated by the Decree No. 338 of the State Council of the People's Republic of China, Dec. 22, 2001, effective Jan. 1, 2002), http://www.china.org.cn/business/laws_regulations/2007-06/22/content_1214778.htm (expressing its purpose of regulating the presence of foreign legal entities in China); *see also* Richard Qiang Guo, Article, *Piercing the Veil of China's Legal Market: Will GATS Make China More Accessible for U.S. Law Firms?*, 13 IND. INT'L & COMP. L. REV. 147, 157–58 (2002) (detailing the negotiations that led to Chinese regulations on GATS).

> A representative office and its representatives shall *not conduct any legal service activities or other for-profit activities other than those set forth in the first paragraph and the second paragraph of this Article*.
>
> **Article 16**. A representative office shall not employ Chinese practitioner lawyers; its *support staff employed shall not provide legal services to clients*.[95]

Four additions were inserted into the Administrative Legislation which is otherwise verbatim to the GATS Commitments.[96] The additions are of great significance because they clarify and narrow the permissible business scope for foreign law firms. First, the GATS Commitments do not contain the phrase "activities encompass Chinese legal affairs."[97] The only language that relates to Chinese law is the Environment Clause, stating that foreign law firms may provide "information on the impact of the Chinese legal environment."[98] As discussed above, the GATS Commitments provide a list of activities that foreign law firms may conduct, with the Environment Clause stating that service related to Chinese legal affairs may only be provided by foreign representatives.[99] Hence, the phrase "activities encompass Chinese legal affairs" ("Conditional Clause") only applies to the Environment Clause, even though it is under the general heading governing all subsections. Therefore, it must be concluded that the Conditional Clause was added to further define the scope of the Environment Clause.

The Conditional Clause not only clarifies the Environment Clause, but also narrows its scope. The word "environment" is defined in *Merriam Webster* as: "the circumstances, objects, or conditions by which one is surrounded; or the aggregate of social and cultural conditions that influence the life of an individual or community."[100] The ambiguity of the word "environment" lies in its all-inclusive nature while also lacking clear identifiable substance. The Conditional Clause excludes an identifiable area of service, that is, the "activities encompass Chinese legal affairs," from the all-inclusive wide-ranging coverage of the word "environment." This exclusion is significant because legal activities encompassing Chinese legal affairs constitute the core area of services that the Chinese legal service market provides, namely, legal advice on the

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95. *See* Regulations on Administration of Foreign Law Firms' Representative Offices in China, art. 15–16, (promulgated by the Decree No. 338 of the State Council of the People's Republic of China, Dec. 22, 2001, effective Jan. 1, 2002), http://www.china.org.cn/business/laws_regulations/2007-06/22/content_1214778.htm (emphasis added) (listing the business and practice limitations imposed on foreign law firms and their representatives).

96. *See* Heller, *supra* note 93 at 767 (noting that the Administrative Regulations further specify the activities entrusted to Chinese law firms); *see also* Pasha L. Hsieh, *The China–Taiwan ECFA, Geopolitical Dimension and WTO Law*, J. INT'L ECON. L. 121, 125 (2011) (noting that China implemented GATS via the Administrative Regulations).

97. *See* Schedule of Specific Commitments, *China–Trade in Services*, GATS/SC/135 (Feb. 14, 2002) (omitting language that certain activities encompass Chinese legal affairs).

98. *See id.* (noting that Chinese firms can offer knowledge about the Chinese legal environment as foreign representative offices).

99. *See id.* (listing the activities that foreign firms are allowed to conduct along with limitations).

100. *See* THE MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/environment.

application of substantive Chinese law.[101] Such a heavy-handed exclusion is analogous to disallowing a practicing doctor to prescribe a medical remedy to his patients. In other words, in a typical cross-border transaction, a foreign law firm may not provide services on the Chinese aspects of the transaction.

Second, GATS Commitments uses the word "international" once as an adjective immediately before the nouns "conventions and practices" as permissible activities.[102] The Administrative Regulations inserted an additional "international" immediately before the word "practices."[103] This addition reveals the legislative intent to prevent potential misinterpretation of the scope of the word "practice," by narrowing it to "international" activities.[104]

Third, the GATS Commitments use general language when they state that foreign law firms "can engage in profit-making activities."[105] The scope of profit-making activities includes all the activities enumerated in the Commitments, including: (1) consultancy on foreign and international law; (2) providing legal advice on foreign legal affairs; (3) engaging Chinese law firms for legal advice on Chinese law; (4) establishing long-term relationships with Chinese law firms; and (5) providing information on the impact of the Chinese legal environment.[106] However, the scope of profitable activities is dramatically reduced by the Administrative Regulations to the extent that it only includes the first two categories: (1) consultancy on foreign and international law; and (2) providing legal advice on foreign legal affairs ("Profit Clause").[107] Anything else is now unprofitable. For example, advice on matters concerning Chinese law is unprofitable, even though it is provided by Chinese law firms and incorporated into the work of foreign law firms as part of a whole package.[108] In addition, information on the impact of

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101. *See* Regulations on Administration of Foreign Law Firms' Representative Offices in China, *supra* note 94 (stating that a foreign representative may only provide information on the impact of the Chinese legal environment when it encompasses Chinese legal affairs); *see also* JUDE HOWELL, GOVERNANCE IN CHINA 65 (2004) (discussing that even though China's legal services market has eliminated geographic restrictions, there are still many restrictions in place to prevent foreign law firms from fully entering China's legal field).

102. *See* The People's Republic of China: Schedule of Specific Commitments, Feb. 14, 2002, GATS/SC/135, General Agreement on Trade in Services, 1869 U.N.T.S. 183.

103. *See* Regulations on Administration of Foreign Law Firms' Representative Offices in China, *supra* note 94 (stating that a foreign lawyer or law firm may only act as a consultant).

104. *See id.* (noting that a representative may consult with a client both with international conventions and international practices).

105. *See* Schedule of Specific Commitments, *supra* note 102 (establishing that foreign law firms can engage in profit-making activities).

106. *See id.* (describing the types of profit-making activities permissible under the Commitments).

107. *See* Regulations on Administration of Foreign Law Firms' Representative Offices in China, art. 15, (promulgated by the Decree No. 338 of the State Council of the People's Republic of China, Dec. 22, 2001, effective Jan. 1, 2002), http://www.china.org.cn/business/laws_regulations/2007-06/22/content_1214778.htm (describing the scope of profitable activities as applied to foreign law firms).

108. *See generally* Office of the United States Trade Representative, Exec. Office of the President, National Trade Estimate Report on Foreign Trade Barriers 147–48 (2006) (discussing the obstacles that prevent foreign law firms from participating fully in China's legal market). *See* Jane J. Heller, *China's New Foreign Law Firm Regulations: A Step in the Wrong Direction*, 12 PAC. RIM L. & POL'Y J. 767 (2003) at 751, 762–63 (explaining that China's Schedule maintains existing restrictions on the provision of legal services by foreign law firms).

Chinese legal environment is also unprofitable.[109] Thus, the Profit Clause effectively eliminates the incentive for foreign law firms to wage war against Chinese law firms on the Environment Clause.

Fourth, in addition to the prohibition that foreign law firms may not employ Chinese practicing lawyers as found in GATS Commitments, the Administrative Regulations further provide that even Chinese support staffs in foreign law firms may not provide legal services to clients.[110] This means that foreign law firms are not only barred from employing practicing Chinese lawyers to advise on issues concerning Chinese law, but are also barred from employing Chinese lawyers who are willing to relinquish their right to practice and act as support staff. In other words, foreign law firms are stripped of the opportunity to advise clients on Chinese law.

The collective effect of the changes made by the Administrative Regulations is obvious. Chinese authority has once again redrawn the bright line between the application of foreign and international law and Chinese law, and foreign law firms and Chinese law firms, making an even larger market share for the Chinese legal profession. Since foreign law firms may not profit on services related to Chinese law, any work of this nature is only profitable by Chinese law firms. As such, not only is the market share preserved exclusively for Chinese law firms, but its profitability also will not be compromised by the involvement of foreign law firms.

If the term "Chinese legal service market" is interpreted narrowly to mean legal services concerning Chinese law as opposed to the physical market where law firms of any nationality may come in and conduct business, then there is virtually no access to the Chinese legal service market because the entire market is preserved for the benefit of the Chinese legal profession. The example below illustrates this point. Needless to say, these additional restrictions imposed by the Administrative Regulation could potentially expose China to liabilities as the result of violating its GATS Commitments. Therefore, a foreign law firm in a member state may resort to Dispute Settlement procedure and bring its grievance to the WTO against China for breach of its WTO obligations.

Let's apply the provisions of the Administrative Regulations in a typical cross-border transaction. In this transaction, a foreign client needs a foreign law firm's advice on the foreign-end of the transaction concerning the law of a foreign jurisdiction while also needing advice on the Chinese-end of the transaction concerning Chinese law. Since the foreign law firm may not advise on issues concerning Chinese law, its only recourse is to engage a Chinese law firm to provide such services. Furthermore, since the foreign law firm may not profit on the advice of Chinese law, those services provided by the Chinese law firm will fall outside the cost-profit

109. *See* Mark A. Cohen, *International Law Firms in China: Market Access and Ethical Risks,* 80 Fordham L. Rev. 2569–70 (2012) (stating that foreign lawyers are often barred from participating from certain types of meetings with Chinese government agencies even when in the company of local counsel); *see also* Heller, *supra* note 108 at 767 (stating that the Regulations do not take a position on what may constitute providing information on the impact of the Chinese legal environment).

110. *See* Regulations on the Administration of Foreign Law Firms' Representative Offices in China, art. 16, *supra* note 107 (stating that the support staff shall not provide legal services to clients).

calculation of the foreign law firm. Moreover, profit sharing arrangements, commonly used in business partnerships, are not permissible.[111]

The Environment Clause has been adopted by the Administrative Regulations. Although China would like to remove it altogether in order to provide complete protection for its legal field, such removal would be outright admission of its violation of GATS Commitments.[112] Consequently, China's measures to further limit market access against FLSP must still comport with its GATS Commitments in order to be defensible.

C. Further Legislation Implementing GATS Commitments

The Administrative Regulation is only the beginning of China's attempt to narrow the scope of its GATS Commitments. In less than a year after the Administrative Regulation took effect, a set of supplementary rules—Rules for the Implementation of the Regulations on Administration of Foreign Law Firms' Representative Offices in China ("Implementing Rules")—was promulgated through an order of the Ministry of Justice.[113] The Implementing Rules specify activities that constitute "Chinese legal services"—an effort purported to further clarify the scope of the business activities foreign law firms may conduct, more importantly, to directly address the scope of the Environment Clause.[114] The Implementing Rules state:

> **Article 32**. The following activities shall be considered to be 'Chinese legal services' as provided in Article 15 of the Administrative Regulations:
>
> (1) Participating in litigation proceedings in China in the capacity of a lawyer;
>
> (2) Providing opinions or certification on specific issues concerning the application of Chinese law in contracts, agreements, articles of association or other written documents;

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111. *See* Heller, *supra* note 108 at 767 (noting that Article 39 of the Implementing Rules prohibits profit-sharing ventures with Chinese law firms).

112. *See* Andrew Godwin, *The Professional "Tug of War": The Regulation of Foreign Lawyers in China, Business Scope Issues and Some Suggestions for Reform*, 33 MELB. U. L. REV. 132, 136 (2009) (emphasizing China's reluctance to the Environment Clause and the controversial aftereffect post-accession); *see also* Xueyao Li & Sida Liu, *The Learning Process of Globalization: How Chinese Law Firms Survived the Financial Crisis*, 80 FORDHAM L. REV. 2847, 2851 (2012) (implying the importance of the Environment Clause as a contingency for China's WTO accession).

113. Implementation Rules for the 2002 Foreign Law Firm Regulations, General Provisions (promulgated by the Ministry of Justice Order No. 73, July 4, 2002, effective Sept. 1, 2002) (China), *as amended by* the Amendment of the Rules of the Ministry of Justice Concerning the "Regulations on Administration of Foreign Law Firms" Representative Offices in China (promulgated by the Ministry of Justice Order No. 92, effective Sept. 2, 2004) (China) (modifying the decision of the Ministry of Justice); *see also* Qiang Guo, *Are Foreign Lawyers Gaining Ground in Asia?*, 4(1) PERSPECTIVES (2003), http://www.oycf.org/Perspectives2/20_033103/ForeignLawyer.pdf (noting the issuance of the Implementing Provisions).

114. See Heller, *supra* note 108 at 767–68 (listing the activities that constitute legal activities); Implementation Rules for the 2002 Foreign Law Firm Regulations, General Provisions (promulgated by the Ministry of Justice Order No. 73, July 4, 2002, effective Sept. 1, 2002), art. 32, www.gov.cn.gongbao/content/2003/content_62105.htm (China) (stating the acts which shall be determined "China Legal Affairs").

> (3) Providing opinions or certification on actions or events to which Chinese law applies;
>
> (4) In the capacity of an agent, expressing an opinion on the application of Chinese law in arbitration activities;
>
> (5) Representing clients in undertaking registration, amendment, application and filing procedures and other procedures with Chinese government authorities or other organizations that have administrative management functions conferred on them by other laws and regulations.[115]

The controversial Environment Clause is addressed in Article 33 as follows:

> **Article 33**. When providing information concerning the impact of the Chinese legal environment in accordance with subparagraph (5) of Article 15 of the Administrative Regulation, representative offices and their representatives *may not provide specific views or conclusions on the application of Chinese law.*[116]

To ensure compliance, the Implementing Rules prescribe the manner in which foreign law firms must conduct their business. **Article 37** compels disclosure to clients by foreign law firms of their inability in advising on Chinese law at the inception of legal services.[117] **Article 38** prohibits foreign law firms to use the title of "consultants on Chinese law" for any of its personnel, including Chinese lawyers who have been qualified to practice Chinese law immediately before their employment with foreign law firm.[118]

One other relevant provision is Article 39, which regulates the relationship between foreign and Chinese law firms in restrictive language as follow:

> **Article 39.** A representative office and the law firm it belongs to may not conduct the following acts:
>
> (1) Directly or indirectly investing in Chinese law firms;
>
> (2) Making practicing associations with Chinese law firms or Chinese lawyers that share the profits or risks.
>
> (3) Establishing joint offices or sending personnel to Chinese law firms to engage in legal service activities.
>
> (4) Managing, operating, controlling or enjoying the equal rights and interests of Chinese law firms.[119]

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115. See Rules for the Implementation of the Administrative Regulations on Representative Offices of Foreign Law Firms in China, *supra* note 113 (last visited Mar. 18, 2013).

116. *Id.*

117. *See id.* (compelling disclosure of the representatives' inability to advise regarding Chinese law).

118. *See id.* (prohibiting the use of the title "consultants on Chinese law").

119. *Id.* (regulating the relationship of foreign and Chinese law firms).

This article illustrates why the operation of Chinese law firms should be independent from the influence of foreign law firms.[120] Any meaningful association between foreign and Chinese law firms from a business standpoint is also impermissible. Since profit sharing in a business partnership is not an option in a cross-border transaction, there is no way to have a meaningful business association between foreign and Chinese law firms.

V. The Effect of the Rules for the Implementation

As it appears, the Implementing Rules did nothing to clarify the outer boundary of the Environment Clause. Instead, it further watered down the content of the Environment Clause, which is the only provision that opens the door for FLSP to participate in the Chinese legal services market.

An examination of the series of implementing legislation reveals that China has breached its WTO obligations.[121] The aggregated effect of the Regulations and Rules did not merely narrow the scope of the GATS Commitments; they almost completely wiped out foreign law firms' ability to provide legal services in relation to Chinese law.[122] The little room for maneuvering under the Environment Clause has been interpreted by foreign lawyers to permit only newsletters and general reports for clients' marketing purpose.[123]

The presence of FLSP in China is much less meaningful if they are not permitted to profit from domestically related legal services. The restrictive tone of the Chinese authority has

120. *See* Godwin, *supra* note 112 at 140 (noting that Article 39 of the Implementing Rules clearly states that Chinese law firms must remain independent of foreign law firms in their operations); *see also* Carole Silver, *The Variable Value of U.S. Legal Education in the Global Legal Services Market*, 24 GEO. J. LEGAL ETHICS 1, 34 (2011) (recognizing that foreign law firms can give general advice on Chinese law but must leave additional practicing to Chinese law firms).

121. *See* Christopher Duncan, *Out of Conformity: China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions After Accession*, 18 AM. U. INT'L L. REV. 399, 406 (2002) (commenting that China's failure to comply with basic WTO requirements presents significant problems); *see also* Shin-yi Peng & Benjamin Y. Li, *Facilitating Market Access for Taiwanese Lawyers in China*, 23 UCLA PAC. BASIN L.J. 172, 191 (2006) (highlighting that China is acting inconsistently with its GATS obligations by continuing discriminatory measures against Taiwanese lawyers and law firms).

122. *See* Jane J. Heller, *China's New Foreign Law Firm Regulations: A Step in the Wrong Direction*, 12 PAC. RIM L. & POL'Y J. 751, 767–768, 774 (2003) (emphasizing that the Rules carve out areas in which only Chinese firms can provide services and foreign firms must refer matters to be handled by outside Chinese law firms); *see also* Chengyan Lu, *Legal Services in China: Facing the WTO*, 20 UCLA PAC. BASIN L.J. 278, 324 (2003) (finding that foreign lawyers have not been allowed to provide legal services involving Chinese law because Chinese lawyers have the exclusive rights to engage in them).

123. *See* Andrew Godwin, *The Professional "Tug of War": The Regulation of Foreign Lawyers in China, Business Scope Issues and Some Suggestions for Reform*, 33 MELB. U. L. REV. 132, 140 (2009) (noting that Article 15 of the Implementing Rules has been interpreted to be limited to preparing newsletters for clients and generally reporting on the Chinese legal environment for marketing purposes); *see also* Peng & Li, *supra* note 121 at 186 (commenting that the implementing legislation prohibits foreign lawyers from representing clients in ordinary procedures that non-lawyer foreigners are permitted to provide).

resulted in a high level of consternation.[124] In response, a meeting was held by China's Ministry of Justice to provide some clarification on the interpretation of the Regulations and Rules,[125] which foreign lawyers were invited to.[126]

An understanding of sorts between China's Ministry of Justice and the foreign lawyers was reached during the meeting.[127] As prohibitions are concerned, foreign lawyers may not provide authoritative and conclusive opinions on the application of Chinese law on particular legal issues.[128] However, general advice on issues governed by Chinese law falls within the Environment Clause, thus it is permissible and also profitable.[129] Specific concerns were also addressed as follows:

> (1) Foreign lawyers would not be in breach of the rules by passing on advices from Chinese lawyers in communication with clients, so long as they made it clear that the information was based on advice from Chinese lawyers.
>
> (2) Despite the recommendations of Chinese lawyers, the rules did not prohibit foreign lawyers from drafting documents governed by Chinese law, such as joint venture contracts.
>
> (3) Irrespective of the effect that foreign lawyers may attribute to disclaimers inserted in their advices, these were not effective in terms of allowing foreign lawyers to circumvent the prohibition on providing advice on specific issues concerning the application of Chinese law.
>
> (4) Restrictions on the relationships that foreign law firms could maintain with local law firms did not rule out flexible fee arrangements, long-term retainer arrangements (under which the foreign firm would effectively act as

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124. *See* Godwin, *supra* note 123 at 141 (pointing out that foreign lawyers in China initially reacted with consternation to the Administrative Regulations and Implementing Rules); *see also* Heng Wang, *Chinese Views on Modern Marco Polos: New Foreign Trade Amendments After WTO Accession*, 39 CORNELL INT'L L.J. 329, 349 (2006) (noting that the liberalization of international trade will cause negative effects for China, including decreased earnings, higher skill levels for workers, and layoffs).

125. *See* Godwin, *supra* note 123 at 141 (noting the existence of meeting conducted by China's Ministry of Justice on interpretation of the Implementing Rules and Administrative Regulations based on the recollections of the author who was present at the meeting).

126. *See id.* at 141 (stating that foreign lawyers were invited to the Shanghai meeting initiated by the Chinese Ministry of Justice as recalled by the author who was one of the foreign lawyers).

127. *See id.* (describing the agreement reached between foreign lawyers and the Chinese Ministry of Justice at a 2002 meeting in Shanghai based on the author's personal recollections).

128. *See* Heller, *supra* note 122 at 767–68 (finding that foreign lawyers are prohibited by Chinese law to give explicit advice on Chinese legal issues); *see also* Chengyan Lu, *supra* note 122 at 312 (holding that the Implementing Rules bar foreign lawyers from giving specific and conclusive legal advice related to Chinese law).

129. *See* Richard Qiang Guo, Article, *Piercing the Veil of China's Legal Market: Will GATS Make China More Accessible for U.S. Law Firms?*, 13 IND. INT'L & COMP. L. REV. 147, 175 (2002) (maintaining that foreign lawyers are not prohibited from offering clients advice and opinions on the Chinese legal environment); *see also* Charles C. Liu, Note and Comment, *China's Lawyer System: Dawning upon the World Through a Tortuous Process*, 23 WHITTIER L. REV. 1037, 1088 (2002) (asserting that foreign lawyers are permitted to give advice related to the Chinese legal environment under Chinese WTO obligations).

> the "client") or even the sharing of resources, so long as this did not result in a "shared-office arrangement."[130]

The Understanding is more lenient than the restrictive tone of the Implementing Rules. In fact, there are several instances where the Understanding differs from the Implementing Rules. For example, the drafting of legal contracts and documents governed by Chinese law was expressly prohibited by the Implementing Rules,[131] but is permissible in the Understanding.[132] In addition, the mandatory disclosure of an inability to advise on Chinese law under the Implementing Rules[133] may be disregarded according to the Understanding so that a foreign lawyer can provide legal advice on the application of Chinese law with respect to specific legal issues.[134] Even the perceived strict prohibition on all forms of association between foreign and Chinese law firms is more relaxed in the Understanding.[135] However, it is worth noting that the so-called Understanding is based on personal notes of a foreign lawyer who attended the meeting held by the Ministry of Justice.[136] There is no evidence that the Understanding has been officially recognized.[137]

The unofficial status of the Understanding did not affect foreign law firms' reliance upon it. Foreign law firms conceded that the core areas of legal practices that are essential to Chinese law firms' interest are off limits, such as legal representation in litigation, formal legal opinions on the application of Chinese law, and the employment of Chinese practicing lawyers.[138] However, for everything else, they look to the Understanding and adopt a flexible approach.[139] Permissible

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130. See Andrew Godwin, *supra* note 123 at 142 (2009).

131. *See* Regulations on Administration of Foreign Law Firms' Representative Offices in China, art. 15–16, (promulgated by the Decree No. 338 of the State Council of the People's Republic of China, Dec. 22, 2001, effective Jan. 1, 2002), http://www.china.org.cn/business/laws_regulations/2007-06/22/content_1214778.htm (noting that a foreign law firm must entrust a Chinese firm to conduct the foreign firm's legal affairs in China, which includes the drafting of legal documents).

132. *See* Godwin, *supra* note 123 at 142 (mentioning that the Implementing Rules did not prevent foreign lawyers from drafting documents for Chinese courts).

133. *See* Regulations on Administration of Foreign Law Firms' Representative Offices in China, *supra* note 131 (requiring that foreign firms must retain a Chinese firm for the purpose of advising on Chinese laws).

134. *See* Andrew Godwin, *The Professional "Tug of War": The Regulation of Foreign Lawyers in China, Business Scope Issues and Some Suggestions for Reform*, 33 MELB. U. L. REV. 142 (2009) (adding that foreign lawyers can circumvent the Implementing Rules and can provide specific legal advice on Chinese laws).

135. *See id.* at 141.

136. *See id.* at 141 n.37 (mentioning the author's own experience at the Ministry of Justice meeting).

137. *See id.* at 141 (stating that there were no rules of what was prohibited); *see also* Jane J. Heller, *China's New Foreign Law Firm Regulations: A Step in the Wrong Direction*, 12 PAC. RIM L. & POL'Y J. 751 (2003) (recommending that China permit free interaction between Chinese and foreign lawyers).

138. *See* Guo, *supra* note 129 (explaining that foreign law firms cannot engage in legal services); *see also* Yujie Gu, *Entering the Chinese Legal Market: A Guide for American Lawyers Interested in Practicing Law in China*, 48 DRAKE L. REV. 173, 201 (1999) (discussing that foreign firms cannot issue legal opinions).

139. *See* Cynthia Losure Baraban, *Inspiring Global Professionalism: Challenges and Opportunity for American Lawyers in China*, 73 IND. L.J. 1247, 1274 (1998) (articulating that foreign law firms can represent clients in various legal issues); *see also* Susan Vitale, Note, *Doors Widen to the West: China's Entry in the World Trade Organization Will Ease Some Restrictions on Foreign Law Firms*, 7 WASH. U. J. L. & POL'Y 223, 244 (2001) (stating that China intends to remove some restrictions on foreign law firms).

activities include the use of Chinese law firms' letterhead to provide advice on issues of Chinese law and the employment of legally qualified Chinese lawyers as Chinese legal consultants to provide professional legal services outside the exclusive areas of licensed Chinese lawyers.[140]

With the Understanding under their belt, foreign law firms are building extensive practices and resources in China.[141] Such extensive practice is inconsistent with the Implementing Rules and Regulations and in direct competition with local Chinese lawyers.[142] In a market where foreign products are generally regarded as economically more valuable than the local counterparts (including service products),[143] the Chinese legal profession soon felt the pinch.[144] Accusations from the Chinese legal society that foreign law firms are taking advantage of grey areas in the law are overwhelming.[145]

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140. *See* Regulations on Administration of Foreign Law Firms' Representative Offices in China, art. 15–16, (promulgated by the Decree No. 338 of the State Council of the People's Republic of China, Dec. 22, 2001, effective Jan. 1, 2002), http://www.china.org.cn/business/laws_regulations/2007-06/22/content_1214778.htm (demonstrating that practicing Chinese lawyers may not be hired by foreign law firms); *see also* Jane J. Heller, *China's New Foreign Law Firm Regulations: A Step in the Wrong Direction*, 12 PAC. RIM L. & POL'Y J. 751, 768, 775–76 (2003) (confirming that the Regulations on Representative Offices of Foreign Law Firms in China prohibit the hiring of practicing Chinese lawyers).

