Articles

CORE PRINCIPLES FOR EFFECTIVE BANKING SUPERVISION: AN ENFORCEABLE INTERNATIONAL FINANCIAL STANDARD?

Duncan E. Alford

[pages 237–296]

Abstract: The Basel Committee on Banking Supervision serves as an international forum to discuss international bank supervision issues. Because of the gravity and frequency of banking crises since the demise of the Bretton Woods System in the early 1970s, international financial standards have emerged as a method to minimize these crises. In 1998, the Basel Committee issued a comprehensive standard on bank supervision that built upon its work over the previous two and a half decades. In this Article, the author analyzes this comprehensive standard—the Core Principles for Effective Banking Supervision—and assesses its implementation in the European Union, the United Kingdom, France, the United States, and the Hong Kong SAR. The author then analyzes the options available to enforce this “soft law” and comments on the effectiveness of these options, including the surveillance programs of the World Bank and the International Monetary Fund and certain provisions of the Revised Capital Accord of 2004. Despite the improvements represented by the Core Principles, the author suggests future changes in the international bank supervisory regime.

RIGHTS-BASED APPROACHES TO EXAMINING WAIVER CLAUSES IN PEACE TREATIES: LESSONS FROM THE JAPANESE FORCED LABOR LITIGATION IN CALIFORNIAN COURTS

Dinusha Panditaratne

[pages 299–351]

Abstract: Waiver clauses, which purport to bar claims for reparations, appear in numerous historical and contemporary peace agreements, including in the 1951 Treaty of Peace with Japan. This Article questions the validity of many such waivers under the Constitution and applicable international law. However, as demonstrated in a series of federal court decisions from 2000 to 2003 which rejected the reparations claims of former forced laborers in wartime Japan, judges are induced by political considerations to uphold the validity of waiver clauses. How can courts reconcile their duty to protect the fundamental rights of claimants with the realpolitik considerations at play? One answer lies in adopting established interpretive
approaches to limit the scope of a waiver clause. The waiver clause in the 1951 Treaty, like many of its counterparts in other treaties, contains several ambiguities. This Article outlines three rights-based interpretive approaches and demonstrates how these could have been invoked to construe one particularly ambiguous aspect of the waiver in the 1951 Treaty, in a manner which would have reconciled competing policy imperatives.

Notes

REGIONALIZING LABOR POLICY THROUGH NAFTA: BEYOND PRESIDENT BUSH’S TEMPORARY WORKER PROPOSAL

Elizabeth L. Gunn

[pages 353–377]

Abstract: The North American Free Trade Agreement (NAFTA) sought to create an expanded and secure market for the goods and services produced in its member territories. It represented huge improvements in the freedom of goods, services, and investments to move between member nations, but remained silent on the issue of freedom of movement of labor. The major objection to unrestricted movement of labor within NAFTA was the concern of permanent immigration from Mexico into, mainly, the United States. In early 2004, President George W. Bush introduced a proposal to allow, unilaterally, freer movement of temporary laborers into the United States. This Note argues that the President’s proposal is flawed because it fails to seek a multilateral agreement for the freedom of movement beyond that which flows into the United States, and especially ignores U.S. citizens seeking employment abroad. Rather than the United States acting unilaterally, this Note argues for a reconsideration of movement of labor within NAFTA.

THE FOREIGN CORRUPT PRACTICES ACT: IT’S TIME TO CUT BACK THE GREASE AND ADD SOME GUIDANCE

Rebecca Koch

[pages 379–403]

Abstract: Congress enacted the Foreign Corrupt Practices Act to combat an epidemic of illicit payments by U.S. businesses and individuals to foreign officials. The FCPA prohibits any bribe to a foreign official to influence any official act, induce unlawful action, or obtain or retain business. The FCPA, however, carves out an exception for facilitating grease payments made to foreign officials to expedite or secure performance of routine government actions. This exception allows for modest payments to low-ranking officials to expedite non-discretionary clerical activities. The FCPA fails to provide a monetary threshold for what constitutes a permissible grease payment. This Note explains that the carve-out for grease payments impedes the Congressional goal of stamping out corruption. To alleviate the problems associated with grease payments, this Note advocates for Congressional repeal, or amendment of, the statute; DOJ promulgation of guidelines defining permissible grease payments; corporate activism; and institutional reform.
UNFAIR CONSEQUENCES: HOW THE REFORMS TO THE RULE AGAINST HEARSAY IN THE CRIMINAL JUSTICE ACT 2003 VIOLATE A DEFENDANT’S RIGHT TO A FAIR TRIAL UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Conor Mulcahy

Abstract: For years, judges and legislatures in common-law jurisdictions have struggled to develop effective and equitable rules regarding the admissibility of hearsay statements. Particularly in criminal cases, in which a defendant’s very liberty is often at stake, governments have endeavored to strike the balance between the prosecution’s need for probative evidence against the accused and the defendant’s right to cross-examine those who have made statements against him. Parliament attempted to achieve such parity when it passed the Criminal Justice Act 2003, a watershed piece of legislation that significantly liberalized the admissibility of hearsay statements in English and Welsh criminal trials. Because the Act allows the jury to convict the defendant based on uncorroborated hearsay evidence alone, however, it contravenes the defendant’s right to a fair trial under the European Convention on Human Rights.