141. *See* Andrew Godwin, *supra* note 134 at 144 (affirming that foreign clients were content to partake in restricted legal services in China because China was such a huge marketplace); *see also* Xueyao Li & Sida Liu, *The Learning Process of Globalization: How Chinese Law Firms Survived the Financial Crisis*, 80 FORDHAM L. REV. 2847, 2847 (2012) (stating that China has become a hotbed for the expansion of legal services since 2001).

142. *See* Jacques deLisle, *China's Legal Encounter With the West*: *A History Institute for Teachers*, 13 FPRI FOOTNOTES 8 (2008), http://www.fpri.org/footnotes/1308.200806.delisle.chinalegalencounterwest.html (revealing that China has complained that WTO members in China have not abided by China's regulations); *see also* Hongming Xiao, *The Internationalization of China's Legal Services Market*, 1 PERSPECTIVES 6 (2000), http://www.oycf.org/Perspectives2/6_063000/internationalization_of_china.htm (explaining that some Chinese lawyers are worried that the influx of foreign lawyers will create competition).

143. *See Impenetrable*, THE ECONOMIST, Oct. 15, 2009, http://www.economist.com/node/14660438 (stating that many foreign businesses succeed in China); *see also* Yong Zhang, *Chinese Consumers' Evaluation of Foreign Products: The Influence of Culture, Product Types and Production Presentation Format*, 30 EUROPEAN J. OF MARKETING 50 (1995) (claiming that, as early as 1995, China's total imports were expected to exceed one billion U.S. dollars).

144. *See* Jessica Seah, *Chinese Bar Group that Once Railed Against Foreign Firms Now Welcomes Them*, THE ASIAN LAW. (Oct. 1, 2012), http://www.americanlawyer.com/PubArticleAL.jsp?id=1202573240587&Chinese_Bar_Group_That_Once_Railed_Against_Foreign_Firms_Now_Welcomes_Them&slreturn=20130218161725 (noting how, in 2006, the Shanghai Bar association issued a now-famous memo cracking down of foreign law firm competition in China); *see also* Shao Zongwei, *Local Lawyers Feel the Heat*, CHINA DAILY (Jan. 13, 2003), http://www.chinadaily.com.cn/en/doc/2003-01/14/content_152250.htm (confirming that many Chinese lawyers feel competition from foreign legal personnel).

145. *See* Godwin, *supra* note 141 at 151 (expressing that foreign law firms have benefited from ambiguities in China's regulations); *see also* Susan E. Vitale, *Doors Widen to the West: China's Entry in the World Trade Organization Will Ease Some Restrictions on Foreign Law Firms*, 7 WASH. U. J. L. & POL'Y 223, 226 (2001) (confirming that ambiguity occurs in China's Tentative Provisions that allow foreign law firms greater access to Chinese law).

The phenomenon of foreign law firms openly disregarding officially promulgated legislation may be shocking to the western society that is accustomed to law and order;[146] however, it is not so shocking in Chinese culture. The civil constituent of law and legal system has never played a significant role in China's political structure, and its enforcement is even weaker.[147] The lack of legitimacy and corruption in the Chinese government produced the atmosphere of distrust.[148] Circumvention of government policy is not uncommon at any level of Chinese society.[149] Given the weak enforcement of Chinese law, foreign law firms did not take long to assimilate into such a culture where practical gain always outweighs one's conscience, especially when the law makers and laws do not carry much moral weight in the first place.[150]

VI. The Unique Position of the Special Administrative Regions

A discussion about China's legal service market and its foreign players must not leave out one important group—legal service providers from the Special Administrative Regions (SAR)

146. *See* Edward J. Eberle, *Comparative Law, Art. 13*, ANN. SURV. INT'L & COMP. L. 93, 96 (2007) (observing that in the western tradition, a majority of external law is written, thus it conveys authority and respect); *see also* Adrien Katherine Wing, *Conceptualizing Violence: Present and Future Developments in International law; Panel III: Sex and Sexuality: Violence and Culture in the New International Order: A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 ALB. L. REV. 943, 946 (1997) (acknowledging the inviolability of laws and hierarchy in Western society).

147. *See* Hua Cai, *Bonding, Law Enforcement and Corporate Governance in China*, 13 STAN. J.L. BUS. & FIN. 82, 83 (2007) (recognizing that law enforcement in China remains weak); *see also* Ji Li, *When Are There More Laws? When Do They Matter? Using Game Theory to Compare Laws, Power Distribution, and Legal Environments in the United States and China*, 16 PAC. RIM L. & POL'Y J. 335, 336 (2007) (describing China as an authoritarian state with a weak judiciary).

148. *See* Robert Harmel & Yao-Yuan Yeh, *Corruption and Government Satisfaction in Authoritarian Regimes: The Case of China*, AMERICAN POL. SCI. ASS'N 2011 ANNUAL MEETING, WORKING PAPER 17 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1899973## (reporting that Chinese distrust the government's capacity to ensure faithful implementation of its policies); *see also* Hairong Lai, *Building Trust in Government in China: Sources of the People's Trust in Government in China*, CHINA CENTER FOR COMPARATIVE POLITICS AND ECONOMICS 9 (explaining that rampant corruption among Chinese officials is damaging the people's trust).

149. *See* CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA ANNUAL REPORT 2008, ONE HUNDRED TENTH CONGRESS, SECOND SESSION 33 (Oct. 31, 2008) (explaining that top Chinese local state and Party officials were dismissed for "server malfeasance" and abuse of police power); *see also* Thomas Lum, Patricia Moloney Figliola, & Matthew C. Weed, *China, Internet Freedom, and U.S. Policy*, CONGRESSIONAL RESEARCH SERVICE 4 (July 13, 2012) (explaining that Chinese Internet users are able to circumvent government controls of the Internet).

150. *See* Hua Cai, *Bonding, Law Enforcement and Corporate Governance in Chi*
na, 13 STAN. J.L. BUS. & FIN. 82, 83 (2007) (implying China's legal enforcement mechanisms remain weak); *see also* Michael Trebilcock & Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 VA. L. REV. 1514, 1519 (2006) (indicating China has an absence of strong formal contract law and enforcement regimes).

of China—Hong Kong and Macau.[151] China's SAR occupies a unique position in its political structure. Due to their historical colonial status, Hong Kong and Macau enjoy a high level of autonomy.[152] The democratic political systems from their colonial origins have been carried forward since they have returned to control of Mainland China.[153] To ensure a peaceful transaction, the stay of the democratic political systems was a compromise between the local populations of those regions and Mainland China, which agreed to refrain from exercising its absolute control over Hong Kong and Macau to a defined extent.[154] In addition, because Hong Kong and Macau were colonies, they were much more connected with the rest of the world than Mainland China.[155] Therefore, they are more in line, politically and culturally, with their former western controlling states.[156] The unique position of Hong Kong and Macau is often used

151. Hong Kong was returned to China from UK in 1997, and Macau was returned to China from Portugal in 1999. *See* Zoher Abdoolcarim, *Hong Kong's Future: Sunshine, With Clouds*, TIME, Jun. 7, 2007 (reporting that Hong Kong was passed from the UK to China on July 1, 2007); *see also 1997: Hong Kong Handed Over to Chinese Control*, BBC, July 1, 1997 (reporting that Hong Kong has been handed back to Chinese authorities after 150 years of British control). China's attempt to reclaim Taiwan has not succeeded. *See* He Baogang, *Why is Establishing Democracy So Difficult in China?: The Challenge of China's National Identity Question*, 35 CONTEMPORARY CHINESE THOUGHT 71, 71 (2003) (describing that in Taiwan, both the Guomindang and the Democratic Progressive Party governments have refused to reunify with China); *see also* Eric von Kessler, *Taiwan's Dilemma: China, The United States, and Reunification*, NAVAL POSTGRADUATE SCHOOL v (2008) (explaining that Taiwan authorities rebuke unification with China).

152. *See* Heng Loong Cheung, *Hong Kong SAR: Autonomy Within Integration?*, 4 UCLA J. INT'L L. & FOR. AFF. 181, 183 (1999) (addressing how the notion of "One Country, Two Systems" confers a high degree of autonomy to the Hong Kong Special Administrative Region (HKSAR)); *see also* Frances M. Luke, *The Imminent Threat of China's Intervention in Macau's Autonomy: Using Hong Kong's Past to Secure Macau's Future*, 15 AM. U. INT'L L. REV. 717, 718–19 (2000) (discussing how the Basic Law guarantees Macau, the only other Special Administrative Region besides Hong Kong, autonomy in all things except foreign affairs and defense).

153. *See* George E. Edwards, *Applicability of the "One Country, Two Systems" Hong Kong Model to Taiwan: Will Hong Kong's Post-Reversion Autonomy, Accountability, and Human Rights Record Discourage Taiwan's Reunification With the People's Republic of China?*, 32 NEW ENG. L. REV. 751, 758 (1998) (stating that Hong Kong is well-suited for the "One Country, Two Systems" model because it was under the control of the United Kingdom, and has a basis for democratic government since the 1980s); *see also* John K. Kwok, *The Hong Kong Special Administrative Region Under "One Country, Two Systems": Design for Prosperity or Recipe for Disaster?*, 15 N.Y. L. SCH. J. INT'L & COMP. L. 107, 110 (1994) (recognizing that although some aspects of a democratic government are missing from the Hong Kong system, the system does still reflect British principles).

154. *See* Cheung, *supra* note 152 at 190 (recognizing the flexible approach taken by PRC authorities with regards to Hong Kong's autonomy by keeping the administrative, legislative and judicial systems of the PRC separate from the Hong Kong system); *see also* Tim Schwarz, *Hong Kong SAR 15 Years On: Is It Still Special?*, CNN (Sept. 14, 2012, 5:33 AM), http://www.cnn.com/ 2012/06/30/world/asia/hong-kong-china-anniversary (stating that after Britain handed Hong Kong back to China, Hong Kong fell under Chinese rule but governed itself).

155. *See* Guiguo Wang & Priscilla M. F. Leung, *One Country, Two Systems: Theory Into Practice*, 7 PAC. RIM L. & POL'Y J. 279, 281 (1998) (stating that for decades the mainland of China was isolated from the rest of the world for decades); *see also* Bo Gu, *Hong Kong Is Still a World Away From Mainland China for Many*, NBC NEWS (Feb. 14, 2012, 12:46 PM), http://behindthewall.nbcnews.com/_news/2012/02/14/10407103-hong-kong-is-still-a-world-away-from-mainland-china-for-many?lite (discussing the differences between citizens of Hong Kong and people from the Mainland, particularly how Hong Kong was essentially closed off to Mainlanders, but open to the rest of the world).

156. *See* Samanthi Dissanayake, *Hong Kong Brits Few but Faithful*, BBC NEWS (June 26, 2007, 11:23 GMT), http://news.bbc.co.uk/2/hi/asia-pacific/6221356.stm (recognizing aspects of Hong Kong life that are still in accordance with the way of life in Britain); *see also* John Simpson, *Hong Kong and China: Growing Apart?*, BBC NEWS (Nov. 23, 2012, 7:45 ET), http://www.bbc.co.uk/news/world-asia-20461829 (discussing the distinction between the citizens of Hong Kong and citizens of the Chinese Mainland, and how many citizens of Hong Kong still align themselves with the United Kingdom).

by the Mainland Chinese authority as the testing ground for its foreign policy.[157] As such, China's policy in Hong Kong and Macau is often seen as indicator of the direction in which China is heading.[158]

The participation of Hong Kong and Macau in WTO is independent from Mainland China, although technically speaking they are integral parts of China.[159] The relationship between SAR and Mainland China is governed by a series of Partnership Agreements.[160] The most recent partnership agreement is the Closer Economic Partnership Arrangements (CEPA).[161]

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157. *See* James T.H. Tang, *Hong Kong's International Relations—The Challenge for a Dependent Polity in a Globalizing World*, HONG KONG DEMOCRATIC FOUNDATION (Jan. 14, 2000), http://www.hkdf.org/newsarticles.asp?show=newsarticles&newsarticle=98 (recognizing that China uses Hong Kong as a conduit for a number of foreign activities).

158. *See* Ming K. Chan, *Hong Kong: Colonial Legacy, Transformation, and Challenge*, 547 ANNALS AM. ACAD. POL. & SOC. SCI. 11, 15 (1996) (stating that the stability and prosperity of Hong Kong greatly contributes to China's economic reform and modernization); *see also* Luke, *supra* note 152 at 717 (finding that China serves as the central government and maintains the economic systems of Hong Kong and Macau).

159. *See* Neil J. Conley, *The Chinese Communist Party's New Comrade: Yahoo's Collaboration with the Chinese Government in Jailing a Chinese Journalist and Yahoo's Possible Liability Under the Alien Torts Claim Act*, 111 PENN ST. L. REV. 171, 207 (2006) (stating that Hong Kong is a separate entity from Mainland China); *see also* David S. Bloch & Thomas TerBush, *Democracy in the Cities: A New Proposal for Chinese Reform*, 33 CAL. W. INT'L L.J. 171, 187 (2003) (demonstrating that both Hong Kong and Macau are semi-independent from Mainland China with a differing economy).

160. *See* Lin Feng & Jason Buhi, *Emissions Trading Across China: Incorporating Hong Kong and Macau into an Urgently Needed Air Pollution Control Regime Under "One Country, Two Systems,"* 19 J. TRANSNAT'L L. & POL'Y 123, 127 (2009) (finding that executive agreements govern the relationship between SARs and mainland China); *see also* Ulrich G. Schroeter, *The Status of Hong Kong and Macao Under the United Nations Convention on Contracts for the International Sale of Goods*, 16 PACE INT'L L. REV. 307, 309 (2004) (holding that SARs are linked to Mainland China through Partnership Agreements).

161. *See* Lin Feng & Jason Buhi, *supra* note 160 (stating that the Central Government of China has signed the CEPA); *see also* Wei Wang, CEPA: *A Lawful Free Trade Agreement Under "One Country, Two Customs Territories?,"* 10 L. & BUS. REV. AM. 647, 651 (2004) (finding that there is a CEPA partnership agreement between Hong Kong and Macao with mainland China). The CEPA is a free trade agreement. *See* Jiaxiang Hu, *Closer Integration, Controversial Rules: Issues Arising from the CEPA Between Mainland China, Hong Kong, and Macao*, 18 PACE INT'L L. REV. 389, 395 (2006) (holding that a CEPA agreement is a free trade agreement). There are two sets of CEPA—one between Mainland China and Hong Kong, and one between Mainland China and Macau. For CEPA (Hong Kong), *see* TRADE AND INDUSTRY DEPARTMENT, MAINLAND AND HONG KONG CLOSER ECONOMIC PARTNERSHIP ARRANGEMENT (CEPA), http://www.tid.gov.hk/english/cepa/legaltext/cepa_legaltext.html (demonstrating that the Mainland and Hong Kong submitted a CEPA agreement to the WTO on December 27, 2003). For CEPA (Macau), see EXTERNAL ECONOMIC & TRADE RELATIONS, MAINLAND AND MACAO CLOSER ECONOMIC PARTNERSHIP AGREEMENT (CEPA), http://www.economia.gov.mo/web/DSE/public?_nfpb=true&_pageLabel=Pg_EETR_CEPA_S&locale=en_US (showing that the Mainland and Macao submitted a CEPA agreement to the WTO on January 1, 2004). The CEPA are regularly reviewed and supplemented. *See* Wei Wang, *CEPA: A Lawful Free Trade Agreement Under "One Country, Two Customs Territories?"*, 10 L. & BUS. REV. AM. 647, 653 (2004) (demonstrating that CEPA can be supplemented). The most recent supplement, Supplement VIII, was signed by Mainland China and Hong Kong on December 13, 2011. *See* TRADE AND INDUSTRY DEPARTMENT, MAINLAND AND HONG KONG CLOSER ECONOMIC PARTNERSHIP AGREEMENT (CEPA), http://www.tid.gov.hk/english/cepa/legaltext/cepa9.html (showing that the eighth supplement to the CEPA agreement between the Mainland and Hong Kong was signed on December 13, 2011).

Currently, China's policy on SAR lawyers in relation to providing legal services in Mainland China is as follows:[162]

> (1) Limited forms of association between SAR law firms and interior law firms are permissible;
>
> (2) Interior law firm may employ SAR lawyers;
>
> (3) Qualification examination is open to SAR lawyers (it is not available to foreign lawyers).[163]

These permissions are subject to the condition that SAR lawyers may not handle matters of Mainland law and litigation.[164] While China's policy on SAR lawyers is far from total liberalization, it nevertheless reflects a much more relaxed attitude towards SAR lawyers than the current regime governing the operation of foreign law firms. FLSP seem to have much to look forward to in the near future.

Conclusion

Currently, although foreign lawyers are not permitted to practice Chinese law, they are still active in a wide variety of legal areas, such as banking, finance, commercial arbitration, property, tax, maritime law, direct investment, intellectual property, and general corporate consulting.[165] Their contribution is not limited to building a healthy competitive market.[166] The young Chinese legal profession stands to learn from their foreign counterparts' professionalism, managerial skills, and internationally accepted code of conduct.

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162. CEPA (Hong Kong) is being used here to demonstrate the policy in both SAR regions.

163. *See Regulations on National Judicial Examination*, art. 15(1), MINISTRY OF JUSTICE P.R.C. (Aug. 14, 2008), http://www.moj.gov.cn/index/content/2008-08/14/content_923571.htm?node=7337 (noting applicants for the legal profession must be of Chinese nationality); *see also* THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA TRADE AND INDUSTRY DEPARTMENT, SPECIFIC COMMITMENTS ON LIBERALIZATION OF TRADE IN SERVICES, ANNEX 4, http://www.tid.gov.hk/english/cepa/files/annex 4.pdf (last visited Mar. 16, 2013) (stating only residents with Chinese citizenship may apply to the legal profession).

164. *See* Andrew Godwin, *The Professional "Tug of War": The Regulation of Foreign Lawyers in China, Business Scope Issues and Some Suggestions for Reform*, 33 MELB. U. L. REV. 132, 156 (2009) (stressing that attorneys who are not Chinese citizens are not allowed to handle matters of Mainland law); *see also* US-CHINA BUSINESS COUNCIL, LEGAL MARKET ACCESS ISSUES IN CHINA (2013), https://www.uschina.org/files/public/documents/2013/02/legal-market-briefer.pdf (explaining American attorneys are not allowed to practice law in China).

165. *See* JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 165 (2008) (explaining that foreign firms are not permitted to practice law but still operate in a wide area of law within China); *see also* US-CHINA BUSINESS COUNCIL, LEGAL MARKET ACCESS ISSUES IN CHINA (2013), https://www.uschina.org/files/public/documents/2013/02/legal-market-briefer.pdf (noting that although American attorneys may not practice law in China, American firms still are active in China's legal system).

166. *See* Dennis M. Horn, *Navigating China and U.S. Law*, 18 ABA BUS. L. TODAY (2008) (noting American firms enable and enhance a wide array of services); *see also* US-CHINA BUSINESS COUNCIL, LEGAL MARKET ACCESS ISSUES IN CHINA (2013), https://www.uschina.org/files/public/documents/2013/02/legal-market-briefer.pdf (acknowledging American firms have helped to contribute to the growth and development of China's legal service sector).

There is no doubt that China has made considerable progress in its legal reforms in the last three decades. However, the reforms are superficial, limited in the areas of economy and ideology on which its legal system is based. Western legal systems are built on capitalist ideology; their laws and political structure are consistent with the notion of separation of powers, rule of law, democracy, and natural justice, among others.[167] China's reform will not be immune to these dominant influences.

So far, China's reform, albeit superficial, has been consistent with the western mode of practice. This is the result of combined forces, such as the influence of the FLSP and the pressure of globalization, especially WTO obligations. However, its socialist nature and supreme Communist Party interest are inherently at odds with the direction it is heading. In due time, China's legal reform will reach the point at which its political ideology and structure will be called into question, or the reforms will meet a dead end. After all, law is an extension of politics.

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167. *See* Office for Promotion of Parliamentary Democracy, Democracy Revisited: Which Notion of Democracy for the EU's External Relations? 20 (2009) (asserting the role separation of powers has had on developing the Western legal system); *see also* Redson Edward Kapindu, Malawi: Legal System and Research Resources, Hauser Global L. Sch. Program: N.Y.U. Sch. of L. (2009) (noting that one fundamental principle of the American legal system is the belief of separation of powers).

Unreliable Excuses: How Do Differing Persuasive Interpretations of CISG Article 79 Affect Its Goal of Harmony?

Brandon Nagy*

> [The states party to the CISG], . . . [being of the opinion] that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade, [have agreed] as follows: . . .[1]

I. Introduction

The United Nations Convention on Contracts for the International Sale of Goods (CISG)[2] "can be regarded as one of the most successful attempts in international commercial law to harmonize divergent legal concepts and principles from various national laws and legal systems."[3]

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1. *See* United Nations Convention on Contracts for the International Sale of Goods, Preamble (U.N. Convention on CISG), April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (highlighting the purpose of the CISG).

2. *See* U.N. Convention on CISG, April 11, 1980, 1489 U.N.T.S. 3 (1993); *see also* U.S. Ratification of 1980 U.N. Convention on Contracts for the Int'l Sale of Goods, 52 Fed. Reg. 40 (Mar. 2, 1987) (outlining the CISG); The CISG became effective January 1, 1988. *See also* Valero Mkt. & Supply Co. v. Greeni Oy & Greeni Trading Oy, 373 F. Supp. 2d 475, 479 (D.N.J. 2005) (citing to 15 U.S.C. app. at 332) (providing general information on the CISG).

3. *See* Peter J. Mazzacano, *Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG*, 2 NORDIC J. COM. L. 1, 49 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1982895 (stating that CISG bridges civil and common law).

* **Student, Sandra Day O'Connor College of Law, Arizona State University (J.D. candidate, May 2013).** **The author wishes to thank faculty advisor Professor Charles R. Calleros for his invaluable help and feedback throughout multiple drafts of this article, and Edith Cseke for her treasured support.**

The CISG supplies a default uniform international commercial sales law[4] to seventy-eight ratifying countries, who collectively account for over three-quarters of the world's international trade.[5] Because a U.S. trader engaging in an international sale or purchase of goods, absent an express and effective choice to be governed by other law,[6] will very likely be bound by the provisions of the CISG, U.S. traders and their legal advisors should understand the benefits and limitations of the CISG.

As an international treaty, the sources of interpretation for the CISG relied on by courts and tribunals, such as scholarly commentary, the *travaux préparatoires* (legislative history of the treaty), arbitral awards, and the decisions of foreign courts are generally persuasive and not binding.[7] Despite lacking precedential force, these sources can have strong persuasive authority

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4. Under CISG art. 1.1(a), the CISG applies most directly when each of the parties to the sales contract has its place of business in a different ratifying country. *See* U.N. Convention on CISG art. 1.1(a), Apr.11, 1980, 1489 U.N.T.S. 3, I.L.M. The CISG may apply in other circumstances, as well: "the CISG may also apply if only one of the parties has its place of business in a ratifying country, but the forum's choice-of-law rules point to the law of that ratifying country, which law includes the CISG." *See* U.N. Convention on CISG art. 1.1(b), Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M.; *see also* U.N. Convention on CISG art. 10, Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M. (providing a test for determining the applicable "place of business" when a party does business in more than one place). Thus, for example, if a party with its place of business in the ratifying country of France contracts with a party with its place of business in the non-ratifying country of England, the CISG will apply if the forum's choice-of-law rules select the domestic law of France as the applicable law. The United States, however, declared a reservation to the CISG under Article 95, permitting it to adopt the CISG without Article 1.1(b). *See* Valero Mkt. & Supply Co. v. Greeni Oy & Greeni Trading Oy, 373 F. Supp. 2d 475, 482 (D.N.J. 2005) (explaining that the reservation was inapplicable because Finland and the United States were both signatories to the CISG). Thus, if one of the parties has its place of business in the United States, then the CISG will apply only if the other party has its place of business in a ratifying country, thus satisfying Article 1.1(a). *See id.* at 482. *See also* Charles R. Calleros, *Toward Harmonization and Certainty in Choice-of-Law Rules for International Contracts: Should the U.S. Adopt the Equivalent of Rome I?*, 28 WIS. INT'L L.J. 639, 644–45 n.17 (2011) (describing how harmonization of interpretations will reduce risks in contract formation). Under Article 6, however, the parties may opt out of the CISG in their contract: "The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions." *See* U.N. Convention on CISG art. 6, April 11, 1980, 1489 U.N.T.S. 3 (describing the ability for parties to opt out of the CISG).

5. *See* Pace University Law School CISG Database: CISG Table of Contracting States, http://www.cisg.law.pace.edu/cisg/countries/cntries.html (tabulating CISG members); *see also* Christopher C. Kokoruda, *The UN Convention on Contacts for the International Sale of Goods—It's Not Your Father's Uniform Commercial Code*, 85 FLA. B.J. 103, 103 (providing a count of CISG signatories as of August 2010).

6. Under Article 6, however, the parties may opt out of the CISG in their contract: "The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions." *See* U.N. Convention on CISG art. 6, Apr. 11, 1980, 1489 U.N.T.S. 3 (describing the ability of parties to circumvent provisions).

7. *See* Calleros, *supra* note 4 at 645 n.20 (citing the U.N. Convention on CISG art. 7(1), Apr. 11, 1980, 1489 U.N.T.S. 3) ("Courts in one signatory country are not bound by the judicial interpretations of the CISG from another country, and any court will have an inevitable tendency to read the CISG through the lens of its own legal system, at least initially. The CISG, however, specifically directs the forum to consider the 'international character' of the CISG and 'the need to promote uniformity in its application.' Courts thus should consider interpretations of the CISG from other jurisdictions to avoid stratification through conflicting interpretations influenced by local law."); *see also* Marlyse McQuillen, *The Development of a Federal CISG Common Law in U.S. Courts: Patterns of Interpretation and Citation*, 61 U. MIAMI L. REV. 509, 510 (2007) (explaining that the CISG is meant to be interpreted by the national courts of CISG signatories).

for domestic courts grappling with a novel question of interpretation of the CISG.[8] The lack of binding precedent creates unique issues for the interpretation of an international treaty because the treaty will be successful only if the varied domestic legal systems that enforce the treaty uniformly interpret its language with respect to its international character.[9] Diverging interpretations of the CISG will create disharmony between legal systems, which could lead to unpredictable results that contradict its goal of harmonizing international commercial law and reducing barriers to trade.[10] Moreover, because predictability is the heart of international trade,[11] an unpredictable CISG may be avoided by well-counseled international traders who, under article 6[12] of the CISG, can choose other law to govern their international sales contracts.[13]

As one of the CISG's "most challenging and important . . . provisions,"[14] article 79 (Article 79) attempts to explain when a party should be exempted from liability for damages resulting from the party's failure to fulfill a contractual obligation.[15] Hoping "that Article 79 would establish its own autonomous definition of impediments beyond a party's control,"[16] the draft-

8. *See* Air France v. Saks, 470 U.S. 392, 404 (1985) (quoting Benjamins v. British Euro. Airways, 572 F.2d 913, 919 (2d Cir. 1978) (demonstrating that the U.S. Supreme Court stated that "the opinions of our sister signatories [are] entitled to considerable weight" within the context of interpreting international treaties); *see also* McQuillen, *supra* note 7 at 537 (reasoning that domestic courts integrate non-binding persuasive domestic precedent, CISG scholarship, and some CISG caselaw when interpreting the CISG).

9. *See, e.g.*, U.N. Convention on CISG art. 7(1), Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M. (stating that the Convention must be interpreted to promote uniformity); *see also* Alexander S. Komarov, *Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1)*, 25 J.L. & COM. 75, 78 (2005) (emphasizing that domestic law can be taken into account when interpreting CISG cases but not when it conflicts with how the law is interpreted internationally).

10. *See* U.N. Convention on CISG, Preamble, Apr. 11, 1980, 1489 U.N.T.S. 3 (stressing that the Convention was created to eliminate barriers to international trade); *see also* William P. Johnson, *Understanding Exclusion of the CISG: A New Paradigm of Determining Party Intent*, 59 BUFF. L. REV. 213, 268 n.264 (2011) (highlighting the problem that courts in different countries may interpret the CISG in a way that is favorable to their domestic policies).

11. *See* Mike Moore, *Promoting Openness, Fairness and Predictability in International Trade for the Benefit of Humanity*, THE WORLD OF PARLIAMENTS, July 2001, http://www.ipu.org/news-e/2-4.htm (stating that "[o]penness, fairness and predictability are at the heart of the multilateral trading system.").

12. *See* U.N. Convention on CISG art. 6, Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M. (maintaining that the CISG signatories can exclude the application of the Convention or change the effects of any specific provision).

13. *See* John H. Jackson, *Perspectives on the Jurisprudence on International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICH. L. REV. 1570, 1575 (1984) (providing that "[p]redictability of decisions, whether based on precedent, statutory formulas, or something else, enables private parties and their counselors (lawyers, economists, and politicians) to calculate generally the potential or lack of potential for a favorable decision under each of a variety of different regulatory schemes.").

14. *See* Harry M. Flechtner, *The Exemption Provisions of the Sales Convention, Including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court*, 3 BELGRADE L. REV. 84, 85 (2011), http://www.cisg.law.pace.edu/cisg/biblio/flechtner10.html (describing Article 79 as a vital CISG provision).

15. *See* U.N. Convention on CISG art. 79, Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M. (exempting parties from liability for failure to perform any of their obligations, if the failure was due to an impediment beyond their control).

16. *See* CAMILLA BAASCH ANDERSEN, UNIFORM APPLICATION OF THE INTERNATIONAL SALES LAW: UNDERSTANDING UNIFORMITY, THE GLOBAL JURISCONSULTORIUM AND EXAMINATION AND NOTIFICATION PROVISIONS OF THE CISG 94 (2007) (quoting the expectations for Article 79).

ers of the CISG avoided the use of various familiar domestic legal terms—such as *force majeure*,[17] *Wegfall der Geschäftsgrundlage*,[18] *eccessiva onerosità sopravvenuta*,[19] impossibility, and impracticability—in favor of "terminology neutrality."[20] In this way Article 79 bridges the various domestic legal doctrines of the signatory states.[21] Yet, the vague language necessitated by its relation to domestic legal doctrines[22] has caused some scholars to bemoan the lack of uniformity created by Article 79.[23]

While it is not possible to evaluate the lack of uniformity found across myriad unpublished court and arbitral decisions, the relatively few published decisions addressing Article 79[24] gener-

17. *Force majeure* (and its Latin equivalent, *vis major*) translates literally into "superior force." However, in many jurisdictions, both common law and civil, this French term is used generically "to characterize a wide range of supervening events." *See* BLACK'S LAW DICTIONARY 718 (9th ed. 2009) (defining "force majeure" as "a superior force"); *see also* Peter J. Mazzacano, *Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG*, 2 NORDIC J. COM. L. 1, 40 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1982895 (stating that CISG bridges civil and common law).

18. Germany's domestic hardship principle, *Wegfall der Geschäftsgrundlage*, translates roughly to "elimination of the basis of the business transaction." *See* Chengwei Liu, *Force Majeure: Perspectives From the CISG, UNIDROIT Principles, PECL and Case Law*, PACE L. SCH. INST. OF INT'L COM. L. 39 (Apr. 27, 2005), http://www.cisg.law.pace.edu/cisg/biblio/liu6.html (noting the Convention avoided referencing domestic theories in the CISG); *see also* Anja Carlsen, *Can the Hardship Provisions in the UNIDROIT Principles Be Applied When the CISG Is the Governing Law?*, PACE L. SCH. INST. OF INT'L COM. L. (Dec. 14, 1998), http://www.cisg.law.pace.edu/cisg/biblio/carlsen.html (stating that the German doctrine of *Wegfall der Geschäftsgrundlage* is inapplicable when the CISG controls).

19. The Italian adoption of Germany's *Wegfall* concept, *eccessiva onerosità sopravvenuta* translates roughly to an excessively burdensome supervening event. *See* Mazzacano, *supra* note 17 at 46 (discussing Italy's adoption of the *Wegfall der Geschäftsgrundlage* principle); *see also* Ingeborg Schwenzer, *Wider Perspective: Force Majeure and Hardship in International Sales Contracts*, 39 VUWLR 709, 711 n.10 (2008), http://www.austlii.edu.au/nz/journals/VUWLawRw/2008/39.pdf (mentioning Italy's theory of hardship).

20. *See* ANDERSEN, *supra* note 16 (quoting the goal of Article 79).

21. *See* Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT'L L. & BUS. 299, 303–04 (2004) (acknowledging that the CISG can help bridge differences between domestic law regimes); *see also* Mazzacano, *supra* note 17 at 1 (discussing the sale law as advocated by the CISG as being transnationally uniform by design).

22. *See* Flechtner, *supra* note 14, at 85 (finding that Article 79's necessarily vague standards have worked against international uniformity).

23. *See* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 615 (Harry M. Flechtner ed., 4th ed. 2009) (hereinafter HONNOLD 2009) (finding that Professor Honnold's statements calling Article 79 the least successful effort toward international uniformity are accurate); *see also* DiMatteo et al., *supra* note 21 at 303–04 (demonstrating that uniformity is an important goal of the CISG).

24. For example, the UNILEX database lists 29 Article 79 decisions. *See* UNILEX CISG, http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1 (last visited Apr. 7, 2013) (listing the 29 decisions pertaining to Article 79). The Pace CISG database lists several more. *See Article 79*, PACE L. SCH. INST. OF INT'L COM. L. (Jan. 7, 2013), http://www.cisg.law.pace.edu/cisg/text/digest-cases-79.html (listing additional decisions pertaining to Article 79). The lack of published cases is probably the result of the fact that arbitral decisions are seldom published. Consequently, the CISG Advisory Council warns: "[a]ny survey of reported decisions is to be read with caution, because the number of cases decided at this point do not allow but a few tentative conclusions regarding interpretative trends on CISG Article 79." *See* Alejandro M. Garro, *CISG Advisory Council Opinion No. 7: Exemption of Liability for Damages Under Article 79 of the CISG*, PACE L. SCH. INST. OF INT'L COM. L. (Apr. 7, 2008), http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html (CISG-AC Op.) (claiming that, given the limited cases published on the matter, Article 79 cases should be read with caution [given the limited cases published on the matter]).

ally do not support the fear that courts would too readily excuse parties or rely on incompatible domestic law in place of the international standards in the CISG.[25] However, these court and arbitral decisions, along with copious scholarship, have revealed contradictions in the treatment of several Article 79 issues: what exactly constitutes an impediment; how to treat non-conforming goods as contrasted with non-delivery; and when non-performance can be attributed to the actions of a third party.[26] Other issues, such as how and whether Article 79 covers "hardship," may be largely settled, but the non-binding nature of the precedent leaves room for national courts to shoehorn domestic excuse doctrines into their applications of Article 79.[27]

Both unsettled and inconsistent decisions undermine and frustrate the uniformity of interpretation necessary to create international harmony. Consequently, and in the interests of increasing the value of the CISG, adjudicators should make every effort to consistently apply Article 79 with regard to its international character and regardless of the particular domestic excuse doctrine they would prefer.[28] Meanwhile, scholars—and the CISG Advisory Council specifically—should try to ensure that their interpretations of Article 79 consistently promote uniformity and harmony.[29]

This article will first provide background information illuminating the broad goals and approach of Article 79, and it will introduce several Article 79 issues demonstrating substantial disharmony. Next, the discussion will focus on the particular disharmony created by adjudicators and scholarship that interprets Article 79 provisions too broadly. Last, this article will offer suggestions on how both adjudicators and scholars can create and strengthen harmony in Article 79 applications.

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25. *See* Garro, *supra* note 24 (discussing the issue of whether courts may too readily excuse parties or rely on domestic law in place of international CISG standards); *see also* Flechtner, *supra* note 22, at 91 (stating that the notion that courts will rely on domestic law instead of international law standards in the CISG is unsupported).

26. *See infra* II.A.3, II.C.1.–3.

27. *See* Supermicro Computer Inc. v. Digitechnic, S.A., 145 F. Supp. 2d 1147, 1150 (N.D.Cal. 2001) (holding that when no state law issues are present, a court may look to analogous international law situations); *see also* Hof van Cassatie [Cass.] [Court of Cassation], June 19, 2009, C.07.0289, http://cisgw3.law.pace.edu/cases/090619b1.html (Belg.) (announcing that only when changed circumstances were not reasonably foreseeable at the contract's inception, they can amount to an impediment under Article 79).

28. *See infra* III.

29. *See id.*

II. Background

A. Overview of Article 79

In contracts governed by the CISG, any party that fails to perform its contractual obligations may be liable to the other party for damages.[30] Under certain extraordinary circumstances, the CISG grants a party exemption from liability for non-performance.[31] To avoid liability for breach under Article 79, the non-performing party must prove: (1) an impediment to performance; (2) that prevented performance; (3) was beyond the party's control; (4) could not reasonably have been taken into account at the time of the conclusion of the contract; (5) and, along with its consequences, could not have been avoided or overcome.[32] Professor Honnold, one of the drafters of the CISG, summarized the principal elements as "externality of the cause, reasonable unforeseeability of the event, and reasonable unavoidability and inability

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30. *See* U.N. Convention on CISG art. 45(1)(b), 61(1)(b), Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M. (indicating damages that can be collected for non-performance). Note that under these articles, "a party has a right to claim damages for any non-performance of the other party without the necessity of providing fault or a lack of good faith or the breach of an express promise on his part, as is required by some legal systems." *See Guide to CISG Article 79*, PACE L. SCH. INST. OF INT'L COM. L. (Aug. 30, 2006), http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-79.html (asserting that breaches under the CISG may result in damages); *see also* Marlyse McQuillen, *The Development of a Federal CISG Common Law in U.S. Courts: Patterns of Interpretation and Citation,* 61 U. MIAMI L. REV. 533 (2007) (noting the CISG allows relief for breaches through awards of consequential and expectation damages).

31. *See* U.N. Convention on CISG art. 79, Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M., stating that

> (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
>
> (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:
>
> (a) he is exempt under the preceding paragraph; and
>
> (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
>
> (3) The exemption provided by this article has effect for the period during which the impediment exists.
>
> (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.
>
> (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

See also Jennifer M. Bund, Note, *Force Majeure Clauses: Drafting Advice for the CISG Practitioner*, 17 J.L. & COM. 381, 386 (1998) (explaining that for a party to be excused under the CISG, the non-performing party must establish that performance was obstructed by an unforeseeable impediment).

32. *See* U.N. Convention on CISG art. 79(1), Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M. (noting that to be free from liability, the non-performing party must fulfill certain criteria); *see also* Dionysios P. Flambouras, *The Doctrines of Impossibility of Performance and Clausula Rebus Sic Stantibus in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law—A Comparative Analysis*, 13 PACE INT'L L. REV. 261, 264 (2001) (acknowledging that the non-performing party must prove why its performance was obstructed).

to overcome the event or its consequences."[33] Additionally, Article 79 includes four subsections to address several specific issues and procedural details that may arise.[34]

Article 79(2) excuses the obligation to perform in some circumstances if the party's failure stemmed from "the failure by a third person whom he . . . engaged to perform the whole or a part of the contract."[35] The scope of "third person" is not entirely clear, but the drafters may have intended it to be read narrowly.[36] Additionally, Article 79(2)(a) and (b) require the non-performing party to demonstrate that both it and the third person fulfill the Article 79(1) requirements.[37]

Article 79(3) clarifies that only non-performance during the period within which the impediment exists will be excused.[38] Therefore, if an impediment is temporary—perhaps a transit strike preventing delivery of the goods—Article 79 does not provide a permanent excuse.[39] Accordingly, when the impediment vanishes, the non-performing party's obligation to perform is reinstated.[40]

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33. *See* HONNOLD 2009, *supra* note 23, at 626 (stating non-performance of a party must be based on unforseeability and unavoidability); *see also* Flambouras, *supra* note 32 at 264 (noting an acceptable excuse for non-performance relies upon the non-performing party meeting certain criteria).

34. *See* U.N. Convention on CISG art. 79(2)–(5), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668 (providing guidance for additional circumstances and procedural issues with regard to exemptions); *see also* Flechtner, *Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods*, 19 PACE INT'L L. REV. 29, 42 (2007) (discussing one specific subsection of Article 79 which addresses specific performance and exemption).

35. *See* U.N. Convention on CISG art. 79(2), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668 (stating that performance may be excused when a third party is at fault); *see* Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW J. INT'L L. & BUS. 424 (2004) (explaining that Article 79 contains a provision which addresses failure to perform when a third party is to blame).

36. Honnold states that "[the] legislative history indicates that narrow scope should be given to the phrase . . . there must be an 'organic link' between the main contract and the subcontract." JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 615 (3d ed. 1999) (hereinafter HONNOLD 1999) (commenting that a narrow reading of "third party" was intended); *see also* Carla Spivack, *Of Shrinking Sweatsuits and Poison Vine Wax: A Comparison of Basis for Excuse Under U.C.C. § 2-615 and CISG Article 79*, 27 U. PA. J. INT'L ECON. L. 757, 777 (2006) (analyzing the ambiguity of whether a supplier is considered a third party).

37. *See* U.N. Convention on CISG art. 79(2)(a)–(b), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668 (indicating two conditions for excusing performance under the third party exemption); *see also* Spivack, *supra* note 36 at 776 (2006) (reiterating the conditions that are required for excusal of performance due to third-party obstruction).

38. *See* U.N. Convention on CISG art. 79(3), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668 (clarifying that non-performance will be excused only when it occurs during the obstruction by the third party); *see also* Tom Southerington, *Impossibility of Performance and Other Excuses in International Trade,* Publication of the Faculty of Law of the University of Turku, Private law publication series B:55, http://www.cisg.law.pace.edu/cisg/biblio/southerington.html (noting that the exemption applies only from the time the impediment begins to when it ends).

39. *See* U.N. Convention on CISG art. 79(3), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668 (defining the time limitation on excusal of non-performance due to impediment); *see also* Southerington, *supra* note 38 (remarking that there is provision addressing only partial impediment to performance).

40. *See* U.N. Convention on CISG, art. 79(3), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (indicating that the exemption provided only has effect when an impediment exists); *see also* Bund, *supra* note 31 at 387 (commenting that Article 79 does not provide a permanent excuse for a temporary impediment).

Article 79(4) adds the additional requirement that the non-performing party must give reasonably timely notice to the other party of "the impediment and its effect on his ability to perform."[41]

Article 79(5) limits the excuse to damages only.[42] Parties retain all other rights to relief including the rights to "avoid" the contract, demand performance, seek restitution or interest, or reduce the purchase price.[43]

1. Article 79 in General: Contrasting "Impediment" With National Legal Doctrines

Carefully chosen by the CISG drafters to be less restrictive than the term "impossibility," "failure to perform . . . due to an impediment beyond his control"[44] denotes an objective, outside force or obstacle that interferes with performance.[45] Professor John Honnold contends that the impediment must be severe enough to actually prevent performance—essentially a causation element.[46] Honnold also argues that the drafters did not adopt the term "frustration," which allows excuse on the grounds of economic hardship, because they assumed that "an extreme and unforeseeable change in economic circumstances" could, if it actually prevented performance, itself qualify as an "impediment" under Article 79(1).[47] The International Chamber of Commerce, when creating a guide for its arbitrators, concluded that an "impedi-

41. *See* U.N. Convention on CISG art 79(4), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (stating that the failure to give such notice will result in liability to the non-performing party); *see also* Flambouras, *supra* note 32, at 261, 272–73 (2001) (addressing the reliance damages incurred if notice has not been given).

42. *See* U.N. Convention on CISG art. 79(5), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (stating that a party is not prevented from exercising rights other than a claim to damages); *see also* JOSEPH M. LOOKOFSKY, UNDERSTANDING THE CISG: A COMPACT GUIDE TO THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 130 (2004) (explaining that the Article 79(5) damages exemption does not preclude a claim for interest).

43. *See* U.N. Convention on CISG art. 46, 49, 50, 62, 78, 81(2), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (outlining the wide range of reliefs a party may retain when a contract has been breached). Avoidance requires a "fundamental breach" which may or may not have occurred in a situation where an impediment prevented performance; *see also* U.N. Convention on CISG, art. 25, 49, 79, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (discussing different instances where a fundamental breach may lead to remedies for the buyer); *see also* Eric C. Schneider, *Measuring Damages Under the CISG Article 74 of the United Nations Convention on Contracts for the International Sale of Goods*, 9 PACE INT'L L. REV. 223, 224 (1997) (referring to the numerous general provisions of the Convention that have a bearing on a party's claims for damages).

44. *See* U.N. Convention on CISG art. 79(1), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (stating that an excuse is available for a non-performing party only if they were unable to expect or avoid the consequences of an impediment); *see also* CHRISTOPH BRUNNER, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES 76 (2009) (remarking that the non-performing party must not explicitly or implicitly assume the risk of an impediment's occurrence).

45. *See* HONNOLD 1999 *supra* note 36 at 480 (defining Article 79's "impediment" standard); *see also* PETER HUBER & ALASTAIR MULLIS, THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS, 257–58 (2007) (discussing the impediment standard in the CISG).

46. *See* HONNOLD 1999, *supra* note 36 at 483 (explaining the standard required for a showing of "impediment"); *see also* STEVEN L. HARRIS ET AL., UNIFORM COMMERCIAL CODE SERIES (2012) (interpreting CISG Article 79 as a provision that excuses non-performance and stating its requirements).

47. *See* HONNOLD 1999, *supra* note 36 at 477 (examining "change" under the performance exemptions); *see also* Lillian V. Blageff, *Recent Cases Interpreting the Convention on Contracts for the International Sale of Goods*, CORP. COUNS. Q., Jan. 2011, at 1 (labeling Article 79 of the CISG as a force majeure clause).

ment" should be "some kind of obstacle which has prevented performance as normally foreseen"—a definition appearing to leave room for hardship.[48] Article 79's "impediment" may also include the U.S. concept of "frustration of purpose,"[49] but only to the extent that it relates to an obstacle obstructing contractual performance as originally envisaged.[50] The text of Article 79 also fails to address the United States' Uniform Commercial Code (U.C.C.) doctrine of "commercial impracticability."[51]

Whatever "impediment" was originally intended to mean, since the CISG entered into force, its ultimate meaning is the product of its application and interpretation by courts and arbitration tribunals. When defining "impediment," most jurisdictions started by determining if and how their national doctrines for exemption fit within the CISG's concept of "impediment." For example, Germany's *Schiedsgericht der Handelskammer*, an arbitral tribunal, interpreted Article 79's "impediment" to be consistent with *force majeure*, economic impossibility, and excessive onerousness.[52] Italy's *Tribunale Civile di Monza*, a civil district court, however, expressly found "impediment" to be distinct from and not including *eccessiva onerosità sopravve-*

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48. *See* International Chamber of Commerce, Force Majeure and Hardship comment 9, at 11 (1985); *see also* ICC Force Majeure Clause, ICC Hardship Clause 2003, Publication No. 650, http://www.trans-lex.org/700700 (last visited Mar. 25, 2013) (detailing the structure of the ICC force majeure clause).

49. *See* 17 AM. JUR. 2D *Contracts* § 651 (1964) (holding that "Frustration of purpose or the object of the contract" is based upon the "fundamental premise that relief should be given where the parties could not reasonably have protected themselves by the contract's terms against contingencies that later arose"); *see also* Andrew A. Schwartz, *A "Standard Clause Analysis" of the Frustration Doctrine and the Material Adverse Change Clause*, 57 UCLA. L. REV. 789, 800 (2010) (articulating the history and purpose of the frustration clause).

50. *See* Henry D. Gabriel, *A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code*, 7 IND. INT'L & COMP. L. REV. 279, 307 (1997) (asserting that "Article 79 embodies the CISG's provisions for frustration of purpose and impossibility"); *see also* Francesco G. Mazzotta, *Why Do Some American Courts Fail to Get It Right?*, 3 LOY. U. CHI. INT'L L. REV. 85, 87 (2005) (noting that Article 79 is essentially a force majeure, or impossibility, clause).

51. *See* U.C.C. § 2-615 (2011) (stating that "[e]xcept so far as a seller may have assumed a greater obligation . . . (a) Delay in delivery or non-delivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid"); *see also* 17 AM. JUR. 2D *Contracts* § 656 (2013) (proclaiming that "[a] contract is said to be commercially impracticable when, because of unforeseen events, it can be performed only at an excessive and unreasonable cost or when all means of performance are commercially senseless"); *see also* Carla Spivack, *Of Shrinking Sweatsuits and Poison Vine Wax: A Comparison of Basis for Excuse Under U.C.C. § 2-615 and CISG Article 79*, 27 U. PA. J. INT'L ECON. L. 762 (2006) (explaining that excuse under Article 79 is narrower than excuse under the U.C.C. since a literal "impediment" is required as opposed to a mere showing of impracticability).

52. *See, e.g.*, Chinese Goods Case (Ger. v. China), Schiedsgericht der Handelskammer (Hamburg, Ger. 1996), English-language abstract, http://www.unilex.info/case.cfm?pid=1&do=case&id-=195&step=Abstract; German full text, http://www.unilex.info/case.cfm?pid=1&do=-case&id=195&step=FullText (analogizing Article 79 to various national legal doctrines); *see also* Ingeborg Schwenzer, *Wider Perspective: Force Majeure and Hardship in International Sales Contracts*, 39 VUWLR 709 (2008), http://www.austlii.edu.au/nz/journals/VUWLawRw/2008/39.pdf.

nuta—the Italian hardship doctrine.[53] In this way, the Italian court implied that an impediment requires actual impossibility.[54]

Further, a distinction between Article 79 and domestic excuse doctrines can be inferred from rulings by courts and tribunals, emphasizing that Article 79 preempts and displaces the similar domestic doctrine when the CISG governs a transaction.[55] More often, Article 79 decisions have found "impediment" to be most similar to their domestic exemptions standards for "impossibility."[56] Still, others have found that while impossibility may be the most similar concept, "hardship" standards apply to render Article 79 exemption standards less restrictive than the harsher "impossibility."[57] Although undoubtedly frustrating to the CISG's goal of uniformity, such diverging opinions on the scope of "impediment" can hardly be considered surprising given that "[t]he convention, *faute de mieux*, will often be applied by tribunals (judges or arbitrators) who will be intimately familiar with their own domestic law."[58]

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53. *See* Nuova Fucinati v. Fondmetal Int'l (It. v. Swed.), Tribunale Civile di Monza (It. 1993), English abstract, http://www.unilex.info/case.cfm?pid=1&do=case&id=21-&step=Abstract; Italian full text, http://www.unilex.info/case.cfm?pid=1&do=-case&id=21&step=FullText (concluding that the CISG does not allow avoidance under Article 79 based on hardship).

54. *See id.* (holding that hardship is not a ground for avoidance).

55. *See, e.g.*, Electronic Hearing Aid Case (Ger. v. It.), Landgericht Aachen (Ger. 1993), English translation, http://cisgw3.law.pace.edu/cases/930514g1.html (maintaining that the "[r]ules of frustration or economic hardship (*Wegfall der Geschäftsgrundlage*) under domestic law or domestic law challenges having to do with mistake as to the quality of the goods are irrelevant because the CISG fills the field in these areas"); *see also* Chengwei Liu, *Force Majeure: Perspectives From the CISG, UNIDROIT Principles, PECL and Case Law*, PACE L. SCH. INST. OF INT'L COM. L. 39 (Apr. 27, 2005), http://www.cisg.law.pace.edu/cisg/biblio/liu6.html (reasoning that Art. 79 preempts comparable national doctrines).

56. *See, e.g.*, Nuova Fucinati v. Fondmetal Int'l (It. v. Swed.), Tribunale Civile di Monza (It. 1993), English abstract, http://www.unilex.info/case.cfm?pid=1&do=case-&id=21&step=Abstract; Italian full text, http://www.unilex.info/case.cfm?pid=1&do-=case&id=21&step=FullText (determining that contract avoidance because of hardship is not a remedy under Art. 79); *see also* Vital Berry Mktg. v. Dira-Frost (Chile v. Belg.), Rechtbank van Koophandel, Hasselt (Belg. 1995), English abstract, http://www.unilex.info/case.cfm?pid=1&do=case&id=263&step=Abstract; Dutch full text, http://www.unilex.info/case.cfm?pid=1&do=case&id=263&step=FullText (informing the Court held that drops in the market price of a good cannot exempt the buyer for non-performance because "fluctuations of prices are foreseeable events in international trade and far from rendering the performance impossible they result in an economic loss well included in the normal risk of commercial activities"); *see also* Iron Molybdenum Case (U.K. v. Ger.), Oberlandesgericht Hamburg (Ger. 1997), http://cisgw3.law.pace.edu/cases/-970228g1.html (holding that Article 79 does not exempt a seller from liability for non-delivery to buyer because of a supplier's failure to deliver unless it is impossible for the seller to procure replacement goods of a similar quality on the market).

57. *See* U.N. Convention on CISG art. 79, Apr. 11, 1980, 15 U.S.C.A. 1987, 1489 U.N.T.S. 3, I.L.M. (agreeing that a party is not liable for the failure to perform their obligations if the party can prove the failure was due to factors beyond that party's control); *see also* Shoes Case (It. v. Ger.), Amtsgericht Charlottenburg, Germany (1994), English Translation, http://cisgw3.law.pace.edu/cases/940915g1.html (holding that Article 79 exempted a buyer from interest on delayed payment of the purchase price because the Court determined timely payment, although possible, could not be reasonably expected in the circumstances and thereby implied Article 79 less restrictive than the impossibility exemption standards).

58. JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 1 (1989) (hereinafter HONNOLD, DOCUMENTARY HISTORY) (acquiescing that the tribunals will tend to read international rules skewed toward the legal ideas ingrained in them).

2. Concepts of "Fault" Weighed Against "Risk" in Article 79

Specific interpretations of the exact standards of "impediment" notwithstanding, Article 79 decisions provide a limited reprieve from the CISG's "no-fault," or "strict liability" approach to damages.[59] Contrasting the CISG's intent to approach the concept of damages from the perspective of a party's guarantee (strict liability) with that of a fault-based assessment, Professor Honnold explained: "The Convention thus is based on a unitary, contractual obligation to perform the contract and be responsible for damages—as contrasted with some legal systems that make liberal use of the idea of fault in dealing with liability for damages for breach of contract."[60] Other leading commentators, such as Dr. Georg Gruber and Professor Hans Stoll, have expressed accord: "Following the Anglo-American model of strict liability, the promisor is in principle liable for all losses arising from non-performance, irrespective of fault."[61] Article 79, however, provides an exception from such strict liability by allowing exemption from liability for damages where the non-performing party can sufficiently meet the standards for "impediment" presented in Article 79.[62] Thus, Article 79's exemption establishes a limit to the no-fault regime inherent in the CISG.[63]

Although Article 79's departure from the CISG's no-fault approach may balance the strict liability of guarantee, its check is not unlimited. Instead, Article 79's exemption maintains a careful balance with the general no-fault approach:

> Article 79 is the result of a difficult compromise between the advocates of an absolute guarantee that the contract will be performed, in accordance with the Anglo-American model, and the proponents of the principle of fault, characteristic for most of the continental European legal systems. The compromise must not be weakened by recourse to principles of liability under national law when interpreting Article 79. . . .[64]

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59. *See* Harry M. Flechtner, *Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods*, 19 PACE INT'L L. REV. 32–33 (stating that in Germany, it has been found that Article 79 decisions provide a strict liability approach); *see also* Spivack, *supra* note 51 at 796 (asserting that under Article 79, with respect to third-party excuses, something close to strict liability seems to operate).

60. *See* HONNOLD 1999, *supra* note 36 at 479 (1999) (explaining the ideas that the Convention is based upon).

61. *See* Hans Stoll & Georg Gruber, *Article 74, in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 746 (Peter Schlechtriem & Ingeborg Schwenzer eds., Geoffrey Thomas trans., Oxford Univ. Press 2005).

62. *See* U.N. Convention on CISG art. 79, Apr. 11, 1980, 15 U.S.C.A. 1987, 1489 U.N.T.S. 3, I.L.M. (providing exemptions for a non-performing party when an impediment exists that they reasonably could not have prepared for at the time of creation).

63. *See* Stoll & Gruber, *supra* note 61 at 746 ("Article 79 thus constitutes the necessary limitation to the principle of strict liability for non-performance of the contract which otherwise underlies the CISG"); *see also* JOSEPH M. LOOKOFSKY, UNDERSTANDING THE CISG IN THE USA 154 (3d ed. 2008) (reiterating that the exemption is available only in certain exceptional circumstances, and that the general rule remains strict liability).

64. Stoll & Gruber, *supra* note 61 at 746.

Recognizing this balance, tribunals contemplating Article 79 exemptions have often applied concepts of risk—more specifically, which party was best positioned to manage the risk of the force majeure event that they addressed.[65] A 1996 German arbitration known as the *Chinese Goods Case* provides a strong example of the risk of loss analysis that tribunals may use to determine the applicability of the Article 79 exemption.[66] In the *Chinese Goods Case*, the tribunal analyzed which party bore the risk of loss and ultimately determined that because the buyer paid in advance for a missed delivery, the contract for sale clearly allocated the risk of procurement of the goods to the seller when its supplier was unable to provide the goods.[67] Asserting that "[o]nly the apportionment of risk in the contract is relevant" to application of Article 79, the tribunal denied the seller's claim for Article 79 exemption.[68] Therefore, these decisions imply that regardless of "fault," the non-performing party must not have assumed the risk of the event that caused the non-performance.

In certain rare circumstances, Article 79's emphasis on which party assumed the risk of the supervening event can require interpretation of domestic risk of loss rules.[69] For example, in a 1996 Hungarian arbitration known as the *Caviar Case*, the seller and buyer each claimed that the other bore the risk of loss where an intervening trade embargo (taking effect after the seller's delivery of caviar to the buyer and before the payment due date) caused the caviar to be destroyed by preventing the buyer from making payment to the seller and taking possession of the caviar.[70] Finding the CISG and the contract unclear on which party bore the risk of loss at that time, the Court of Arbitration determined that the seller's national law (Yugoslav) governed the transaction and held that the title to ownership passed to the buyer at the moment the goods are taken over by the buyer.[71] Because the risk of freight was borne by the buyer and because "the damage caused by force majeure has to be borne by the party where the risk is at the moment the force majeure occurs," the Arbitration Court concluded that Article 79 did not exempt the buyer and awarded damages to the seller.[72] Note, however, that even where

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65. *See, e.g.*, Vine Wax Case II (Austria v. Ger.), Bundesgerichtshof, Germany (1999), English language translation, http://cisgw3.law.pace.edu/cases/990324g1.html (reiterating that "the possibility of exemption under CISG Art. 79 does not change the allocation of the contractual risk"); *see also* Peter Schlechtriem, Uniform Sales Law in the Decisions of the *Bundesgerichtshof* (Todd. J. Fox trans., Pace Law Institute of International Commercial Law) (2000) (attributing responsibility to the party who retained the risk in their economic sphere).

66. Chinese Goods Case (Ger. v. China), Schiedsgericht der Handelskammer (Hamburg, Ger. 1996), English language abstract, http://www.unilex.info/case.cfm?pid=1&do-=case&id-=195&step=Abstract; German full text, http://www.unilex.info/case.cfm?-pid=1&do=-case&id=195&step=FullText (expressing that China and Germany's agreement on a German arbitral court for dispute resolution meant that parties had implicitly chosen laws of Germany to govern contract and therefore CISG applied).

67. *Id.* (holding that seller liable for damages resulting from non-receipt).

68. *See id.* (discussing contracting parties' ability to manage risk under Article 79 of the U.N. Convention on CISG).

69. CISG Art. 7(2) requires gaps in the CISG that cannot be filled by its general principles to be filled "in conformity with the law applicable by virtue of the rules of private international law." *See* U.N. Convention on CISG art. 7(2), Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M. (addressing matters that are governed by, but not expressly addressed within, the United Nations Convention on Contracts for the International Sale of Goods).

70. *See* Caviar Case (Yugoslavia v. Hung.), para. 1, (Arb. Ct. attached to the Hung. Chamber of Comm. and Indus. of Budapest 1996), English language translation, http://cisgw3.law.pace.edu/cases/961210h1.html (paraphrasing the factual background to an arbitration concerning a caviar shipment contract).

71. *See Caviar Case*, *supra* note 70 para. 10 (highlighting the arbitrator's decision to adhere to Hungarian conflict of law rules).

72. *See id.* (describing the passing of risk from the Seller to the Buyer).

national risk of loss laws were not implicated, Article 79 has been interpreted to avoid upsetting the contractual allocation of risk, which could impart the risk of freight on the buyer.[73]

3. Special Case of Breach via Delivery of "Non-conforming Goods"

The term "impediment" denotes an event external to the seller of the goods, thus applying to events causing non-delivery or delay in delivery, but arguably excluding problems leading to non-conformance (defectiveness) in delivered goods.[74] This conservative approach reflects the fear of drafters from common-law jurisdictions—who favored a "warranty-based" approach—that "contractual liability . . . based on proof of fault, might unduly influence civil-law judges or arbitrators willing to allow sellers to escape liability for defective performance, pleading events beyond their control that could not have been considered."[75]

Yet, Article 79(1) refers to non-performance with the phrase "failure to perform any of his obligations."[76] Because Article 35 imparts on the seller an obligation to deliver conforming goods,[77] a breach of that obligation appears to be potentially excusable under the plain language of Article 79(1). Therefore, when read with an emphasis on fault, "a defect present in the goods at the time of the conclusion of the contract may conceivably constitute an impediment to the seller's obligation to deliver conforming goods" and may potentially merit Article 79 exemption as an impediment.[78] In practice, however, successful claims by sellers for exemption from liability for delivering non-conforming goods have been extremely rare.[79]

In the *Vine Wax Case*, Germany's *Bundesgerichtshof* (Federal Supreme Court) appears to have allayed the "fear that extending the exemption to delivery of non-conforming goods might

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73. *See* Art Books Case (It. v. Switz.) (Handelsgericht des Kantons Zürich 1999), English-language translation, http://cisgw3.law.pace.edu/cases/990210s1.html (noting that where "[t]he [seller] fulfilled its delivery obligation by handing over the goods to the first carrier. [Seller] therefore did not engage the forwarding agent 'for the performance' of its delivery obligation . . . . The [seller] is therefore not responsible for the carrier's miscellaneous mistakes").

74. *See* Barry Nicholas, *Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § 5.02 at 5-10 (Nina M. Galston & Hans Smit eds., Matthew Bender) (stating that the choice of the word "impediment" resulted from the widely shared view that a seller could not be exonerated of liability for non-conforming goods).

75. *See* CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, para 6, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007, http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html (commenting on the first discussion of whether a seller may claim exemption of liability under CISG Art. 79).

76. *See* U.N. Convention on CISG art. 79(1), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (stating that a party is not liable for failure of performance if it was due to an impediment beyond his control).

77. *See* U.N. Convention on CISG art. 35, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (outlining conformity of goods and third-party claims more in depth).

78. *See* CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, *supra* note 75.

79. *See id.* (providing a rare example of a case in which a seller may be exempted of liability for delivery of non-conforming goods); *see also* UNCITRAL Digest (nn. 13–14), http://cisgw3.law.pace.edu/cisg/text/anno-art-79.html (citing to nine cases where tribunals denied exemption for delivery of non-conforming goods and only one where exemption was granted).

reintroduce the principle of liability for fault through the 'back door.'"[80] In the *Vine Wax Case*, a seller forwarded defective vine wax he had received from his supplier-manufacturer directly to the buyer without first inspecting it.[81] The intermediate appellate court found that, in theory, Article 79 could exempt a seller from delivering non-conforming goods.[82] Nonetheless, it held the seller liable for delivering non-conforming goods because the seller had failed to inspect the wax prior to delivering it to the buyer.[83] Disagreeing with the lower court's reasoning but still denying exemption to the seller, the *Bundesgerichtshof* held that:

> The [seller's] liability under the [CISG] is, contrary to the Lower Court 's opinion, not based on the supplier's obligation to inspect the goods before delivery to its purchaser. . . . That is so because the seller's culpability is not important due to the statutory allocation of risk and the lack of a different agreement between the parties concerning the allocation of risk, resulting in a guarantee [warranty] liability of the seller.[84]

By refusing to generalize on whether or not a seller could ever be exempt when delivering non-conforming goods, and by explaining why this particular seller could not be exempted from delivering non-conforming goods, the decision suggests that the *Bundesgerichtshof* believes Article 79 might excuse a seller's delivery of non-conforming goods.[85] In a subsequent case, the *Bundesgerichtshof* similarly left open the possibility of Article 79 excusing delivery of non-conforming goods by refusing to pronounce a general principle and instead emphasizing the heavy burden of proof beholden on such petitions for exemption.[86]

Consistent with a "plain language" interpretation of Article 79, these decisions strengthen the notion that a seller's delivery of non-conforming goods is a violation of "any of his obligations" within the scope of Article 79(1).[87] Even if exemption from liability is possible for such a breach, however, the scope of the Article 79 exemption does not expand greatly because "it is generally and correctly considered that sellers implicitly assume the risks involved in the pro-

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80. *See* CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, *supra* note 75 (indicating that cases in which a seller may be exempt from liability for delivering non-conforming goods are extremely rare).

81. *See Bundesgerichtshofes* [BGH] [Federal Court of Justice] Mar. 24, 1999, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2440, 1999 (Ger.), *translated at* http://cisgw3.law.pace.edu/ cases/990324g1.html (stating that the defendant had not actually received and accepted or inspected the goods prior to delivery to plaintiff).

82. *See Oberlandesgericht* [OLG] [Court of Appeals] Mar. 31, 1998, *translated at* http://cisgw3.law.pace.edu/cases/980331g1.html (acknowledging that an impediment to performance may also be due to defective delivery).

83. *See id.* (concluding that the seller could not sustain facts that would have led to an exemption from liability under Article 79).

84. *See Bundesgerichtshofes*, *supra* note 81 (illustrating that the basic responsibility of defendant for plaintiff's damages is not questioned by the appeal's argument that the damage would have occurred in the same way if the defendant had delivered the same vine wax to plaintiff as it had delivered in prior years).

85. *See* CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, *supra* note 75.

86. *See Bundesgerichtshof*, *supra* note 81 (holding that Article 79 may actually excuse delivery of non-conforming goods).

87. *See* CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, para 10, *supra* note 75(recalling an advisory opinion that argues that failure to deliver non-conforming goods may be a breach of duty under Article 79).

curement of the goods they sell."[88] Thus, while exemption for delivery of non-conforming goods remains possible, it is likely to be rare in light of the demanding requirements.[89]

Even if exemption from liability is possible for such a breach, however, the scope of the Article 79 exemption does not apply broadly because "it is generally and correctly considered that sellers implicitly assume the risks involved in the procurement of the goods they sell."[90] Thus while exemption for delivery of non-conforming goods remains possible, it is likely to be rare in light of the demanding requirements.[91]

B. CISG Advisory Opinion No. 7

Recognizing the "considerable room for judicial appraisal and divergent interpretation of several words used in, and issues raised by, Article 79,"[92] on October 12, 2007, the CISG Advi-

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88. *Id.* at ¶ 13 (reiterating the Advisory Opinion's argument that sellers assume the risk involved in the procurement of goods they sell).

89. *See id.*

> Assume, for example, the case of a seller bound to deliver frozen goods which, due to a blackout or power failure occurring before the transfer of risk to the buyer but after the seller parted with the goods, arrive in a decomposed state at the place of delivery. Article 79 may apply in this case only if the seller succeeds in establishing that he did not know of the blackout and that the power failure was totally beyond his control. The seller would not be exempted of liability for damages if he reasonably could have been expected to take the possibility of a power failure into account at the time of the conclusion of the contract.

See also Dionysios P. Flambouras, *The Doctrines of Impossibility of Performance and Clausula Rebus Sic Stantibus in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law—A Comparative Analysis*, 13 PACE INT'L L. REV. 276–78 (2001) (emphasizing the potential difficulty of an exemption from delivery of non-conforming goods).

90. *See* CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, *supra* note 75 at ¶ 13.

91. *See* Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007, http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html.

92. CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, *supra* note 75 at ¶ 4 (concluding that decisions to date do not bear their initial concerns about judicial overbreadth and misapplication of proper procedures).

sory Council (CISG-AC)[93] released an advisory opinion attempting to address three areas of current and potential divergence and disharmony: the delivery of non-conforming goods, a party's liability for impediments arising from the actions of third-persons, and economic hardship as a ground for exemption.[94] The CISG-AC noted that the limited success parties have had invoking Article 79, the dearth of published cases decided thus far, and the limited utility of those cases[95] prevented strong conclusions regarding interpretative trends. Therefore, the CISG-AC relied heavily on the *travaux préparatoires* and scholarly opinions.[96] The CISG-AC's opinion first discusses the general treatment of each of the three issues by variegated national court and arbitral decisions, and then concludes with a theoretical extension of Article 79 to resolve hypothetical situations not yet addressed in published decisions.[97] By preemptively addressing points of possible divergence, the CISG-AC, laudably, attempts to provide the basis for uniform decisions in the future. Unfortunately, the CISG-AC may have thwarted its goal because its speculation on how to apply Article 79 to potential "hardship" situations[98] appears to invite an overly liberal basis for exemption and remedy that only provides grounds for further divergence and disharmony.[99]

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93. Composed of scholars specializing in international trade law and from diverse legal cultures, the CISG Advisory Council

> is a private initiative which aims at promoting a uniform interpretation of the CISG. . . . Accordingly the group is afforded the luxury of being critical of judicial or arbitral decision and of addressing issues not dealt with previously by adjudicating bodies. The Council is guided by the mandate of Article 7 of the Convention as far as its interpretation and application are concerned: the paramount regard to international character of the Convention and the need to promote uniformity. . . . In practical terms, the primary purpose of the CISG-AC is to issue opinions relating to the interpretation and application of the Convention on request or on its own initiative.

These opinions, while not binding on any particular adjudicative body, are nonetheless viewed as highly influential. *See generally* CISG Advisory Council, http://www.cisgac.com (last visited Mar. 24, 2013) (providing a description of the CISG-AC's scope, uniformity, and mode of operation).

94. *See* CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, *supra* note 75 at para 6 (outlining Article 79's grant of protections to buyers and sellers in respect to aspects that may be beyond their control). For summaries of the CISG-AC's positions and a further discussion of these three topics, *see supra* II.A.3. for non-conforming goods; *see also*, *infra* II.C.1 and II.C.2 for economic hardships and for suppliers as third parties, respectively.

95. *See id.* at ¶ 4 (explaining that sellers filed more claims and that no trending impediment exists). "However, not every decision identifies facts that may become relevant to draw some tentative conclusions (e.g., the nationality of the parties, the type of goods involved or other details of the transaction), while others are incomplete in the sense that they merely state that the conditions of Article 79 have not been met.").

96. *See* CISG-AC Opinion No. 7, *supra* note 75 at ¶¶ 26–27, 29 (finding that there are only vague descriptions of what the intent of the drafters was located in scholarly and "preparatory works").

97. *Id.* (setting forth the standards for exemption of liability under Article 79 of the CISG).

98. *Id.* (providing some guidance as to what is meant by "hardship" under Article 79).

99. *See* Hof van Cassatie [Cass.] [Court of Cassation], June 19, 2009, http://cisgw3.law.pace.edu/cases/090619b1.html (Belg.), *see infra* III.A.–B. The Pace University CISG library reveals only 16 published cases with an Article 79 issue decided since Oct. 12, 2007 (the release date of CISG-AC Opinion No. 7). Pace University Article 79 Database, http://www.cisg.law.pace.edu/cisg/text/digest-cases-79.html. Of these 16 cases, the *Steel Tubes Case* (Steel Tubes Case (Netherlands v. France)), Hof van Cassatie, Belgium (19 June 2009), English translation, http://cisgw3.law.pace.edu/cases/090619b1.html, is the only case directly addressing issues discussed in the CISG-AC Op. hypotheticals.

C. Article 79(1) Requirements

Article 79(1) requires the non-performing party to prove: (1) an impediment to performance existed; (2) it prevented performance (causation); (3) it was beyond the party's control; (4) it could not reasonably have been taken into account at the time of the conclusion of the contract; and (5) it or its consequences could not have been avoided or overcome.[100] The following subsections discuss actual examples of impediments, causation, and the three other elements within Article 79(1) in order to better understand how courts and arbitral tribunals apply Article 79(1) in practice.

1. "Impediment" Requirement, Generally, Under Article 79(1)

Non-performing parties governed by the CISG have argued, with varying degrees of success, that a wide variety of events constituted "impediments" within the meaning of Article 79, and therefore the party should be exempted from liability for its non-performance.[101] Often, court decisions and arbitral tribunal awards do not specifically discuss the question of impediment. In such cases, inferences that the impediment requirement was met can be gleaned from either a grant of exemption (permitting an inference that the stated facts of the case satisfied all the elements for exemption, including an impediment) or from a denial of exemption on grounds that the impediment did not satisfy one or more of the additional Article 79(1) requirements.[102] In many other decisions, however, courts and tribunals denied exemption on the basis of a separate Article 79(1) element and did not address the (potentially difficult) question of whether or not an impediment existed.[103] While this class of cases may not illuminate the nature of the impediment requirement, they nonetheless demonstrate the wide variety of impediments claimed by parties, many of which presumably were viewed by the tribunals to be valid impediments, though without explicit rulings to that effect.

In general, courts and arbitral tribunals have used language requiring "that an impediment be an unmanageable risk or a totally exceptional event, such as *force majeure*, economic impossibility, or excessive onerousness."[104] Exceptional conditions precipitating a delivery of nonconforming goods—such as the non-existence of a method to detect or prevent non-confor-

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100. *See* U.N. Convention on CISG, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, at art. 79(1) (listing the exemptions that are acceptable under the Convention).

101. *See generally* UNCITRAL Digest, http://cisgw3.law.pace.edu/cisg/text/anno-art-79.html (last visited Mar. 25, 2013); *see also* http://dspace.nwu.ac.za/handle/10394/4730.

102. *See* A/Conf.97/C.1/SR.27 at 10 (showing the Norwegian attempt to allow for the "only" so when the impediment vanishes the resulting circumstances may lead to another impediment); *see also* UNCITRAL Digest, *supra* note 101 (providing an example of where an impediment argument was denied).

103. *See* UNCITRAL Digest, *supra* note 101 (citations omitted) (citing to various cases that denied a claimed exemption not based on impediments).

104. *See id.* at para. 10 (citing to the *Chinese Goods Case* (Ger. v. China), Schiedsgericht der Handelskammer Hamburg, Germany (1996), English-language abstract, http://www.unilex.info/case.cfm?pid=1&do=case&id=195&step=Abstract; German full text, http://www.unilex.info/case.cfm?pid=1&do=case&id=195&step=Fulltext).

mity prior to delivery[105]—may also fall within the scope of impediment.[106] More specifically, successful impediments have included, *inter alia*: various typical *force majeure* events (such as fire, flood, or extreme weather);[107] a prohibition on exports by the seller's country;[108] a refusal by state officials to allow buyer to import the goods into its country;[109] military hostilities (the Second Iraq War) preventing inspection and acceptance of the goods pursuant to the terms of the contract;[110] the delivery of defective goods manufactured by the seller's supplier where the supplier's manufacturing process was found to be beyond the seller's control;[111] the failure of a carrier to timely deliver the goods to the buyer where the seller duly arranged and timely transferred the goods to the carrier;[112] and a strike by the employees of the seller's supplier.[113]

In contrast, some tribunals refusing to grant an exemption have employed "language suggesting that there was not an impediment within the meaning of Article 79(1)."[114] While not always clearly stating whether the rationale was due to failure of the impediment requirement or another element of 79(1), the decisions nonetheless give some indication of events that may not be considered impediments: a seller's failure to deliver due to an emergency shutdown at its

105. *See Bundesgerichtshof* [BGH] [Federal Court of Justice] Jan. 9, 2002, Neue Juristische Wochenschrift [NJW] 1651,2002 (Ger.), English translation, http://cisgw3.law.pace.edu/cases/020109g1.html (suggesting that the non-existence of means to prevent or identify a lack of conformity in the goods could be enough of an impediment to exempt a seller under Article 79).

106. *See* prior commentary in this article.

107. *See* Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG, No. 03 C 1154, 2004 WL 1535839, at 6 (N.D. Ill. July 7, 2004) (holding that, assuming it was foreseeable that such severe weather would occur and would stop even icebreakers from working properly, then the defendant's *force majeure* defense was an impediment); *see generally* UNCITRAL Digest, *supra* note 101 (citing to various cases where courts have ruled that there was an impediment).

108. *See* Coal Case (Ukr. v. Bulg.), Bulgarian Chamber of Commerce and Industry Case No. 56/1995, at 4 (Apr. 24, 1996), English translation, http://cisgw3.law.pace.edu/cases/960424bu.html (providing an action by a seller country that serves as a lawful impediment).

109. *See* Butter Case (Russ. v. Ger.), Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce Case No. 155/1996, at 5 (Jan. 22, 1997), English translation, http://cisw3.law.pace.edu/cases/970122r1.html (Noting the fact that the buyer was exempted from damages stemming from failing to take delivery of the goods).

110. *See* Hilaturas Miel, S.L. v. Republic of Iraq, 573 F. Supp. 2d 781, 800 (S.D.N.Y. 2008) (describing how hostilities prevented complete fulfillment of the contract terms).

111. *See* Flippe Christian v. SARL Douet Sport Collections (Switz. v. Fr.), Tribunal de commerce de Besançon Case No. 97 009265, Sports Clothes/Judo Suits France Case, at 5 (Jan. 19, 1998), English translation, http://cisgw3.law.pace.edu/cases/980119f1.html (emphasizing seller's lack of bad faith as additional justification for its Article 79 exemption).

112. *See* Art Books Case (It. v. Switz.), Handelsgericht des Kantons Zürich Case No. HG 970238.1, at 2–3 (Feb. 10, 1999), English translation, http://cisgw3.law.pace.edu/cases/990210s1.html (finding seller exempt for damages from late delivery).

113. *See* Coal Case (Ukr. v. Bulg.), Bulgarian Chamber of Commerce and Industry Case No. 56/1995, at 4–5 (Apr. 24, 1996), English translation, http://cisgw3.law.pace.edu/cases/960424bu.html. (recognizing the coal miners' strike as an impediment causing the seller's failure to deliver the goods but denying exemption from liability because seller had already breached its obligation to timely deliver when the strike occurred).

114. *See* UNCITRAL Digest, *supra* note 101 (noting that it is not always clear whether tribunals that refused to find exemptions did so due to an impediment within the meaning of article 79(1) or due to an element related to the character of the impediment).

supplier's plant;[115] a seller's failure to deliver after its supplier ceased production due to extreme financial difficulties;[116] a buyer's refusal to pay for delivered goods because of negative market developments, currency revaluation, and other adverse economic events;[117] a buyer's failure to pay the purchase price because of inadequate currency reserves that could be freely converted into the payment currency;[118] and a buyer's failure to open a letter of credit where buyer's government ordered a general suspension on the payment of foreign debts.[119]

Within this variety of claimed impediments, the decisions reveal three classes of impediments claimed with frequency. First, governmental actions—such as custom restrictions, trade sanctions, or an embargo—appear to be favored as impediments.[120] Similarly, civil actions unrelated to the contract—such as a sufficiently disruptive strike—can also be impediments.[121] Second, a seller's breach caused by its supplier's default creates a special class of impediment.[122] Third, forces creating particularly onerous economic hardship may also be grounds for

115. *See* Metallic Sodium Case (Ger. v. Russ.), Award 155/1994 (Int'l Comm. Arb. 1995), http://cisgw3.law.pace.edu/cases/950316r1.html (explaining that a seller should avoid liability because the factory shut-down was beyond the seller's control).

116. *See* Chinese Goods Case (Ger. v. China), (Int'l Comm. Arb. 1996), http://www.unilex.info/case.cfm?pid=1&do=case&id=195&step=Abstract (indicating that financial impediments are not considered impediments beyond an individuals control).

117. *See* Steel Ropes Case (Russ. v. Bulg.), Award 11/1996 (Bulg. Comm. Ct. 1998), http://cisgw3.law.pace.edu/cases/980212bu.html (listing the buyer's reasons for defaulting on payment, including worsening market conditions, inflation, and distribution and storage issues).

118. *See also* Equipment/Automatic Diffractameter Case (Ger. v. Russ.), Award 123/1992 (Int'l Comm. Arb. 1995), http://cisgw3.law.pace.edu/cases/ 951017r1.html (concluding that because inadequate sums of foreign currency in the buyer's account were not listed, the buyer is responsible to make full payment to the seller).

119. *See* Failure to Open Letter of Credit and Penalty Clause Case (Austria v. Bulg.), Award 7197/1992 (Int'l Comm. Arb. 1992), http://cisgw3.law.pace.edu/ cases/927197i1.html (stating that a seller had the right to demand performance due to a buyer's failure to open a letter of credit in accordance with their contract).

120. *See* Hilaturas Miel v. Republic of Iraq, 573 F. Supp. 2d 781, 788, 791–92 (S.D.N.Y. 2008) (noting that a yarn manufacturer attempted to rescind performance of a contract due to the Iraq War); *see also* Failure to Open Letter of Credit and Penalty Clause Case (Austria v. Bulg.), Award 7197/1992 (Int'l Comm. Arb. 1992), http://cisgw3.law.pace.edu/cases/927197i1.html (discussing a tribunal's sanctioning of Bulgaria for the failure to comply with a contract); Coal Case (Ukr. v. Bulg.), Award 56/1995 (Bulg. Comm. Ct. 1996), http://cisgw3.law.pace.edu/cases/960424bu.html (regarding an impediment to a contract as a result of the Ukrainian government's trade restrictions on the export of coal); Butter Case (Russ. v. Ger.), Award 155/1996 (Int'l Comm. Arb. 1997), http://cisgw3.law.pace.edu/cases/970122r1.html (detailing a seller's claim that he should be exempt from performance due to overly restrictive testing by Russian Customs).

121. *See* Coal Case (Ukr. v. Bulg.), Award 56/1995 (Bulg. Comm. Ct. 1996), http://cisgw3.law.pace.edu/cases/960424bu.html (discussing a claim that a Ukrainian coal workers' strike was sufficient impediment to excuse performance of a contract).

122. *See* Metallic Sodium Case (Ger. v. Russ.), Award 155/1994 (Int'l Comm. Arb. 1995), http://cisgw3.law.pace.edu/cases/950316r1.html (stating that a manufacturers refusal to supply a seller with necessary goods is not a sufficient impediment to excuse performance); *see also* Chinese Goods Case (Ger. v. China), (Int'l Comm. Arb. 1996), http://www.unilex.info/case.cfm?pid=1&do=case&id=195&step=Abstract (noting that Article 79 states that a party will not be held liable for failure to perform if their failure is due to circumstances beyond their control).

excuse.[123] Governmental actions and civil counteractions appear to be particularly fact dependent, and further discussion is outside the scope of this comment. Breaches by suppliers and economic hardship considerations, however, warrant deeper analysis.

2. Breach by Suppliers as a Particular Impediment

At first glance, a seller's supplier (or subcontractor) appears to be a "third party" implicating Article 79(2) and, indeed, in some circumstances a tribunal may find that to be the case.[124] In general, however, a seller (or the buyer) retains responsibility for the performance of those within its sphere of risk; "for example, the seller's own staff or personnel and those engaged to provide the seller with raw materials or semi-manufactured goods."[125] Third parties within the seller's sphere of risk include those third parties "who, while not entrusted with the performance of the contract vis-à-vis the buyer, nevertheless enable, assist, or create the preconditions for the seller's delivery of conforming goods."[126] A consistent line of decisions concludes that the seller bears the risk that these third-party suppliers or subcontractors on which the seller depends may breach their own contract with the seller, so that the seller will not be excused when failure to perform was caused by its supplier's default.[127] Because these are not the types of third persons "engaged to fulfill a whole or a part of the contract"[128] contemplated in Article

123. *See* Steel Ropes Case (Russ. v. Bulg.), Award 11/1996 (Bulg. Comm. Ct. 1998), http://cisgw3.law.pace.edu/cases/980212bu.html (examining a buyer's attempt to void a contract for construction material due to worsening economic conditions); *see also* Equipment/Automatic Diffractameter Case (Ger. v. Russ.), Award 123/1992 (Int'l Comm. Arb. 1995), http://cisgw3.law.pace.edu/cases/951017r1.html (observing a Russian buyer who wished to void a contract because of the turbulent economic conditions within the USSR).

124. The author is unaware of a published case where a seller's supplier or subcontractor was found to be a "third party" implicating Article 79(2). The CISG-AC Advisory Opinion No. 7 could not cite a case supporting this proposition but suggests that a supplier's monopoly may be such a situation. *See* CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, para 6, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007, http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html (declaring that a party who assists in the creation of conditions that inhibit contractual performance will fall under Article 79).

125. *See id.* at para 2.2(a), (stating that courts will rarely grant a claim of exemption for a third party's failure to deliver when that breach was foreseeable).

126. *See id.* at para 18 (defining third parties within the sphere of risk as subcontractors, suppliers, and auxiliary agents).

127. *See, e.g.*, Vine Wax Case II (Austria v. Ger.), *Bundesgerichtshof*, Germany (1999), http://cisgw3.law.pace.edu/cases/980331g1.html (noting that delivery of defective goods is an impediment that seller produced); Flippe Christian v. Douet Sport Collections (Switz. v. Fr.), Tribunal de commerce de Besançon, France (1998), http://cisgw3.law.pace.edu/cases/980119f1.html (ordering the seller to reimburse the buyer a percentage of the price).

128. *See* U.N. Convention on CISG art. 79(2), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (declaring that a party will not be held liable for the actions of a third party if it is shown that the third party's failure was beyond the seller's control).

79(2),[129] "Article 79(1) remains the controlling provision to ascertain the liability of the seller for the acts or omissions of that type of 'third persons' whose default cannot be invoked by the seller to excuse his own failure to deliver conforming goods."[130]

Some commentators argue that a seller's sphere of risk does not extend to situations where the seller cannot control the choice of supplier or its performance—perhaps in situations where the supplier holds a monopoly, although this has not been addressed in a decision.[131]

In this way, "sphere of risk" analysis appears to be a proxy for the "control" element of Article 79(1) to the extent that a seller controls its choice of supplier (as contrasted with a supplier chosen by the buyer).[132] Therefore, potentially subject to the narrowest of exceptions, a supplier's default does not constitute a genuine impediment with regard to the seller's performance.[133]

3. Economic Hardship as a Particular Impediment

Non-performing parties have frequently claimed that significant changes in the financial aspects of a contract that cause performance to become extraordinarily burdensome should qualify as an "impediment" exempting the party from liability.[134] Such "hardship" arguments appear to be grounded in both national legal doctrines (such as *imprévision*, frustration of contract, commercial impracticability, *Wegfall der Geschäftsgrundlage*, *eccesiva onerosita sopravve-*

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129. Article 79(2) contemplates "third persons" to be those "'independently' engaged by the seller to perform all or part of the contract directly to the buyer" and who, unlike third-party suppliers or subcontractors "for whose performance the seller is fully responsible, are not merely separate and distinct persons or legal entities, but also economically and functionally independent from the seller, outside the seller's organizational structure, sphere of control or responsibility." *See* CISG-AC Opinion No. 7, *supra* note 124 at para 19 (citing DENIS TALLON, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 545 (M. Bianca & M.J. Bonell, eds., 1987)).

130. *See* CISG-AC Opinion No. 7, *supra* note 124 at para 18 (describing third persons as suppliers of raw material or subcontractors of semi-manufactured parts).

131. *See id.* at ¶¶ 18–20 (citing to HANS STOLL & GEORG GRUBER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) Article 79, 819–22 (Peter Schlechtriem et al. eds., 2d ed. 2005)) (suggesting an exemption from liability where a seller deals with an independent third person).

132. *See* Harry Flechtner, *Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods*, 19 PACE INT'L L. REV. 29, 33–39 (2007) (noting that sellers bear the risk of non-conforming goods provided by a supplier even where sellers have no opportunity to inspect the goods); *see also* Carla Spivack, *Of Shrinking Sweatsuits and Poison Vine Wax: A Comparison of Basis for Excuse Under U.C.C. §2-615 and CISG Article 79*, 27 U. PA. J. INT'L ECON. L. 757, 795–98 (2006) (highlighting that Article 79 applies a strict liability standard on sellers for non-conforming goods provided by suppliers).

133. *See* Flechtner, *supra* note 132 at 36–38 (comparing arguments for and against a fault based approach to a seller's liability for non-conforming goods received via a supplier); *see also* Spivack, *supra* note 132 at 776–79 (contrasting the U.C.C. and CISG provisions regarding third-party failures).

134. *See* Dionysios P. Flambouras, *The Doctrines of Impossibility of Performance and Clausula Rebus Sic Stantibus in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law—A Comparative Analysis*, 13 PACE INT'L L. REV. 261, 277–80 (2001) (noting that the CISG lacks specific provisions allowing for renegotiation in light of unforeseen economic hardship); *see also* Article 79(1): "Impediment" Requirement, 2012 UNCITRAL DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS (2012), http://cisgw3.law.pace.edu/cisg/text/digest-2012-79.html (stating that an impediment could arise from economic or political impossibility).

nuta) and conflicting scholarly opinions about the extent of "impediment."[135] Although some early commentators argue that the drafting history of Article 79 indicates that "hardship" cannot fit within the "insurmountable obstacle" concept of "impediment,"; in actuality "such history evidences that the discussions were not conclusive on this question."[136] Because Article 79 does not define "impediment" as an event that renders performance absolutely impossible, an impediment may be represented by "a totally unexpected event that makes performance excessively difficult."[137]

In practice, courts and tribunals have routinely denied petitions for Article 79 exemption grounded in hardship stemming from changes in market prices: sellers' failure to deliver the goods caused by an increase in cost,[138] sellers' failure to deliver the goods where the market price of the goods increased dramatically,[139] and buyers' refusal to accept delivery and pay the seller because of a dramatic decrease in the value of the goods being sold.[140] When denying such petitions, courts have generally commented that "a party is deemed to assume the risk of market fluctuations and other cost factors affecting the financial consequences of the con-

135. *See* CISG-AC Opinion No. 7, *supra* note 124 (noting that most of the legal doctrines can be traced back to the doctrine of *rebus sic stantibus*); *see also* David J. Bederman, *The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations*, 82 AM. J. INT'L L. 1, 2 (1988) (summarizing *rebus sic stantibus* as the notion that treaties cease to bind nations when there is a fundamental change in circumstance).

136. *See* CISG-AC Opinion No. 7, *supra* note 124 at ¶¶ 27–28, 30 (concluding that "economic hardship" was not discussed as such when rejecting the Norwegian proposal); *see also* Joseph Lookofsky, *Not Running Wild With the CISG*, 29 J.L. & COM. 141, 157–58 (2011) (highlighting the inconclusive nature of economic hardship in context of Article 79). For an extremely thorough discussion of the drafting history of Article 79 as it relates to the concept of "hardship," *see* CISG-AC Opinion No. 7, *supra* note 135 at ¶¶ 24–40, nn. 27–40 (referencing isolated discussions and court decisions related to Article 79).

137. *See* CISG-AC Opinion No. 7, *supra* note 124 at ¶ 28 (claiming "ample support" for the idea that the Convention did not intend to make the exemption from non-performance easy); *see also* Francesco G. Mazzotta, *Why Do Some American Courts Fail to Get It Right?*, 3 LOY. U. CHI. INT'L L. REV. 85, 108 (2005) (positing that relevant case law suggests the Article 79 exemption is closer to the "impossibility" standard).

138. *See, e.g.*, Tomato Concentrate Case (Fr. v. Ger.), Oberlandesgericht Hamburg, Germany (1997), http://cisgw3.law.pace.edu/cases/970704g1-.html (holding the seller liable for failing to supply contracted tomato concentrate when prices increased); Steel Bars Case (Egypt v. Yugoslavia), Award 6281, (ICC Int'l Ct. Arb. 1989), http://www.unilex.info/case.cfm?pid=1&do=case&id=-11&step=FullText (applying Yugoslav law to determine that the increase in price was predictable); Iron Molybdenum Case (U.K. v. Ger.), Oberlandesgericht Hamburg, Germany (1997), http://cisgw3.law.pace.edu/cases/970228g1.html (emphasizing that the seller bears the risk of increasing market prices); Chinese Goods Case (Ger. v. China), (Int'l Comm. Arb. 1996), http://www.unilex.info/case.cfm?pid=1&do=case&id=195&step=Abstract (declaring that difficulties in delivery due to the seller's financial problems are not an impediment so beyond the seller's control to permit exemption under Article 79).

139. *See* Ferrochrome Case (It. v. Swed.), Tribunale Civile di Monza, Italy (1993), http://www.unilex.info/case.cfm?pid=1&do=case&id=21&step=Abstract (denying a claim of hardship because it was not expressly excluded under CISG); *compare with* Carla Spivack, *Of Shrinking Sweatsuits and Poison Vine Wax: A Comparison of Basis for Excuse Under U.C.C. S 2-615 and CISG Article 79,* 27 U. PA. J. INT'L ECON. L. 757, 792 (2006) (suggesting the door has been left open to determine what price increases would satisfy an exemption under Article 79).

140. *See* Frozen Raspberries Case (Chile v. Belg.), Rechtbank van Koophandel, Hasselt, Belgium (1995), http://www.unilex.info/case.cfm?pid=1&do=case-&id=263&step=Abstract, Dutch full text, http://www.unilex.info/case.cfm?pid=1&-do=case&id=263&step=FullText (remarking that a drop in market price did not exempt the buyer from non-performance under Article 79); *see also* Steel Ropes Case (Russ. v. Bulg.), Award 11/1996 (Bulg. Comm. Ct. 1998), http://cisgw3.law.pace.edu/cases/980212bu.html (explaining that the worsening of market conditions was not a sufficient reason for the buyer to ask the seller to stop making deliveries).

tract."[141] Indeed, it was not until June 2009, almost twenty years after the CISG's entry into force, that a court granted an Article 79 petition expressly on grounds of "hardship" stemming from a rise in the cost of raw materials.[142]

Specifically addressing the concept of hardship, the Belgian Hof van Cassatie (Supreme Court) contemplated whether or not a 70% rise in the market price of steel tubes constituted sufficient hardship to excuse the seller from liability for declining to perform its obligation to deliver steel tubes to the buyer.[143] First, the Hof van Cassatie opined that Article 79 can govern situations of hardship: "Changed circumstances that were not reasonably foreseeable at the time of the conclusion of the contract and that are unequivocally of a nature to increase the burden of performance of the contract in a disproportionate manner, can, under circumstances, form an impediment in the sense of [Article 79]."[144] Such an opinion accords with the leading scholarship and cases addressing the issue.[145]

Next, the Hof van Cassatie applied this general theory to the facts before it and determined that the market fluctuation of 70 percent was, indeed, sufficient hardship to warrant

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141. *See* Article 79(1): "Impediment" Requirement, 2012 UNCITRAL DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS (2012), http://cisgw3.law.pace.edu/cisg/text/digest-2012-79.html (noting that courts have denied parties to break contracts due to economic circumstances).

142. *See* Hof van Cassatie [Cass.] [Court of Cassation], June 19, 2009, AR C070289N, http://cisgw3.law.pace.edu/cases/090619b1.html (Belg.) (summarizing due to the sudden 70% increase in the price of steel the buyer was required to renegotiate the contract); *see also* Amin Dawwas, *Alteration of the Contractual Equilibrium Under the UNIDROIT Principles*, PACE INT'L L. REV. ONLINE COMPANION 1, 8–11 (2010) (discussing that the Court of Cassation for Belgium ordered the renegotiation of a purchase contract due to market inflation hardship), Hof van Cassatie, Belgium (19 June 2009).

143. *See* Hof van Cassatie [Cass.] [Court of Cassation], June 19, 2009 (analyzing CISG Article 79 and UNIDROIT Principles Articles 7(1) and (7(2) to determine whether parties must conform to a purchase contract).

144. *See* Hof van Cassatie [Cass.] [Court of Cassation], June 19, 2009 (stating that Article 79 is applicable to circumstances where parties breach a contract due to unforeseeable circumstances). But note that renegotiation of a contract is a remedy neither within the scope of Article 79 specifically (which only grants an exemption from damages), nor the CISG generally. *See* U.N. Convention on CISG art. 79(2), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (lacking any mention of a renegotiation requirement).

145. *See* authorities cited within this article, *supra* II.C.

exemption under Article 79 and ordered that parties renegotiate the contract![146] Such a holding, however, not only was the first instance of hardship successfully justifying excuse in a published decision, but also directly contradicts established decisions stating that economic fluctuations cannot be an "impediment" to the extent that they reflect the risk inherent in international trade.[147] Indeed, according to the decisions addressing hardship under Article 79 prior to the *Steel Tubes Case*, a price increase or decrease of more than 100 percent does not suffice.[148] Moreover, even a scholar that accepts the *Steel Tubes* principle in extreme cases argues that the 100% threshold may be based on domestic markets and should actually be greater for international markets, perhaps as high as 150%–200%.[149] Thus, when determining how substantial an economic change must be to fall within the scope of "impediment," courts and tribunals now must determine whether the Belgian court's new, lenient threshold is an aberration or the emergence of a trend.

III. Discussion

Within the overall goal of harmonizing international commercial trade law, Article 79 aspires to "bridge the differences between the civilian principles of hardship and force majeure with the common law's limited recognition of impracticability, frustration, and impossibility."[150] Such a bridge requires uniform interpretation to succeed; accordingly, Article 79 "must

146. *See* Hof van Cassatie [Cass.] [Court of Cassation], June 19, 2009 (affirming the Appellate Court's judgment ordering the parties to renegotiate the terms of the contract). Also remarkable is the remedy prescribed by the court; the text of Article 79 purports only to excuse liability from damages. *See* U.N. Convention on CISG art. 79(2), April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (codifying the circumstances that may exempt parties from liability for not fulfilling obligations under a contract). For a more detailed discussion, *see* this comment, *infra* III.A.

147. *See* Ingeborg Schwenzer, *Wider Perspective: Force Majeure and Hardship in International Sales Contracts*, 39 VUWLR 709, 716, n. 44 (2008), http://www.austlii.edu.au/nz/journals/VUWLawRw/2008/39.pdf (citing to CIETAC, 10 May 1996, No 21, CISG-online 1067; Bulgarian Chamber of Commerce and Industry, 12 Feb 1998, No 11, CISG-online 436; Rechtbank van Koophandel, Hasselt, 23 Feb 1994, No 1849, CISG-online 371; Cour d'Appel de Colmar, 12 Jun 2001, CISG-online 694; Cour de Cassation, 30 Jun 2004, No 964, CISG-online 870) (arguing that a price increase is foreseeable for an individual involved in international trade). Note also that in the *Ferrochrome Case*, the Italian Court did not believe Art. 79 provided for an excuse on the grounds of hardship at all, and specifically not for a 30% increase in the price. *See* Ferrochrome Case (It. v. Swed.), Tribunale Civile di Monza, Italy (1993), http://www.unilex.info/case.cfm?pid=1&do=case&id=21&step=Abstract (denying a claim of hardship because such a remedy is not located within Article 79 or elsewhere within the CISG).

148. *See* Steel Ropes Case (Russ. v. Bulg.), Award 11/1996 (Bulg. Comm. Ct. 1998), http://cisgw3.law.pace.edu/cases/980212bu.html (examining a buyer's attempt to void a contract for construction material due to worsening economic conditions); *see also* Equipment/Automatic Diffractameter Case (Ger. v. Russ.), Award 123/1992 (Int'l Comm. Arb. 1995), http://cisgw3.law.pace.edu/cases/951017r1.html (observing a Russian buyer who wished to void a contract because of the turbulent economic conditions within the USSR).

149. *See* Schwenzer, *supra* note 147 at 709, 717 (suggesting that due to the risks inherent in international trade, contracts should include provisions that account for greater fluctuations in price); *see also* Rodrigo Momberg Uribe, *Change of Circumstances in International Instruments of Contract Law. The Approach of the CISG, PICC, PECL and DCFR*, 15 VJ 233, 244 (2011) (providing that market fluctuations in international trade are foreseeable because they are greater).

150. *See* Peter J. Mazzacano, *Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG*, 2011 NORDIC J. COM. L. 1, 49 (2011), http://www.njcl.utu.fi/2_2011/peter_j_mazzacano.pdf (addressing the compromise in Article 79 between civil and common law principles).

be read and interpreted without reference to domestic legal principles."[151] Perhaps the most self-evident method of promoting harmony and ensuring uniform interpretation is for a court or tribunal to rely on the body of previous interpretations, both academic and judicial. Years of decisions influenced by domestic legal doctrines, however, have resulted in contradictory treatment of several issues: what, exactly, constitutes an impediment; whether or not delivering non-conforming goods may ever be excused; and when non-performance can be attributed to the actions of a third party. These contradictions necessarily reduce the predictability of Article 79 application and therefore reduce the utility of the CISG to the businesses who transact under its governance.[152]

In other areas, such as "hardship," the body of previous Article 79 judicial and arbitral interpretations overwhelmingly support a uniform interpretation despite differing domestic legal doctrines. Because such sources are typically only persuasive on the court or tribunal tasked with applying Article 79, the courts and tribunals may instead reinterpret Article 79 through the lens of domestic legal doctrines, reintroducing disharmony in the application of Article 79, as happened in the *Steel Tubes Case.*[153]

The CISG Advisory Council, in its Advisory Opinion No. 7, attempted to increase harmony by identifying three areas of potential fracture—non-conforming goods, third-party liability, and hardship—and reconciling or recommending, as appropriate, a uniform solution.[154] Yet, rather than promoting harmony by establishing a uniform interpretation, the Advisory Opinion may have actually increased disharmony.

Specifically, this comment first discusses the danger of disharmony through overly liberal interpretations of the requirements for exemption. Then, this comment discusses the danger of regional disharmony from adapting domestic interpretations into Article 79 applications. Last, this comment discusses several methods for preserving, creating, and strengthening harmony.

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151. *See id.* (defining what the compromise between civil and common law principles means within Article 79).

152. "By enhancing predictability regarding the content of governing law, the CISG can help parties to assess the costs and risks of entering into an international commercial sales contract, thus facilitating commercial exchanges." *See* Charles R. Calleros, *Toward Harmonization and Certainty in Choice-of-Law Rules for International Contracts: Should the U.S. Adopt the Equivalent of Rome I?*, 28 WIS. INT'L L.J. 639, 645 (2011) (outlining all of the positive characteristics of CISG and indicating CISG provides enhanced predictability).

153. Scafom International v. Lorraine Tubes S.A.S. (Neth. v. Fr.), Hof van Cassatie Case No. C.07.0289.N, Steel Tubes Case, (June 19, 2009), English translation, http://cisgw3.law.pace.edu/cases/090619b1.html (indicating that French law was applied to the facts of this case where CISG was not on point).

154. *See* CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, at para 3.2, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, 12 October 2007, http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html. (emphasis added) (discussing how the Advisory Council has ushered CISG towards the goal of uniformity); *see also* ANDRE JANSSEN & OLFAF MEYER, CISG METHODOLOGY, 38 (2009) (discussing the high quality of CISG judgments concerning the correct application of the CISG provisions).

A. Disharmony: Fracture Through Liberalization of the Requirements for Excuse

The recent *Steel Tubes* case[155] presents perhaps the best example of the potential disharmony fostered by liberal (in the "too lenient" sense) interpretations of Article 79 elements. When asked to determine if a 70% rise in the cost of steel constituted sufficient hardship to become an "impediment" and excuse a Belgian seller,[156] the *Hof van Cassatie* case was faced with a substantial, consistent body of prior decisions and scholarship indicating that excuse was not warranted. Undaunted, it decided sufficient hardship existed, applied Article 79, and excused the Belgian seller from liability for damages.[157]

Rather than being persuaded by the prior decisions, the *Hof van Cassatie* case may be justifying its interpretation on CISG Advisory Opinion No. 7. Despite concluding that market fluctuations "are a normal risk of commercial transactions," the CISG-AC refrained from excluding them altogether under the theory that "the theoretical possibility of such radical and unexpected changes admits the application of Article 79 in those rare instances."[158] By declaring the theoretical possibility without setting a threshold despite the clear decisions to the contrary, the CISG-AC may have emboldened the *Hof van Cassatie* case to break from the otherwise international uniformity against such instances of claimed hardship.[159]

Admittedly, if market fluctuations can theoretically precipitate sufficient economic hardship, then in practice that threshold will necessarily vary based on the specific facts of the transaction, the effect the transaction would have on the parties, and the industry within which the transaction occurs.[160] Such variances, however, undermine the uniformity and predictability of application sought after by the member states of the CISG. This becomes especially problematic where, as it currently stands, a Bulgarian steel manufacturer cannot find relief from even a

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155. Scafom International v. Lorraine Tubes S.A.S. (Neth. v. Fr.), Hof van Cassatie Case No. C.07.0289.N, Steel Tubes Case, (June 19, 2009), English translation, http://cisgw3.law.pace.edu/cases/090619b1.html (serving as an example of application of domestic law during a CISG dispute).

156. *Id.* (illustrating the types of disputes that come before courts tasked with interpreting CISG).

157. *See* Scafom International v. Lorraine Tubes S.A.S. (Neth. v. Fr.), *supra* note 155 (holding that the Belgian seller was excused from liability on a hardship theory).

158. *See* CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, at ¶ 40, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007, http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html (CISG-AC Op.) (stating that rare instances allow for market fluctuations to be considered an impediment); *see also* Peter Schlechtriem, *Uniform Sales Law—The UN-Convention on Contracts for the International Sale of Goods*, 101 n.422a (Manz, Vienna 1986), http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html (noting that radically changed circumstances should be treated as impediments).

159. *See* CISG-AC Opinion No. 7. This is not cited in the court's decision, but it had been available for approximately 18 months; *see* Harry M. Flechtner, *The Exemption Provisions of the Sales Convention, Including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgium Cassation Court* 13 (Univ. of Pittsburgh Sch. of L., WORKING PAPER NO. 2011–09, 2011) (emphasizing that the Belgian Cassation Court is likely to cause non-uniformity).

160. *See* Ingeborg Schwenzer, *Wider Perspective: Force Majeure and Hardship in International Sales Contracts,* 39 VICT. U. WELLINGTON L. REV. 709 (2008) (noting that price fluctuations can be unforeseeable); *see also* Flechtner, *supra* note 159 at 84, 85 (2011) (stating the threshold requirements for Article 79).

200% increase in market prices[161] in a Bulgarian court while its Belgian buyer could be relieved of at least a 70% (and perhaps smaller) change in prices if pursued in a Belgian court. Such trade imbalances, if allowed to spread, would severely undermine the commercial utility of the CISG.[162] Thus, even if some variance must be expected between industries, some baseline standard must emerge to prevent spreading fractured interpretations of the CISG.

B. Disharmony: Regional Fracture Through Adaptations of Domestic Interpretations

Although not the first instance of a national court adapting domestic excuse doctrines into its interpretation of the CISG,[163] the Belgian *Steel Tubes Case* was the first judicial application of Article 79 to justify an additional remedy other than exemption from liability for damages. Consequently, it again provides a terrific example of "what not to do" if desiring uniformity in the interpretation of Article 79 specifically, and the CISG generally.[164] After determining hardship applicable under Article 79, the *Hof van Cassatie* determined that the CISG's failure to provide for the remedy of an obligation to renegotiate constituted a "gap" in the CISG that the court must fill.[165] Citing Article 7(2),[166] the *Hof van Cassatie* "determined that the convention itself, rather than applicable international law, required a court to adapt the terms of the parties' contracts in light of the seller's hardship" and affirmed the intermediate appellate court's order increasing the price the buyer was obliged to pay.[167]

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161. *See* Steel Ropes Cases (Russ. v. Bulg.), Bulgarian Chamber of Commerce and Industry Case No. 11/1996 (Feb. 12,1998), http://cisgw3.law.pace.edu/cases/980212bu.html (citing the Bulgarian tribunal's holding that any amount of market fluctuations for these steel products is foreseeable, and thus not sufficient hardship under the CISG); *see also* Carla Spivack, *Of Shrinking Sweatsuits and Poison Vine Wax: A Comparison of Basis for Excuse Under U.C.C. 2–615 and CISG Article 79*, 27 U. PA. J. INT'L ECON. L. 757 (2006) (stating that the Bulgarian tribunal refused the market fluctuation argument).

162. *See* Flechtner, *supra* note 159 at 15 (concluding that varying interpretations of the CISG would mean a failure of its goals); *see also* Schwenzer, *supra* note 160 at 709 (stating that the unification of laws would be undermined with local interpretation).

163. *See* Supermicro Computer, Inc. v. Digitechnic, S.A., 145 F. Supp. 2d 1147, 1151 (N.D. Cal. 2001) (asserting that the CISG does not address disclaimers of the implied quality obligations imposed by CISG Art. 35(2) and applied under domestic law, U.C.C. § 2-316).

164. *See* Scafom International v. Lorraine Tubes S.A.S. (Neth. v. Fr.), Hof van Cassatie Case No. C.07.0289.N, Steel Tubes Case, (June 19, 2009), English translation, http://cisgw3.law.pace.edu/cases/090619b1.html (justifying an additional remedy other than the exception from liability for damages); see *also* Flechtner, *supra* note 159 at 84, 97 (showing that the Belgian *Steel Tubes Case* was the first judicial application of article 79 in this situation).

165. *See* Scafom International v. Lorraine Tubes S.A.S. (Neth. v. Fr.) (determining that the Court must fill the gap left by the CISG); *see also* Flechtner, *supra* note 159 at 84, 90 (explaining why the Court decided to fill the gap left by CISG).

166. Recognizing their inability to foresee (and perhaps to agree on) all potential situations that could arise, the drafters of the CISG included Article 7(2) to prescribe the methodology for answering questions governed by the CISG that are not expressly addressed therein: "(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law." *See* U.N. Convention on CISG art. 7(2), Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M.

167. *See* Scafom International v. Lorraine Tubes S.A.S. (Neth. v. Fr.) (determining that the convention required the Court to adapt the terms of the parties contracts in light of the sellers hardship); see *also* Flechtner, *supra* note 159 at 84, 93–94 (highlighting that the international law required the sellers hardship to be taken into account).

Potentially inconsistent methodology for gap-filling aside,[168] the Belgian *Hof van Cassatie* effectively determined that the CISG contained a gap to be filled because Article 79's only remedy is exemption from liability from damages stemming from non-performance. Renegotiation of contractual terms or adaptation by the court—modification without the parties' agreement—is a national remedy for hardship (albeit one common to civil law jurisdictions),[169] and not a remedy within the CISG. Moreover, this exact remedy was *rejected* by the drafters of the CISG.[170] If predictability and uniform interpretation are goals of the CISG, then a court's ability to incorporate its own domestic legal doctrines into the range of potential remedies must surely be anathema to parties contracting under the CISG.

Like its landmark finding of sufficient economic hardship, the Belgian court's application of a domestic remedy for hardship may be related to the CISG Advisory Opinion. Specifically, the final paragraph of the Advisory Opinion tackles the issue of hardship remedies and concludes: "[i]n a situation of hardship under Article 79, the court or arbitral tribunal may provide *further relief* consistent with the CISG and the general principles on which it is based" (emphasis added).[171] The Belgian Hof van Cassatie makes no indication that it has considered the CISG Advisory Opinion, but it does track the Advisory Opinion closely in contradiction to any previous decisions.[172] Despite explicitly noting the absence of "guidelines under the Convention for a court or arbitrator to 'adjust,' or 'revise' the terms of the contract so as to restore the balances of the performances," the Advisory Opinion allows for the theoretical possibility

168. Such methodology is not within the scope of this comment. For a detailed analysis of the topic, *see* Flechtner, *supra* note 159 at 84 (noting that adhesion should be used to uniformly fill the gaps); *see also* Sarah Howard Jenkins, *Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles—A Comparative Assessment*, 72 TUL. L. REV. 2015, 2017 (1998) (commenting that there are two prevailing views on which methodology the courts should use in gap-filling).

169. *See* Schwenzer, *supra* note 160 at 709, 721–25 n. 44 (indicating that in cases of hardship, some civil law legal systems call upon the court primarily to adapt a contract to changed circumstances); *see also* Rodrigo Momberg Uribe, *Change of Circumstances in International Instruments of Contract Law. The Approach of the CISG, PICC, PECL and DCFR*, 15 VINDOBONA J. INT'L COM. L. & ARB. 233, 242 (2011) (noting the possibility for varying outcomes exists depending on the method used for distributing losses among the parties).

170. *See* HONNOLD, DOCUMENTARY HISTORY, *supra* note 58 at 350 (noting that Honnold recalls that a proposal aimed at incorporating an article allowing a party to "claim an adequate amendment of the contract or its termination" on account of "excessive difficulties" was expressly rejected by UNCITRAL's Working Group); *see also* Larry A. DiMatteo & Daniel T. Ostas, *Comparative Efficiency in International Sales Law*, 26 AM. U. INT'L L. REV. 371, 381 (2011) (explaining that the CISG expressly rejects the use of any analogous national jurisprudence and instead adopts the original understanding of its rules).

171. *See* CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, at ¶¶ 3.2, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007, http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html (emphasis added) (stating that "in a situation of hardship under Article 79, the court or arbitral tribunal may provide further relief consistent with the CISG and the general principles on which it is based."); *see also* Joseph Lookofsky, *Not Running Wild With the CISG*, 29 J.L. & COM. 141, 162 (2011) (defining further relief as renegotiation and/or contract adjustment that is specifically tailored to hardship).

172. *See* Scafom International v. Lorraine Tubes S.A.S. (Neth. v. Fr.), Hof van Cassatie Case No. C.07.0289.N, Steel Tubes Case (June 19, 2009), English translation, http://cisgw3.law.pace.edu/cases/090619b1.html (noting that the Belgian court will look to national law on matters where CISG is not on point); *see also* Sofie M.F. Geeroms, *Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not be Translated . . .* , 50 AM J. COMP. L. 201, 209 (2002) (observing that the Belgian Hof van Cassatie acknowledges the possibility of replacing its own reasoning when a lower court's judgment is legally correct but poorly explained).

of stretching either the good-faith requirement of Article 7(1)[173] or Article 79(5)'s[174] preservation of rights to allow a court or tribunal to determine the obligations of the parties and "adapt" the terms of the contract to fit the changed circumstances.[175] Mirroring the process described in the Advisory Opinion, the Belgian *Hof van Cassatie* cites Article 7(1)'s good faith requirement as the basis for allowing a remedy of judicial adaption.[176] Thus, the Advisory Opinion may again be implicated in inadvertently harming the very uniformity it seeks to preserve.

C. Harmony: Suggestions for Creating and Strengthening Uniformity

The CISG's strength and purpose comes from its harmonizing effects on international trade law. Promoting uniformity and predictability not only benefits contracting parties, but manifests the intent of the member states. One way in which the CISG creates this harmony is by relying on principles of guarantee between contracting parties irrespective of fault for breaches that arise. However, the "principle of *rebus sic stantibus* and concept of changed circumstances [had been] widely recognized by arbitral tribunals and the courts of most jurisdictions."[177] Logically, then, the CISG's inclusion of Article 79's provisions for excuse from liability for damages stemming from non-performance serves to appease such concepts of fairness and equity when unforeseeable and uncontrolled events prevent contractual perfor-

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173. "(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." *See* U.N. Convention on CISG art. 7(1), Apr. 11, 1980, 1489 U.N.T.S. 3 (citing the Convention's intent to preserve uniformity and promote good faith in international commercial transactions).

174. "(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention." *See* U.N. Convention on CISG art. 79(5), Apr. 11, 1980, 1489 U.N.T.S. 3 (referring to the Convention's limitation on parties' actions to only claiming damages).

175. *See* Schwenzer, *supra* note 160 at 723–24 (2009) (explaining that arguments exist which advocate for expanding the good-faith requirement); *see also* CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, at ¶ 40, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on Oct. 12, 2007, http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html (describing an Advisory Opinion allowing courts to interpret contracts for international transactions to fit certain circumstances).

176. *See* Scafom International v. Lorraine Tubes S.A.S. (Neth. v. Fr.), *supra* note 172 (providing an English translation of the Belgian Supreme Court's decision in the Steel Tubes Case holding that Article 7(1)'s good-faith requirement serves as a basis for allowing a remedy of judicial adaption); *see also* Joseph Lookofsky, *Not Running Wild with the CISG*, 29 J.L. & COM. 141, 167 n.138 (2011) (indicating how the *Steel Tubes* court expanded on the 7(1) good-faith provision and similar principles in order to render a decision).

177. *See* Peter J. Mazzacano, *Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG*, 2 NORDIC J. COM. L. 1, 12 (2011) (demonstrating that *rebus sic stantibus* and the concept of changed circumstances are widely recognized by courts); *see also* Charles Tabor, Comment, *Dusting Off the Code: Using History to Find Equity in Louisiana Contract Law*, 68 LA. L. REV. 549, 555–58 (2008) (presenting the history of the concepts of changed circumstances and *rebus sic stantibus* that make them widely accepted today as basic truths by courts and tribunals).

mance.[178] But, because domestic legal doctrines governing excuse vary so greatly—from *force majeure* to impossibility, *eccessiva onerosità sopravvenuta* to impracticability, *Wegfall der Geschäftsgrundlage* to economic hardship—harmony requires member states to set aside their specific doctrines in favor of autonomous and internationally uniform standards.[179]

This uniformity and harmony, however, fragments when courts and tribunals allow their domestic legal doctrines to influence their decisions such that concepts of fault creep in beyond what was envisaged by Article 79. Such liberalization of the requirements for Article 79 undermines the interests of contracting parties by reducing the predictability of the interpretations and applications of the treaty's provisions. Similarly, as domestic courts reinterpret the CISG to add their own national or civil or common-law doctrines, regionalization occurs and the fundamental uniformity of the CISG fragments.

Fortunately for the forces of harmony, because most sources of Article 79 interpretations are persuasive rather than authoritative, courts and tribunals preferring to promote uniformity have the ability to ignore decisions from other jurisdictions anathema to international harmony. Indeed, in the interests of uniformity, courts and tribunals not required to follow the Belgian *Steel Tubes Case* should ignore the decision or other divergent interpretations of the CISG.

Additionally, courts and other tribunals interpreting Article 79 can promote further harmonization by staying true to the international principles inherent in the CISG and explicitly promoted by Article 7.[180] While protecting immediate national interests (such as a company seated in the state and requesting excuse under Article 79) will always hold great appeal, courts should take a longer view and realize that protecting the international character at the expense of their national legal doctrines helps create uniformity, predictability, and harmony benefitting their businesses in future transactions.

Further, harmony can be created and preserved by refraining from stretching the definition of "impediment" to fit circumstances divergent from the established strict doctrine. Indeed, the CISG-AC Advisory Opinion, itself, may be guilty of stretching "impediment." By expounding a theoretical teaser based on academic hypotheticals, the CISG-AC may inadver-

178. *See* Dionysios P. Flambouras, *The Doctrines of Impossibility of Performance and Clausula Rebus Sic Stantibus in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law—A Comparative Analysis*, 13 PACE INT'L L. REV. 261, 263–66 (2001) (detailing the purpose and aim of Article 79 of the Convention as limiting liability for non-performance of a contract in the face of insurmountable difficulties); *see also* Lisa M. Ryan, *The Convention on Contracts for the International Sale of Goods: Divergent Interpretations*, 4 TUL. J. INT'L & COMP. L. 99, 112 (1995) (delineating the intent of Article 79).

179. *See* Mazzacano, *supra* note 177 at 49–52 (acknowledging that CISG has been the foremost push in international commercial law towards uniformity among diverging law and regulations); *see also* Harry Flechtner, *Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) As Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods*, 19 PACE INT'L L. REV. 29, 43 (2007) (indicating it is neither a novel nor new idea to suspend or limit domestic interpretations of international commercial laws in the CISG arena).

180. "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." *See* U.N. Convention on CISG art. 7(1), Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M. (promoting interpretations under the CISG that account for the international and multinational character of the agreement and situations it governs).

tently be providing the theoretical framework necessary for courts and tribunals to liberalize the concept of "impediment" and the scope of Article 79. The *Steel Tubes Case* acts as a prime example of how such academic gymnastics can lead to fragmentation and discord, especially when contrasted with the relatively uniform applications of impediment established in case law and the current scholarly literature.[181] Consequently, the CISG-AC would better serve its mission to promote uniform interpretation of the CISG if it more carefully articulated its academic speculation on the potential extent of interpretations—especially for Article 79 where it has admitted that the relative paucity of case law renders predicting trends in interpretation treacherous. Perhaps the CISG-AC could amend Advisory Opinion No. 7 to better reflect the strictness of the decisions published thus far instead of speculating on how courts and tribunals might someday stretch the provisions of Article 79 to expand its current narrow applications, as happened in the subsequent *Steel Tubes Case*. Such an amendment would likely help curtail future disharmony by eliminating language that currently provides an overly liberal basis for exemption that allows "gaps" to be filled by a variety of applications based on domestic legal standards.

To address the potential for courts and tribunals to fragment interpretation of Article 79 by interpreting new remedies into suspect "gaps," the CISG-AC should specifically amend the final paragraph of Advisory Opinion No. 7.[182] Alternatively, and perhaps to greater effect, a new advisory opinion concerning the extent of "gaps," especially regarding remedies, may help prevent future nationalistic interpretations and restore some harmony to applications of Article 79. In the meantime, courts and tribunals must have the intellectual integrity to preserve the international character in their interpretations of excuse under the CISG by following the mandate of Article 7(1): "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[183]

IV. Conclusion

Where certainty is the currency of business, then the uncertainty of exactly how governing laws will be applied must be an inefficiency needlessly increasing the costs of international trade. By harmonizing international trade law, the CISG has been largely successful at creating uniformity and reducing the cost of doing business. Article 79, as the compromise between numerous domestic excuse doctrines, promotes uniformity by delimitating exactly when a con-

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181. *See* Harry M. Flechtner, *Another CISG Case in the U.S. Courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations*, 15 J.L. & COM. 127, 136 (1995) (questioning the validity and functionality of a system where regionalized interpretations of an international agreement are granted such a large degree of deference); *see also* Paul Amato, *U.N. Convention on Contracts for the International Sale of Goods—The Open Price Term and Uniform Application: An Early Interpretation by Hungarian Courts*, 13 J.L. & COM. 1, 21 (1993) (opining on shortcomings of the CISG that arise as a byproduct of lenient interpretations and projecting potential solutions aimed at creating a more uniform system of interpretation under CISG).

182. Where the advisory opinion suggests that courts and arbitral tribunals can use Article 79(5) to justify "adapting" the contract terms. *See* CISG-AC Opinion No. 7, *supra* note 175 (describing potential remedies and procedures once courts have determined that hardship does in fact exist).

183. *See* U.N. Convention on CISG art. 7(1), Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M. (indicating that interpretations under CISG should lean toward an international medium).

tracting party's non-performance can be excused. But to achieve uniformity, Article 79 relies on good faith interpretations made with regard to its international character.

Despite years of scholarship and court and arbitral decisions purportedly interpreting Article 79 without respect to the domestic legal doctrines it displaced, contradictions exist. Business transactions governed by the CISG must manage the uncertainties created by non-uniform treatment of several issues: what, exactly, constitutes an impediment; whether or not delivering non-conforming goods may be ever be excused; and when non-performance can be attributed to the actions of a third party. The merely persuasive effects of previous academic and judicial interpretations, even when as well entrenched as "hardship," are subject to the whims of individual national courts or tribunals who may prefer the provisions of a domestic legal doctrine for excuse over Article 79. Consequently, both unsettled questions and inconsistent decisions risk the harmony the CISG attempts to create.

If nothing is done, courts and tribunals, sensing the beginnings of a trend towards nationalistic or liberal interpretations, may very well engage in a race to the bottom as they protect perceived national interests. Such an evisceration of the uniformity, predictability, and harmony of the doctrine of excuse would undoubtedly be against the intent of the member states and would seriously weaken the CISG.[184] After all, what state would force its businesses to bow to the whims of foreign courts and tribunals, adding extra layers of expense and unpredictability? If the CISG is to accomplish the goals of its member states—blessing business transactions with the benefit of universal and uniform rules—then harmony, including within the doctrines for excuse, must be preserved, even at the expense of entrenched domestic legal doctrines and short-term nationalistic gains.

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184. *See* Georg Gruber & Hans Stoll, *Article 79*, *in* 2 COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 807, 807 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2010); *see also* UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 615 (John O. Honnold & Harry M. Flechtner, eds., 4th ed. 2009)

IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A.

20 N.Y.3d 310, 982 N.E.2d 609 (2012)

The New York Court of Appeals held that parties are not required to expressly exclude New York conflict-of-laws principles in their choice-of-law provisions in order to avail themselves of New York substantive law.

I. Introduction

As evidenced by the domestic availability of foreign goods and services, international business transactions have steadily increased over time.[1] Transnational parties are not exempt from the problems that can arise in the conduct of business transactions. In fact, the additional complexities of transnational business transactions and increasingly global markets contribute to the growth of disputes between parties from different nations.[2] Jurisdictional, choice-of-forum and choice-of-law contests are familiar to such disputes.[3] To avoid time-consuming and expensive litigation of these issues, choice-of-law and choice-of-forum clauses are often included in the parties' contracts to resolve such issues preemptively.[4] In the absence of choice-of-law clauses, a conflict-of-law analysis is undertaken.[5]

Particularly, in New York, the Legislature has enabled parties that lack New York contacts to choose New York substantive law as the governing body of law for their contracts in certain situations.[6] General Obligations Law § 5-1401(1) provides that parties to contracts that arise out of a transaction covering $250,000 may agree that New York substantive law will govern with respect to those contracts.[7] In addition, General Obligations Law § 5-1402 provides that parties who lack New York contacts but have (1) engaged in a transaction covering $1 million or more, (2) agreed through their contract to submit to New York law, and (3) chosen to have New York law govern in accordance with General Obligations Law § 5-1401 may maintain an action in New York courts.[8] While one section addresses the governing law to be applied to contracts, the other addresses the availability of New York courts when certain criteria are met.[9] Read together, the statutes allow parties to select New York to govern their contracts and are enabled to file suit in New York courts despite the lack of New York contacts.[10]

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1. Bayless Manning, *New Patterns in International Law Practice*, 14 DEL. LAW., no. 1, 1996, at 22, 23.
2. Juan M. Alcala, *Transnational Disputes in a Global Economy*, 75 TEXAS B.J. 512, 512 (2012).
3. *Id*. at 515.
4. *Id.*
5. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971) (applied by most jurisdictions in these circumstances).
6. IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A., 20 N.Y.3d 310, 316, 982 N.E.2d 6090 (2012).
7. N.Y. GEN. OBLIG. LAW § 5-1401(1) (McKinney 2012).
8. N.Y. GEN. OBLIG. LAW § 5-1402(1) (McKinney 2012).
9. *See* N.Y. GEN. OBLIG. LAW § 5-1401(1) (McKinney 2012); *see also* N.Y. GEN. OBLIG. LAW § 5-1402(1) (McKinney 2012).
10. *IRB-Brasil Resseguros, S.A.*, 20 N.Y.3d at 315.

In *IRB Brasil Resseguros v. Inepar Investments*, the New York Court of Appeals considered whether a choice-of-law provision designating New York law as controlling in a contract between international parties should be enforced without the need of expressly excluding conflicts-of-law principles. The New York Court of Appeals affirmed the Appellate Division's modified judgment for damages against Inepar Investments.[11] In doing so, the Court upheld the lower court's ruling that a choice-of-law clause that designates New York law as governing with regard to the parties' rights and obligations is binding under General Obligations Law § 5-1401.[12]

II. Facts and Procedural History

A. Background

Plaintiff-appellee, IRB Brasil Resseguros, S.A. (hereinafter IRB), is a half state-owned corporation organized under Brazilian law with headquarters in Rio de Janeiro.[13] Defendant-Appellant Inepar S.A. Indústria e Construções (hereinafter IIC) is also incorporated in Brazil and was one of two corporations named as Defendants in the plaintiff's claim.[14] The other defendant initially named was Inepar Investments, a wholly owned subsidiary of non-party Inepar Energia, a company in which IIC owns a majority of the common stock.[15]

In 1996, IIC sought to refinance its debt and raise capital through the issuance of a Medium-Term Note Program in the international market.[16] In September 1996, Inepar Investments initiated and IIC guaranteed this Note Program (hereinafter "Note Program") through which $30 Million in Global Notes were offered to investors.[17] The Note Program was governed by a Fiscal Agency Agreement executed on September 24, 1996, which provided that "[t]his Agreement, the Notes and the Guarantee shall be governed by, and construed in accordance with, the laws of the State of New York, without regard to conflict of laws principles."[18] IRB thereafter purchased $14 Million in notes from the Program on September 30, 1996, which would be due on October 1, 2001.[19] Only eight interest payments were made pursuant to the Note Program, after which Inepar Investments defaulted on both the interest and the principal balance.[20]

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11. *Id.* at 316.
12. *Id.* at 313–14.
13. IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A., No. 604448/06, 2009 WL 2421423, at *3 (N.Y. Sup. 2009).
14. *Id.* at *2–3.
15. *Id.* at *2. Claims against Inepar Investments were not considered in this or the lower courts' decisions.
16. *Id.* at *2.
17. *Id.*
18. *Id.* (quoting from the Global Note agreement).
19. *Id.* at *3.
20. *Id.*

IRB then filed a breach-of-contract action against Inepar Investments under the Note Program and against IIC under the guarantee.[21] In response to the action, IIC moved for summary judgment, claiming that IRB did not have rights under the guarantee and that the guarantee was void under Brazilian law.[22] IRB cross-moved for summary judgment, arguing that no material issues of fact existed.[23]

B. Lower Court Decisions

The New York Supreme Court, New York County, considered both IRB's and IIC's motions for summary judgment, dismissed IIC's motion, and granted IRB's motion.[24] IIC argued that (1) IRB did not have a legal right to enforce the Guarantee because it was not a Relevant Account Holder,[25] and (2) the Guarantee was void under Brazilian law because it was never authorized by the board of directors.[26] With regard to IIC's first argument for summary judgment, the court held that IIC had not demonstrated that IRB was not a relevant account holder.[27] More important, regarding IIC's second argument, IIC argued that New York's choice of law principles should be applied and that, as such, Brazilian law applied to the action.[28] In response to IIC's second argument, the court held that the contractual choice-of-law clause would be upheld and New York substantive law applied.[29]

The Supreme Court acknowledged the importance of New York's recognition of contractual choice-of-law provisions in contracts where enforcement would not be against public policy, unreasonable, unjust, or invalid because of fraud or overreaching.[30] In addition, because this contract was for an amount not less than $250,000, the court found that General Obligations Law § 5-401 applied.[31] Section 5-401 mandates that, in an agreement where there is a choice-of-law provision designating New York law as governing with regard to the parties' rights and obligations, that provision will govern, despite the contract's lack of reasonable relation to New York.[32] The court also briefly stated that, be that as it may, there was "sufficient

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21. *Id.* at *2.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at *12–13.
26. *Id.* at *15.
27. *Id.*
28. *Id.*
29. *Id.* at *17.
30. *Id.* at *15.
31. N.Y. GEN. OBLIG. LAW § 5-1401(1) (McKinney 2012). (stating in relevant part that "[t]he parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars, including a transaction otherwise covered by subsection 1-105 of the uniform commercial code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state.").
32. Further discussion of the N.Y. General Obligations Law provision is provided in § III.

contact between New York and the transactions to support the contractual choice of New York Law."[33]

Regarding IRB's motion for summary judgment, the court held that IRB had met its burden by demonstrating that there was a guarantee, an underlying debt, and a guarantor's failure to perform in accordance with the guarantee; IRB's motion for summary judgment was thus granted.[34] IIC subsequently appealed to the Appellate Division, First Department, which affirmed the judgment and modified only the post-judgment interest rate.[35] IRB then appealed to the Court of Appeals of New York.[36]

III. Discussion

In its consideration of this appeal, the New York Court of Appeals examined New York General Obligations Law §5-401.[37] The Court explained that the New York legislature's choice to pass this law centered on its concern for the state's standing as a financial and commercial center.[38] Recognizing the unpredictability of a "contact" or "relationship" analysis, the legislature enacted this law so that parties could avail themselves of New York law if they so desired by writing a choice-of-law clause into their contracts.[39]

Although IIC did not argue that the choice-of-law provision should be disregarded, it did argue that New York law in its entirety should apply.[40] Such an application, it argued, would also include the application of New York's conflict-of-laws principles.[41] Furthermore, IIC argued that the parties would have had to exclude New York's conflict-of-laws principles expressly in order for New York substantive law to apply.[42] In IIC's view, an application of conflict-of-laws principles could only result in the application of Brazilian law.[43]

Looking to the plain language of § 5-401, the Court concluded that the choice-of-law provision dictated the application of New York substantive law.[44] Underlying the Court's decision was consideration of § 5-401's legislative purpose.[45] The Court again mentioned that the goal of this statute was to preserve New York's status as a financial and commercial center.[46] More important, however, the Court observed that disregarding a choice-of-law provision

33. *IRB-Brasil Resseguros S.A.*, 2009 WL 2421423, at *9.
34. *Id.*
35. IRB-Brasil Resseguros S.A. v. Inepar Investments S.A., 83 A.D. 3d 573, 573 (2011).
36. *IRB-Brasil Resseguros, S.A.*, 20 N.Y.3d at 310, 314.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 313.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 315.
45. *Id.* at 316.
46. *Id.*

would only serve to compromise predictability and promote uncertainty.[47] Additionally, the Court commented on the application of the Restatement (Second) of Conflicts of Law.[48] Specifically, the Court reasoned that, under the Restatement, an application of local law would necessarily designate an application of New York substantive law.[49] Finally, the Court briefly commented on the delayed resolution process and increased litigation costs in a conflict-of-laws analysis and noted the unlikelihood that the parties would have opted for this treatment by leaving the question of applicable substantive law unresolved.[50]

IV. Conclusion

The Court concluded that, where parties wish to be governed by New York's conflict-of-law principles, they are free to make this choice upon an express designation in their contract.[51] Furthermore, parties are not required to exclude conflict-of-law principles expressly in their choice-of-law provisions to avail themselves of New York substantive law.[52] Instead, parties to contracts meeting certain statutory requirements can have New York law govern their contracts and avail themselves of New York courts by merely providing a choice-of-law provision, which states that New York law will govern without a need to denounce the New York conflict-of-laws principles.[53]

Reverberating in the Court's decision is the fundamental contractual concept of party autonomy,[54] which promotes a party's ability to choose the governing law for potential disputes when a contract is between nationals of different states.[55] Increasingly, global markets and international transactions demand predictability, and one avenue for its attainment has been the provision of choice-of-law clauses in contracts.[56] Although this is a seemingly simple concept, various courts and jurisdictions have come to varied conclusions as to whether a choice-of-law provision would apply where the parties have previously agreed on such a provision.[57] Because aspects of control and foreseeability are particularly appealing to multistate parties in

47. *Id.*

48. *Id.*; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971) (providing that contracting parties' rights and duties with respect to contractual issues will be determined by the local state law that has the most significant relationship to the transaction and parties).

49. *IRB-Brasil Resseguros S.A.*, 20 N.Y.3d at 316.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 315.

54. Mo Zhang, *Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law*, 20 EMORY INT'L L. REV. 511, 516 (2006) (explaining that the concept of party autonomy is well established, and that the will of the parties is a leading factor in contract law.).

55. *Id.* at 511.

56. *Id.* at 512.

57. *Id.* at 511–12.

the face of the varied application of conflict of laws analyses, [58] the Court's decision here will likely be appealing to contracting parties who meet the statutory requirements of General Obligations Law § 5-1401 and § 5-1402.

Adriana Montero

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58. Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 U. KAN. L. REV. 471, 471 (1989).

Konowaloff v. Metropolitan Museum of Art

702 F.3d 140 (2d Cir. 2012)

The Second Circuit held that the act-of-state doctrine barred plaintiff-appellant's claim because the Soviet government, which had appropriated his great-grandfather's painting in 1918, was later recognized by the United States.

I. Holding

In *Konowaloff v. Metropolitan Museum of Art*,[1] the U.S. Court of Appeals for the Second Circuit held that the act-of-state doctrine barred the plaintiff-appellant from making a valid claim for injunctive, monetary and declaratory relief for the Met's acquisition, possession, display and retention of the Painting because the plaintiff-appellant lacked any ownership right or interest in the Painting, which had been fully appropriated by the Soviet government in 1918.[2] This holding is significant because it displays federal courts' willingness to apply the act-of-state doctrine in foreign private property disputes.

II. Facts and Procedure

A. Facts

The plaintiff-appellant, Pierre Konowaloff, is the sole heir to the estate of his great-grandfather, Ivan Morozov,[3] a Russian national and art collector who lived in Moscow during the early twentieth century.[4] In 1911, Ivan Morozov acquired the Paul Cézanne painting entitled *Madame Cézanne in the Conservatory*, or *Portrait of Madame Cézanne* (Painting).[5] In March 1917, the leaders of the Russian Revolution overthrew Tsar Nicolas II and installed a Provisional Government.[6] In November 1917, the Bolsheviks, or "Soviets," took over the Provisional Government and installed the government of the Russian Socialist Federated Soviet Republic (RSFSR) and its official successor, the Union of Soviet Socialist Republics (U.S.S.R).[7] Although the United States recognized the Provisional Government in early 1917, it did not acknowledge the Soviet government until November 1933.[8]

Within the RSFSR, the Bolsheviks issued a series of decrees nationalizing private property and abolishing private property ownership.[9] On December 19, 1918, the Bolsheviks issued one such decree against Ivan Morozov's art collection, which included the *Portrait of Madame*

1. Konowaloff v. Metropolitan Museum of Art, 702 F.3d 140 (2d Cir. 2012).
2. *Id.* at 141.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 142.
7. *Id.*
8. *Id.* at 141–42.
9. *Id.* at 142.

Cézanne.[10] Ivan Morozov did not voluntarily relinquish his art collection.[11] Nor did Morozov receive any compensation for his rights and interests in the collection.[12] In May 1933, Stephen C. Clark, a trustee of the Metropolitan Museum of Art (Met), acquired the Painting from the Soviet Politburo.[13] The Politburo was the "executive arm" of the Communist Party and tasked with making decisions on art sales.[14] In 1960, Stephen C. Clark died and bequeathed the Painting to the Met.[15]

The plaintiff-appellant, Konowaloff, became the official heir to Ivan Morozov's estate and art collection in 2002.[16] In 2008, Konowaloff learned that Morozov had owned the Painting and demanded that the Met return it to him.[17] The museum refused to return the Painting, and Konowaloff commenced an action in the U.S. District Court for the Southern District of New York, seeking injunctive, monetary and declaratory relief against the Met.[18] Konowaloff argued that Stephen C. Clark's 1933 purchase of the Painting constituted a transaction that violated Russian patrimony laws.[19] Konowaloff further alleged that the Politburo (Communist Party) and the Soviet state were separate entities, and therefore that the sale of the Painting was an "act of party" rather than an "act of state."[20] Konowaloff argued that the acts of the Politburo, in the sale of art abroad, were acts made independent of the Soviet government as part of an "illegal private trade with western capitalists."[21]

The Met moved to dismiss Konowaloff's claims on the grounds that they were barred by (1) the act of state doctrine; (2) the political question doctrine; (3) the doctrine of international comity; and (4) the statute of limitations, or laches; and on the grounds (5) that the complaint failed to state a claim on which relief could be granted.[22] The District Court held that the Met satisfied its burden of showing that the act-of-state doctrine applied to bar Konowaloff's claims.[23] The District Court concluded that there was established precedent in the Second Circuit recognizing the "Soviet government" as the state and its activities as legitimate, official acts.[24] The District Court further declined to question the act of state in expropriating the Painting, because it accepted that the Soviet government took ownership of the Painting in

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 143.
16. *Id.*
17. *Id.*
18. *Id.*
19. Decrees issued in September and October 1918 prohibiting "the export of objects of particular and historical importance," which included paintings. *Id.* at 142.
20. *Id.*
21. *Id.*
22. *Id.* at 143.
23. *Id.*
24. *Id.*

1918 through an official decree.[25] The District Court concluded that the Painting's sale in 1933, whether legal or illegal, was irrelevant to Konowaloff, because he lacked any ownership stake in the Painting. Konowaloff appealed. The Second Circuit affirmed on December 18, 2012.[26]

III. Discussion

A. Standard of Review

The Second Circuit reviewed the District Court's dismissal of the claim on the basis of the pleadings.[27] The Second Circuit accepted as true the factual allegations of the amended complaint and drew all reasonable factual inferences that were available in order to assess whether the pleading stated a legal claim to relief that was plausible.[28] Although the act-of-state doctrine is an affirmative defense as to which the Met had the burden, the court had the discretion to grant a motion to dismiss on the basis of the doctrine when its applicability was evident on the face of the complaint.[29]

B. The Act-of-State Doctrine

In its assessment of the act-of-state doctrine, the Second Circuit turned to Supreme Court decisions for guidance. The Supreme Court, in *Banco Nacional de Cuba v. Sabbatino*,[30] held that under the act-of-state doctrine, the validity of a foreign state's act may not be examined, "even if the complaint alleges that the taking violates customary international law" or the state's own domestic laws.[31] In *Oetjen v. Central Leather Co.*,[32] the Supreme Court held that when "a government which originates in revolution or revolt is recognized by the political department of our government as the *de jure* government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence."[33] The Supreme Court in *United States v. Pink*,[34] and *United States v. Belmont*,[35] further established that the act-of-state doctrine applied despite the fact that the acts at issue occurred years before the United States' formal recognition of the Soviet government.[36] The Second Circuit found that the Supreme Court repeatedly

25. *Id.* at 143–44.
26. *Id.* at 141.
27. *Id.* at 145.
28. *Id.*
29. *Id.* at 146.
30. 376 U.S. 398, 431 (1964); Michael D. Ramsey, *Act of State and Foreign Sovereign Obligations*, 39 Harv. Int'l L.J. 1, 13–16 (1998) (providing a thorough overview of the act-of-state doctrine).
31. *Oetjen*, 376 U.S. at 428.
32. 246 U.S. 297 (1918).
33. *Id.* at 302–03.
34. 315 U.S. 203 (1942).
35. 301 U.S. 324 (1937).
36. *Konowaloff*, 702 F.3d at 146.

applied the act-of-state doctrine to cases involving nationalizations ordered during the Russian revolution and held that Konowaloff's amended complaint, on its face, showed that the action was barred by the act-of-state doctrine.[37]

The Second Circuit rejected Konowaloff's argument that the act-of-state doctrine was inapplicable to the 1933 sale of the Painting.[38] The court found that the relevant act of state, as revealed by the Amended Complaint, was the 1918 appropriation of the Painting.[39] As alleged in the Amended Complaint, Ivan Morozov lost his property rights and interests in the Painting during the appropriation.[40] Morozov did not own the Painting after 1918, and therefore Konowaloff lacked any right or interest in the Painting as Morozov's heir.[41] Absent a right or interest in the Painting, Konowaloff lacked standing to complain of any sale or other treatment of the Painting after 1918 or to seek a declaratory judgment with respect to the Met's right or title to the Painting.[42]

C. "Act of Party" Versus "Act of State"

The Second Circuit rejected Konowaloff's argument that the act-of-state doctrine did not bar his claim, because the Communist Party, not the Soviet state, seized the Painting.[43] The Second Circuit affirmed the District Court's finding that the Soviet government appropriated the Painting, as Konowaloff's Amended Complaint itself "explicitly allege[d] that '[t]he Painting was confiscated by the RSFSR."[44] Konowaloff objected to this finding by arguing that the "allegation continued by asserting that the confiscation was 'an act of theft.'"[45] However, the Second Circuit deemed Konowaloff's objection unpersuasive.[46] The Second Circuit found that the description of the Soviet appropriation as an "act of theft" was a legal assertion, which the court was not required to accept.[47] The Second Circuit further stated that any question into the lawfulness of the Soviet government's seizure was precisely the type of inquiry that the act-of-state doctrine precludes United States courts from determining.[48]

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37. *Id.*
38. *Id.* at 147.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*; *see also* MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007) (party seeking a declaratory judgment must show "a substantial controversy, between parties having adverse *legal interests*, of sufficient immediacy and reality").
43. *Konowaloff*, 702 F.3d at 147.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*; *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004) ("It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens . . .").

D. The Relevance of the Fall of the Soviet Union

Konowaloff contended that the act-of-state doctrine was inapplicable, because the Soviet government was no longer "extant" and there was no danger of upsetting diplomatic relations between the United States and Russia.[49] The Second Circuit rejected this argument. Although the fact that "the regime whose acts are challenged has been replaced may be a factor in the analysis of the act of state doctrine's application," the Second Circuit concluded that this factor was not material in this case, because Russia, as the successor to the U.S.S.R., has never formally renounced the 1918 appropriations.[50] The District Court found that the current Russian government was not interested in further appropriations of private property and had only initiated an investigation into art sales made in the 1930s.[51] The Russian government has not yet repudiated the 1918 appropriation decree that deprived Morozov and his heir Konowaloff of any ownership right to the Painting.[52]

IV. Conclusion

The Second Circuit affirmed the District Court's application of the act-of-state doctrine. This affirmance represents federal courts' continued reliance and application of the act-of-state doctrine in U.S. litigation involving a foreign sovereign's activity. The Second Circuit ultimately concluded that the District Court properly refrained from considering any alleged legal defects in the sale of the Painting in 1933, because the Soviet government had appropriated the Painting in 1918.[53] The Second Circuit further accepted the District Court's finding that the Soviet government, not the Communist Party, conducted the 1918 appropriation of the Painting.[54] The Second Circuit rejected Konowaloff's argument that the fall of the Soviet Union precluded application of the act-of-state doctrine, because the current Russian government has never repudiated the 1918 appropriations.[55]

In barring Konowaloff's action pursuant to the act-of-state doctrine, the Second Circuit sent a strong message to museums and the art world that it would not entertain actions in which foreign governments appropriated works of art—regardless of the politics at the time of the appropriation. The Second Circuit followed the decisions of other Western governments "in honoring the Soviet decrees."[56] For example, families of those whose property was taken by the Bolsheviks have brought analogous actions in German, French, and English courts.[57] Simi-

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49. *Konowaloff*, 702 F.3d at 147.
50. *Id.*
51. *Id.* at 148.
52. *Id.*
53. *Id.* at 147.
54. *Id.*
55. *Id.*
56. Lawrence M. Kaye, *Art Loans and Immunity From Seizure in the United States and the United Kingdom*, 17 INT'L J. OF CULTURAL PROP. 335 (2010) (discussing the link between U.S. immunity laws and property nationalized during the Russian revolution); *see also* Irena Tarsis, *Konowaloff v. Met Decision—Met Can Keep Cezanne*, CENTER FOR ART LAW (Dec. 21, 2012), http://www.itsartlaw.com/2012/12/konowaloff-v-met-decision-met-can-keep.html.
57. Tarsis, *supra* note 56.

larly, those actions proved futile.[58] Interestingly, the Second Circuit distinguished between a foreign government's unrepudiated appropriations and its repudiated appropriations and, in doing so, suggested that this factor may determine a plaintiff's ownership claim. By pointing to Russia's recent investigation into art sales made in the 1930s, the Second Circuit appeared to welcome foreign appropriation cases following a state's valid repudiation. However, there is no indication that Russia looks to repudiate the 1918 appropriations, as Russia has not even permitted the restitution of property originally looted by the Nazi government and does not generally appear to welcome restitution efforts.[59]

Amanda Agnieszka Rottermund

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58. *Id.*

59. Federal Law on Cultural Valuables Displaced to the U.S.S.R. as a result of World War II and Located on the Territory of the Russian Federation N 64-FZ (1998), *http:*//docproj.loyola.edu/rlaw/r2.html.

Licci v. Lebanese Canadian Bank

20 N.Y.3d 327 (2012)

In response to certified questions from the Court of Appeals for the Second Circuit, the New York State Court of Appeals held that New York's long-arm statute confers jurisdiction over a foreign bank when the bank has transacted business within the state and availed itself of the benefits and protections of the state.

I. Holding

In *Licci v. Lebanese Canadian Bank,*[1] the Court of Appeals for the Second Circuit[2] presented the Court of Appeals of New York with two certified questions. In the first certified question, the court asked whether a foreign bank engaged in a "transaction" of business within the meaning of section 302(a)(1) of the New York Civil Practice and Law Rules, New York's long-arm statute, when it effectuated dozens of wire transfers from a New York bank account.[3] In the second certified question, the Court asked whether the plaintiffs' claims under the Anti-Terrorism Act,[4] the Alien Tort Statute,[5] and Israeli law arose from the foreign bank's transaction of business according to section 302(a)(1).[6]

The New York Court of Appeals answered the certified questions in the affirmative and held that a foreign bank sufficiently "transacted business" in New York when it engaged in dozens of wire transfers consisting of millions of dollars through a New York bank account.[7] The Court also held that this high level of bank account activity sufficed to establish an "articulable nexus" or "substantial relationship" to demonstrate that the plaintiffs' claims arose from the bank's transactions in New York.[8]

II. Facts and Procedural Posture

In 2006, Hizballah, a group designated as an Islamic terrorist organization by the U.S. Department of State, launched a series of rocket attacks on Israeli civilians during the Second Lebanon War.[9] Among the victims were dozens of U.S., Canadian, and Israeli citizens residing in Israel at the time of the attacks.[10]

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1. Licci v. Lebanese Canadian Bank, 20 N.Y.3d 327 (2012).
2. Licci v. Lebanese Canadian Bank, 673 F.3d 50 (2d Cir. 2012).
3. *Licci*, 20 N.Y.3d at *328.
4. Anti-Terrorism Act of 1987, 22 U.S.C. § 5201 (1987).
5. Alien Tort Claims Act of 1948, 28 U.S.C. § 1350 (2012).
6. *Licci*, 20 N.Y.3d at *327.
7. *Id*.
8. *Id*.
9. *Id*. at *330; *see also Designation of Kata'ib Hizballah*, U.S. DEP'T OF STATE —TABLE 6 (BB) (June 26, 2009), http://www.state.gov/j/ct/rls/other/des/143209.htm (designating Hizballah, on June 24, 2009, as an Iraqi terrorist organization and describing the group as radical Shia Islamists with anti-Western ideologies).
10. *Licci*, 20 N.Y.3d at *330.

In July 2008, the victims and relatives of the deceased victims filed suit in New York State Supreme Court.[11] The plaintiffs alleged that the Lebanese Canadian Bank (LCB), with help from American Express Bank (AmEx), financially aided the terrorist group in its illegal attacks on civilians by facilitating monetary interchange through the Shahid Foundation, an organization known as Hizballah's "financial arm."[12] The plaintiffs claimed that LCB and AmEx enabled the Shahid Foundation to transfer millions of dollars over several years.[13] Further, the plaintiffs argued that the money transfers indirectly helped fund the rocket attacks launched by Hizballah in 2006.[14]

AmEx removed the lawsuit to the U.S. District Court for the Southern District of New York.[15] In January 2009, the plaintiffs filed an amended complaint against LCB and AmEx under the following theories of liability: (1) aiding and abetting liability for international terrorism under the Anti-Terrorism Act,[16] (2) aiding and abetting liability for genocide, war crimes and crimes against humanity in violation of international law under the Alien Tort Statute,[17] and (3) negligence and breach of statutory duty in violation of Israeli law.

The plaintiffs found support for the court's exercise of personal jurisdiction over LCB under the New York long-arm statute.[18] Under section 302(a)(1), "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state. . . ."[19] In April 2009, LCB moved to dismiss the amended complaint for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2) and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).[20]

On March 31, 2010, the district court judge granted LCB's motion to dismiss the plaintiffs' amended complaint for lack of personal jurisdiction.[21] The plaintiffs appealed the Southern District's dismissal of the complaint to the Second Circuit.[22] The U.S. Court of Appeals for the Second Circuit certified two questions to the New York Court of Appeals regarding whether New York could assert personal jurisdiction over LCB.[23]

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11. *Id*. at *330–331.
12. *Id*. at *331.
13. *Id*.
14. *Id*.
15. *Id*.
16. Anti-Terrorism Act of 1987, 22 U.S.C. § 5201 (2012).
17. Alien Tort Claims Act of 1948, 28 U.S.C. § 1350 (2012).
18. *Id*.
19. N.Y. C.P.L.R. § 302(a)(1) (McKinney 2008).
20. *Licci*, 20 N.Y.3d at *332; *see also* FED. R. CIV. P. (12)(b)(2), (6) (providing for dismissal for lack of personal jurisdiction) and 12(b)(2) (providing for dismissal for failure to state a claim).
21. *Licci*, 20 N.Y.3d at *332 (holding that maintaining a bank account in New York is not enough to assert personal jurisdiction over a foreign defendant, and plaintiffs' claims do not "arise from" these wire transfers because no "articulable nexus or substantial relationship" exists between the wire transfers and the rocket attacks that injured the plaintiffs).
22. *Id*.
23. *Id*.

III. The Court's Analysis

A. Transacting Business in New York

The N.Y. Court of Appeals held that the plaintiffs successfully established that LCB transacted business within the meaning of section 302(a)(1) and purposely availed itself of the benefits and protections of New York by conducting extensive wire transfers worth millions of dollars in New York.[24] LCB benefitted through this arrangement from New York's dependable and transparent banking system, predictable laws and stable currency.[25]

The Court began its analysis by discussing at length the facts and holding of *Amigo Foods Corp. v. Marine Midland Bank*,[26] a case that also involved jurisdiction over a foreign corporation. There, the plaintiff, a wholesaler, contracted to purchase goods for resale from a distributor, with payment to be made through a trust company from Maine. A bank delivered the plaintiff's letter of credit, obtained in New York, to the trust company's correspondent in New York.[27] The plaintiff sued (1) the distributor, (2) the New York bank that issued the letter of credit, (3) the Maine trust company, and (4) the trust company's New York correspondent.[28] The plaintiffs alleged that either the distributor rejected the payment in breach of contract or, alternatively, that the bank erroneously failed to deliver the payment.[29] The court granted the Maine trust company's pre-answer motion to dismiss for lack of personal jurisdiction under the rationale that the trust company did not in any way act in New York.[30]

This court agreed with *Amigo Foods* on the theory that lacking any "other indicia or evidence to explain its essence," standard bank correspondence does not suffice to assert long-arm jurisdiction.[31] The *Amigo Foods* court explained that the trust company did not purposely avail itself of doing business in New York and reap the benefits and protections of New York's laws with respect to the trust company's affiliation with its New York correspondent.[32] Because the trust company was a passive participant in the transaction and had declined the funds as per its customer's assignment, the fact that this claim arose out of New York was simply adventitious and insufficient to establish long-arm jurisdiction.[33]

Therefore, the Court noted that long-arm jurisdiction may be applied when the defendant's use of a bank account within the state is purposeful, even when the only contact with the

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24. *Id*. at *333.
25. *Id*.
26. *Id*. at *335 (citing to Amigo Foods Corp. v. Marine Midland Bank, 39 N.Y.2d 391 (1974)).
27. *Id*. at *335.
28. *Id.* at *335–336.
29. *Id*.
30. *Id*. (explaining that the trust company's only action was to notify its depositor and defendant about the plaintiff's letter of credit).
31. *Id*. at *336.
32. *Id*.
33. *Id*.

state is the maintenance of that bank account.[34] "Purposeful" is an objective standard that depends on the facts of each case and the quality of the defendant's contacts.[35] The fact that LCB's relationship was ongoing for a number of years distinguished this case from *Amigo Foods*, where the transaction arose out of a single occurrence and was minimal and fortuitous.

B. Articulable Nexus/Substantial Relationship

With respect to the second certified question, the court explained that in order for a cause to "arise from" a set of circumstances, an "articulable nexus or substantial relationship" must exist between the business transaction and the claim.[36] Although causation is not a necessary element, the claims must be connected in some way to the transaction in order to assert jurisdiction under the long-arm statute.[37]

According to the court in this case, an articulable nexus could be established if the plaintiffs could show that LCB used the New York bank account dozens of times and over a period of years to transfer millions of dollars to a terrorist organization's financial arm.[38] If proven, the alleged facts would suffice to establish that LCB breached its statutory duties to the plaintiffs, because it repeatedly engaged in wire transfers, thereby erasing the possibility that the use of the New York bank account was a mere coincidence.[39] The court also noted that, even though the plaintiffs' injuries were derived from the rocket attacks, the financial support provided by LCB indirectly to Hizballah sufficed to establish a cause of action, because section 302(a)(1) requires only that one element of the claim arise out of the business transactions in New York.[40]

IV. Conclusion

In answering the two certified questions, the Court of Appeals of New York concluded that the use of a bank account must be purposeful in order for a foreign party to become susceptible to New York's long-arm jurisdiction.[41] By choosing to avail oneself of the banking and financial benefits of New York, even the otherwise ordinary maintenance of a bank account may suffice.[42]

Further, the Court also held that a substantial relationship exists between a business transaction in New York and the breach of statutory duties giving rise to long-arm jurisdiction when a New York bank account is used dozens of times over a long period of time to transfer millions of dollars to the financial arm of a terrorist organization.[43] A foreign party's susceptibility to

34. *Id*. at *337 (interpreting *Amigo Foods* and stating that this is a correct reading of New York law).
35. *Id*.
36. *Id*.
37. *Id*. at *339.
38. *Id*.
39. *Id*.
40. Licci, 20 N.Y.3d at *341; *see also* N.Y. C.P.L.R. § 302(a)(1) (McKinney 2008).
41. Licci, 20 N.Y.3d at *341.
42. *Id*.
43. *Id*. at *340.

New York's long-arm statute is amplified when those financial transactions may have funded the terrorist attacks giving rise to the claim.[44]

The Court's analysis lacks defined boundaries regarding the level of business transaction that is necessary to establish long-arm jurisdiction in New York. The court provides an analysis of *Amigo Foods*, which, with its single, minimal, and unforeseen connection to New York, stands in stark contrast to this case. A more in-depth explanation of the grey area remaining between these two cases would aid the millions of foreign entities that conduct business in New York in evaluating their potential exposure to New York's long-arm jurisdiction statute.

Diana Horhogea

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44. *Id.*

United States v. Bellaizac-Hurtado

700 F.3d 1245 (11th Cir. 2012)

The Eleventh Circuit held that customary international law limits Congress's constitutional authority under the Offences Clause to define "Offences against the Law of Nations," and that the prosecution of drug trafficking in international waters under the Maritime Drug Law Enforcement Act was unconstitutional.

I. Holding

The Eleventh Circuit held that Congress's constitutional power under the Offences Clause to define "Offences against the Law of Nations" is limited to recognizing offenses that are against customary international law and does not extend to creating new offences.[1] Therefore, because drug trafficking is not recognized as an offense against customary international law, the prosecution of drug trafficking in foreign waters under the Maritime Drug Law Enforcement Act (MDLEA) exceeds Congress's constitutional power.[2] The court vacated the convictions of four defendants prosecuted under the MDLEA for drug trafficking in Panamanian waters.[3]

II. Facts and Procedural Posture

In 2010, the U.S. Coast Guard spotted a wooden fishing vessel in Panamanian waters.[4] The fishing vessel did not have lights or a flag, and this raised the suspicion of the Coast Guard.[5] The Coast Guard informed the Panamanian National Aero-Naval Service, which sent its navy to pursue the vessel.[6] Eventually, the vessel's crew escaped into a jungle. When the navy investigated the vessel, it found 760 kilograms of cocaine.[7] Panamanian officials, at various times and in various locations, arrested four suspects.[8] Panama extradited these suspects to the United States for prosecution, pursuant to a diplomatic agreement between the two countries.[9]

A grand jury indicted the four suspects with conspiracy to possess with intent to distribute five or more kilograms of cocaine and the actual possession of five or more kilograms of cocaine

1. United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1251–53 (11th Cir. 2012); *see also* U.S. CONST. art. 1, § 8, cl. 10.
2. *Bellaizac-Hurtado*, 700 F.3d at 1256; *see also* Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70503(a), 70506 (2006).
3. *Bellaizac-Hurtado*, 700 F.3d at 1256.
4. *Id.* at 1247.
5. *Id.*
6. *Id.*
7. *Id.* at 1247–48.
8. *Id.* at 1248.
9. *Id.*

on a vessel subject to U.S. jurisdiction.[10] The defendants moved to dismiss the charges based on the lack of U.S. jurisdiction.[11] The defendants claimed that, in their case, the district court applied the MDLEA unconstitutionally.[12] A magistrate judge who heard the arguments recommended that the defendants' motion to dismiss be denied, stating that jurisdiction was proper, because the defendants were operating a stateless vessel.[13] The magistrate judge said that the district court had jurisdiction because the defendants were operating a stateless vessel, and that the Act was constitutional as applied because Congress and several courts had determined that drug trafficking was "universally condemned" by various nations with "reasonably developed" legal systems.[14] The district court agreed with the magistrate judge's opinion and adopted his report as its decision on the motion.[15]

The defendants conditionally pleaded guilty to the conspiracy charges, and the district court sentenced each defendant to imprisonment, supervised release, and a fine.[16] The defendants appealed their convictions on the grounds that the MDLEA, as applied to their cases, exceeded the power of Congress under the Offenses Clause.[17]

III. Discussion

A. Standard of Review

In considering this issue of first impression, the Eleventh Circuit applied a de novo standard of review.[18] Federal appellate courts use the de novo standard of review whenever they review a statute for its constitutionality.[19]

B. Power of Congress to Define "Offences Against the Law of Nations" Is Limited by Customary International Law

Customary international law limits the power of Congress to define "Offences Against the Law of Nations."[20] Based on related Supreme Court precedent and the text, history, and structure of the Constitution, the power to "define" is limited by the law of nations.[21] "Offences

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* The defendants' sentences for imprisonment each ranged from 25 to 90 months.
17. *Id.*; *see also* U.S. CONST. art. 1, § 8, cl. 10.
18. *Bellaizac-Hurtado*, 700 F.3d at 1248.
19. *Id.*; *see also* United States v. Tinoco, 304 F.3d 1088, 1099 (11th Cir. 2002).
20. *Bellaizac-Hurtado*, 700 F.3d at 1249.
21. *Id.*

against the Law of Nations" refers to violations of customary international law.[22] Therefore, "Offenses Against the Law of Nations" are defined in relation to customary international law.[23]

The Eleventh Circuit cited two Supreme Court cases that established limits on Congress's power to "define" under the Offenses Clause. In *United States v. Furlong*, the Court held that Congress may not define murder as "piracy" in order to punish it under the Piracies Clause.[24] In *United States v. Arjona*, the Court held that the definition of an offense under the Offences Clause depends on the action committed and not on Congress's declaration that it is an offense.[25]

The Eleventh Circuit holds that the founders did not intend to give Congress the power to create new "Offences Against the Law of Nations." At the time the Constitution was written, "define" meant "to give the definition; to explain a thing by its qualities" and "to circumscribe; to mark limits."[26] The meaning of define, then, is to codify the limits of the law, rather than to create new limits.[27] Further, the Constitution limits the power of Congress, and allowing Congress to define any conduct as a piracy or felony gives it limitless power, in violation of the Constitution.[28]

"Offences Against the Law of Nations" is synonymous with violations of customary international law.[29] Adopting the definition in the *Restatement (Third) of Foreign Relations*,[30] also used in five other circuit courts,[31] the court determined that customary international law consists of two elements: (1) a general and consistent practice that reflects wide acceptance among states involved in the activity and (2) a sense of legal obligation.[32] States' wide acceptance and legal obligation is reflected when states have ratified relevant treaties and acted in accordance with those treaties.[33]

There is likely no mutual legal concern in the cases of private conduct, and the Eleventh Circuit considered that when they stated that private criminal conduct is unlikely to be considered a violation of customary international law.[34] Private criminal conduct is prosecuted under

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22. *Id.*
23. *Id.*
24. *Id.*; *see also* United States v. Furlong, 18 U.S. 184, 198 (1820).
25. *Bellaizac-Hurtado*, 700 F.3d at 1249; *see also* United States v. Arjona, 120 U.S. 479, 488 (1887).
26. *Bellaizac-Hurtado*, 700 F.3d at 1249; *see also* SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE, at DEF, DEF (1780).
27. *Id.* at 1250.
28. *Id.*
29. *Bellaizac-Hurtado*, 700 F.3d at 1251–53.
30. *Id.* at 1252; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(2) (1987).
31. *Bellaizac-Hurtado*, 700 F.3d at 1252; *see also* Aziz v. Alcolac, Inc., 658 F.3d 388, 399 (4th Cir. 2011); United States v. Struckman, 611 F.3d 560, 576 (9th Cir. 2010); Buell v. Mitchell, 274 F.3d 337, 372 (6th Cir. 2001); Sampson v. Fed. Republic of Germany, 250 F.3d 1145, 1149 (7th Cir. 2001); Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988).
32. *Bellaizac-Hurtado*, 700 F.3d at 1252.
33. *Id.* at 1254–55.
34. *Id.* at 1252.

U.S. domestic law.[35] However, as there is no international legal obligation to comply with U.S. domestic law, domestic illegality alone does not translate into a violation of customary international law.[36]

C. As Applied in These Cases, MDLEA Unconstitutionally Exceeds Congress's Power, Because Drug Trafficking Is Not a Violation of Customary International Law

During the founding period, drug trafficking was a national matter, not an international concern.[37] The court states that because it was not an international concern, drug trafficking was not a matter of customary international law during the founding period.[38] Many countries supported the drug trade for enormous profits.[39] It was not until the twentieth century that nations started to control the drug trade.[40] Because it was not an international concern at that time, the court looked to contemporary international law to determine whether the law has changed and concluded that drug trafficking was still not a violation of customary international law.[41] The court stated that although treaties have been signed to address drug trafficking, nations have failed to comply with the treaties.[42] The court states that treaties are merely evidence of customary international law, not definitive proof; therefore, the existence of a treaty does not mean that the circumscribed action is a violation of customary international law.[43] A customary international law norm will not form if states have not consented through practice.[44] Since the ratification of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in 1988,[45] the drug trade has continued to flourish, which indicates a lack of requisite state action in compliance with the treaty.[46] Therefore, because the international community has not treated drug trafficking as a violation of customary international law through sufficient state action, neither may Congress.

There was no jurisdiction on the part of the United States, because the defendants did not act in U.S. territory, and their actions were not "Offences Against the Law of Nations."[47] Jus-

35. *Id.*; *see also* Flores v. Southern Peru Copper Corp., 414 F.3d 233, 249 (2d Cir. 2003).

36. *Bellaizac-Hurtado*, 700 F.3d at 1252; *see also Flores*, 414 F.3d at 249.

37. *Bellaizac-Hurtado*, 700 F.3d at 1254.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 1254–58.

42. *Id.* at 1255.

43. *Id.*

44. North Sea Continental Shelf Cases (Fed. Republic of Ger. v. Den.; Fed. Republic of Ger. v. Neth.), 1969 I.C.J. 3, 43 (Feb. 20 1969).

45. *See* United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95.

46. *Bellaizac-Hurtado*, 700 F.3d at 1255.

47. *Id.* at 1258.

tice Barkett concurs with the majority's decision mainly on the grounds of jurisdiction, which includes universal jurisdiction.[48] Universal jurisdiction is given to any nation for certain crimes that are so threatening to the international community or so heinous in scope and degree that they offend the interest of all humanity.[49] Universal jurisdiction occurs only when the crime takes place in non-territorial areas.[50] The main difference between universal jurisdiction and the case here is that with universal jurisdiction, the legislation is non-existent, such as on the high seas, while, in territorial waters, the government of the controlling state has the jurisdiction to create laws and crimes.[51]

Justice Barkett stated that Congress cannot make anything fall under universal jurisdiction, and universal condemnation does not give universal jurisdiction.[52] Justice Barkett's example is that although murder is universally condemned, its universal condemnation does not grant universal jurisdiction.[53] He then concluded by stating that no source of customary international law has defined drug trafficking as subject to universal jurisdiction.[54]

IV. Conclusion

The Eleventh Circuit established that nations must take sufficient action under international treaties in order for offenses to rise to the level of customary international law. It established in this case that any treaty must be accompanied by action that indicates some feeling of legal obligation, rather than the treaty itself creating a full legal obligation.

Andrew Ciccaroni

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48. *Id*.
49. *Id.*; *see also* Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363, 368–69 (2001).
50. *Bellaizac-Hurtado*, 700 F.3d at 1258; *see also* Scharf *supra* note 49 at 368–69.
51. *Bellaizac-Hurtado*, 700 F.3d at 1260.
52. *Id.* at 1259–60.
53. *Id.* at 1260.
54. *Id.* at 1260–61.

Lozano v. Alvarez

697 F.3d 41 (2d Cir. 2012)

The United States Court of Appeals for the Second Circuit held that the one-year period associated with the "now settled" defense under the Hague Convention on Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act is not subject to equitable tolling, and that a child's lack of legal immigration status does not bar application of the "now settled" defense.

I. Holding

In *Lozano v. Alvarez*,[1] the Second Circuit denied a father's petition for the return of his child pursuant to the Hague Convention on Civil Aspects of International Child Abduction (Child-Abduction Convention)[2] and the International Child Abduction Remedies Act (ICARA).[3] The court held that the one-year period associated with the "now settled" defense, as implemented through ICARA, was not subject to equitable tolling.[4] Furthermore, the court held that a child's lack of legal immigration status does not bar finding that the child is settled in the country to which the child had been abducted.[5] The court held that the "now settled" defense applied and the child could remain in the United States.[6]

II. Facts and Procedure

In 2004, defendant-appellee, Diana Lucia Montoya Alvarez (Alvarez), and plaintiff-appellant, Manuel Jose Lozano (Lozano), both originally from Colombia, met and began a relationship in the United Kingdom.[7] On October 21, 2005, Alvarez gave birth to the couple's child.[8] Although the couple never married, Alvarez, Lozano, and the child lived together in the United Kingdom.[9] In October 2008, Alvarez consulted with the child's doctor regarding the child's unusual behavior, including silence, frequent crying, nightmares, and bed-wetting.[10] The nursery manager also concluded that the child's environment at home had a negative effect on the child.[11]

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1. 697 F.3d 41 (2d Cir. 2012).
2. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, art. 12, T.I.A.S. No. 11670, 1343 U.N.T.S. 89.
3. 42 U.S.C. § 11601; *Lozano*, 697 F.3d at 41.
4. *Lozano*, 697 F.3d at 41.
5. *Id.*
6. *Id.*
7. *Id* at 45.
8. *Id.* at 46.
9. *Id.* at 45–46.
10. *Id.* at 46.
11. *Id.*

On November 19, 2008, Alvarez and the child left the couple's apartment; they spent the next seven months residing in a women's shelter.[12] In July 2009, Alvarez and the child left the United Kingdom to live with Alvarez's sister in New York.[13] With their British passports, Alvarez and the child were allowed to enter the United States without a visa for 90 days or less.[14] In October 2009, the 90-day period expired.[15]

After arriving in New York, Alvarez and the child began therapy sessions with a psychiatric social worker.[16] The therapist testified that during her first meeting with the child, the child did not speak, make eye contact, or play in the therapist's office.[17] By February 2010, the therapist diagnosed the child with post-traumatic stress disorder, attributed to the child's experiences while living in the United Kingdom.[18] However, within six months, both Alvarez and the therapist noted improvement in the child's behavior.[19] In particular, the child had stopped bedwetting, was excited to play, and was able to speak freely regarding her feelings.[20]

On November 10, 2010, Lozano filed a petition for the child's return in the United States in the District Court for the Southern District of New York, requesting that the child be returned to the United Kingdom for a custody determination.[21] Under Article 12 of the Child-Abduction Convention, a child wrongfully removed from a country less than one year prior to the filing of a petition must be returned for a custody determination. If the petition is filed after one year or more, the child must be returned "unless it is demonstrated that the child is now settled in his or her new environment."[22] However, under the "now settled" defense, repatriation may be refused if a parent demonstrates that the child is "now settled" in her new environment.[23]

The district court held that Lozano had made a prima facie case of wrongful retention under the Child-Abduction Convention based on the following: (1) the child was a habitual resident of the United Kingdom; (2) Alvarez breached Lozano's custodial rights when she unlawfully removed the child; and (3) Lozano exercised parental rights at the time Alvarez removed the child.[24] Alvarez raised the affirmative defense that the child was "now settled" in her new environment.[25] The district court rejected Lozano's argument that the one-year period

12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Lozano*, 697 F.3d at 46.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 47.
22. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, art. 12, T.I.A.S. No. 11670, 1343 U.N.T.S. 89.
23. *Id.*
24. *Lozano*, 697 F.3d at 47–48.
25. *Id.* at 48.

triggering the "now settled" defense should be tolled until Lozano could have discovered his daughter's location.[26] The court concluded that the one-year period in Article 12 is not a statute of limitations, and is not subject to equitable tolling.[27] Rather, a court may consider the countervailing consideration that the child's interests may be better served remaining where he or she is currently located.[28]

Having rejected Lozano's tolling argument, the district court held that the "now settled" defense applied.[29] This was a sufficient reason to have a U.S. court, as opposed to an English court, decide the issue of custody of the child.[30] Furthermore, the district court found that the child's lack of legal immigration status did not prohibit a finding that she was settled in the United States.[31] On April 29, 2011, the district court issued an order dismissing Lozano's petition and entering judgment for Alvarez.[32] On May 27, 2011, Lozano filed a timely notice of appeal from the district court's denial of his petition.[33]

III. Discussion

A. Standard of Review

The Second Circuit reiterated that, in cases arising under the Child-Abduction Convention and ICARA, a district court's factual determinations are reviewed for clear error.[34] Interpretation of the Child-Abduction Convention, on the other hand, is an issue of law which the court reviews de novo.[35] The district court's application of the Child-Abduction Convention to the facts it has found is also reviewed de novo.[36]

B. "Now Settled" Defense Not Subject to Equitable Tolling

The Second Circuit agreed with the district court and held that courts cannot equitably toll the one-year period set out in Article 12 of the Child-Abduction Convention.[37] An abducting parent's conduct may be taken into account when deciding whether a child is "now settled" in his or her new environment, yet a court may not equitably toll this one-year period before a parent can assert the "now settled" defense.[38] In reaching this conclusion, the court noted that neither Article 12 of the Child-Abduction Convention nor its implementing legislation,

26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 47.
33. *Id.* at 49.
34. *Id.*
35. *Id.*
36. *Lozano*, 697 F.3d at 50.
37. *Id.* at 51.
38. *Id.*

ICARA, explicitly permit or prohibit tolling of the one-year period.[39] However, in the interpretation of a treaty, a court will look beyond the written words of the treaty and examine its history, the treaty negotiations, and the practical construction adopted by the signatory parties.[40]

Article 12 provides in part, "The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year . . . shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."[41] Accordingly, if one year or more has passed since the date of wrongful removal or retention, demonstrating that the child is "now settled" in its new environment may be a sufficient ground for refusing to order repatriation.[42] This allows the court to consider the interests of a child who has been living in a new environment for more than a year, before ordering his or her return.[43]

The Child-Abduction Convention's drafting history also supports the position that the one-year period was designed for courts to consider a child's interests in remaining in the new country.[44] In reaching this conclusion, the Second Circuit referenced a report prepared by Elisa Pérez-Vera, the official Hague Conference reporter for the Child-Abduction Convention.[45] The Pérez-Vera report states that the concern for the "true interests" of children was the primary reason that the signatory states drew up the Child-Abduction Convention.[46] Accordingly, these states were aware of situations where the removal of the child may be justified due to the child's close connection with a certain environment.[47] A child may develop an interest in remaining in a country in which she has lived for a substantial amount of time, regardless of her parents' efforts to conceal or locate her.[48] Therefore, equitable tolling of the one-year period until Lozano could have reasonably located his child would have undermined the Child-Abduction Convention's purpose of protecting a child's true interests.[49]

The Second Circuit acknowledged that three circuits—the Fifth Circuit, the Ninth Circuit, and the Eleventh Circuit—have permitted equitable tolling in cases where the child's whereabouts were concealed.[50] The court rejected the circuit courts' conclusion that equitable tolling was required to prevent the abducting parent from being rewarded for his or her efforts

39. *Id.*

40. *Id.* at 50 (citing Swarna v. Al-Awadi, 622 F.3d 123, 132 (2d Cir. 2010)).

41. *Id.* at 51.

42. *Id.* at 51–52.

43. *Id.* at 52.

44. *Id.* at 52–54.

45. *Id.*

46. *Id.* at 53.

47. *Id.*

48. *Lozano*, 697 F.3d at 54.

49. *Id.* at 52–53.

50. *Id.* at 55. *See* Dietz v. Dietz, 349 F. App'x 930 (5th Cir. 2009); *see also* Duarte v. Bardales, 526 F.3d 563 (9th Cir. 2008); Furnes v. Reeves, 362 F.3d 702 (11th Cir. 2004).

to conceal the child's location.[51] The court concluded that equitable tolling is unnecessary because the Central Authority has discretion in ordering the return of a child, even when a defense has been satisfied.[52] Furthermore, the court rejected the other circuits' characterization of the one-year period in Article 12 as a statute of limitation.[53] Rather, this time period permits the courts to consider the interests of a child who has been in a new environment for more than a year.[54]

C. Child's Lack of Legal Immigration Status Does Not Bar "Now Settled" Defense

After determining that Alvarez properly raised the "now settled" defense, the Second Circuit considered whether the district court erred in finding the child to be settled in New York.[55] Given the Convention's text and purpose, the Second Circuit held that immigration status should be only one of many factors taken into account when deciding whether a child is "now settled."[56] Additionally, the court found that, in any given case, the weight ascribed to a child's immigration status will necessarily vary.[57] Considerations include the child's age, the likelihood that the child will be able to acquire legal status, and the extent to which the child will be harmed by her inability to receive certain government benefits.[58]

In making a "now settled" determination, the Second Circuit noted that a court may consider any factor relevant to a child's connection to his or her living arrangement.[59] Although neither the Convention nor ICARA defines "settled" or states how a child's settlement is to be proven,[60] statutory terms are to be interpreted in light of their placement and purpose in the statutory scheme.[61] Accordingly, the court held that "settled" should be viewed to mean that the child has significant emotional and physical connections demonstrating security, stability, and permanence in her new environment.[62] The following factors are relevant in making the determination: (1) the child's age; (2) the stability of the child's new residence; (3) whether the child regularly attends a school or day care; (4) whether the child regularly attends church or participates in community or extracurricular activities; (5) the respondent's employment status and financial stability; (6) whether the child has friends and relatives in the new area; and

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51. *Lozano*, 697 F.3d at 55. In a 2006 questionnaire on the Child-Abduction Convention, the Executive Department expressed its support for "the concept of equitable tolling of the one-year filing deadline in order to prevent creating an incentive for a taking parent to conceal the whereabouts of a child from the other parent in order to prevent the timely filing of a Hague petition."
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 56.
56. *Id.*
57. *Id.*
58. *Id.* at 57.
59. *Id.* at 56.
60. *Id.*
61. *Id.* (citing Holloway v. United States, 526 U.S. 1, 6 (1999)).
62. *Id.*

(7) the immigration status of the child and respondent.[63] Balancing these various factors is in line with the Child-Abduction Convention's focus on a child's practical well-being.[64]

The district court examined a number of these factors relevant to a "now settled" determination, as well as the child's immigration status.[65] Although the child and Alvarez had overstayed their visas, there was nothing to suggest that the immigration status of the child and Alvarez would upset the future stability of the child's life in New York.[66] Furthermore, given the child's psychiatric history, the district court's focus on stability in the near future seemed particularly appropriate.[67] Even on de novo review, the Second Circuit was not inclined to upset the district court's balancing of multiple fact-based considerations.[68] The court deemed the child to be settled within the meaning of Article 12.[69]

IV. Conclusion

In light of finding that the one-year period under Article 12 could not be equitably tolled, the Second Circuit held that Alvarez properly raised the "now settled" defense.[70] Furthermore, the child's lack of legal immigration status did not bar a finding that the child was settled in the United States.[71] The appellate court concluded that the district court had fully considered with all of the presented information, and was left with no definite and firm conviction that a mistake had been committed.[72] The child was "now settled" under the meaning of the Child-Abduction Convention and, despite her lack of legal immigration status, could remain in the United States.[73]

Alison Angelo

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63. *Lozano*, 697 F.3d at 57.
64. *Id.* at 57–58.
65. *Id.* at 58.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 56.
71. *Id.*
72. *Id.* at 58.
73. *Id.* at 58–59.