DEFINING AWAY RELIGIOUS FREEDOM IN EUROPE: HOW FOUR DEMOCRACIES GET AWAY WITH DISCRIMINATING AGAINST MINORITY RELIGIONS

Nathaniel Stinnett

Abstract: Despite multiple international and regional prohibitions against religious discrimination, many European Democracies continue to discriminate against minority religions. In particular, this discrimination often occurs due to definitional ambiguity surrounding the term “religion.” Using the examples of Russian, Belgian, French, and German law, this Note reveals how many countries violate the international treaties to which they are signatories by defining many religious groups as “sects,” “cults,” or groups otherwise unworthy of official “religion” status. After discussing the necessary components of a successful definition of “religion,” this Note argues that the most effective way to protect freedom of religion is to abandon the term “religion” altogether and adopt a polythetic approach that protects a list of various religious practices, not religion, from discriminatory treatment.
CORE PRINCIPLES FOR EFFECTIVE BANKING SUPERVISION: AN ENFORCEABLE INTERNATIONAL FINANCIAL STANDARD?

DUNCAN E. ALFORD*

Abstract: The Basel Committee on Banking Supervision serves as an international forum to discuss international bank supervision issues. Because of the gravity and frequency of banking crises since the demise of the Bretton Woods System in the early 1970s, international financial standards have emerged as a method to minimize these crises. In 1998, the Basel Committee issued a comprehensive standard on bank supervision that built upon its work over the previous two and a half decades. In this Article, the author analyzes this comprehensive standard—the Core Principles for Effective Banking Supervision—and assesses its implementation in the European Union, the United Kingdom, France, the United States, and the Hong Kong SAR. The author then analyzes the options available to enforce this "soft law" and comments on the effectiveness of these options, including the surveillance programs of the World Bank and the International Monetary Fund and certain provisions of the Revised Capital Accord of 2004. Despite the improvements represented by the Core Principles, the author suggests future changes in the international bank supervisory regime.

Introduction

Banking is typically one of the most regulated industries within a nation’s economy because it serves as the economy’s payment mechanism, gathering financial assets and redeploying them for productive purposes through loans and other types of credit. Because banking and its payment function are so crucial to an economy’s operation, national governments tend to regulate this industry heavily and occasion-

* Head of Reference, Georgetown University Law Library, Washington, D.C. The author wishes to thank the Van Calker Foundation and the Swiss Institute of Comparative Law for their generous support of the research for this article, which was principally conducted at the Swiss Institute in Lausanne, Switzerland during the summer of 2004.

ally even own banks. As international trade has grown, each nation’s banking system has likewise become more international. World merchandise trade increased from US$ 579 billion in 1973 to US$ 6,272 billion in 2002. International bank loans increased from US$ 2,713.7 billion in 1985 to US$ 20,212.9 billion in 2003—a 744% increase.

Despite this growth in international banking, national governments have been very hesitant to enter into international agreements that involve ceding regulatory control of banks incorporated or operating within their jurisdictions. National governments tend to view any transfer of regulatory control over their banking systems as akin to a surrender of sovereign power.

National governments generally wish to retain control over banking systems because of the high costs and negative political repercussions of bank failures. National governments, and related agencies such as a central banks, typically have lender of last resort responsibility for banks operating within their borders. If a bank has insufficient liquid funds to meet payment demands from depositors, the national government, through its central bank, may lend funds to the bank to meet these demands. Furthermore, if a bank becomes insolvent, the national government can provide funds to the depositors of the failed bank through a deposit insurance program, allowing depositors to recoup losses caused by the insolvency (or a significant portion thereof).

Several articles have documented the costs of resolving banking crises as a percentage of the national Gross Domestic Product. For example, the cost of an early 1990s banking crisis in Finland amounted to 11% of

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5 See Dale, supra note 2, at 187.

6 Dobson & Hufbauer, supra note 2, at 101–02.

7 Id.

8 Id.

9 Id. at 102, 106.

its GDP. Likewise, a financial crisis in Mexico from 1994 to 1995 cost 20% of that country’s GDP, and a crisis in Thailand in the late 1990s cost 42% of its GDP. If a systemic financial crisis results from such bank failures, the associated economic costs can increase exponentially. Furthermore, a major disruption in the financial system generally leads to a change in government.

Since the early 1970s national governments have agreed to international financial standards that set guidelines for best practice in regulating banks and, in particular, internationally active banks. These standards, however, are not legally enforceable. They are merely soft law, voluntary guidelines on regulatory and supervisory practices over the banking industry. The most prominent institution issuing these standards for the banking industry has been the Basel Committee on Banking Supervision (“Basel Committee” or “Committee”).

This Article analyzes one of these international financial standards—the Core Principles for Effective Banking Supervision (“Core Principles”) and in particular the mechanisms available to enforce this soft law. The first Section describes the Basel Committee’s history and structure. It analyzes the Basel Committee’s earlier pronouncements on bank supervisory practices, particularly those regarding the coordination of international bank supervision. The second Section analyzes the implementation of the Core Principles in the national laws of five important financial markets: the European Union, the United Kingdom, France, Hong Kong, and the United States. The third Section discusses the options for enforcement of the Core Principles, including key provisions of the recently issued Revised Capital Accord (or Basel II) that effectively buttress the Core Principles. The

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12 Id.
final Section forecasts future development in the Core Principles. The formulation of such developments is an “iterative process.”

I. DEVELOPMENT OF CORE PRINCIPLES

After World War II, the Allied nations created several international institutions to manage the international financial system (“Bretton Woods”). One of the key attributes of the Bretton Woods system was fixed foreign exchange rates. This managed system allowed for financial stability, but also created economic inefficiencies. In the early 1970s, as the result of several factors, this system of managed foreign currency rates disintegrated. Floating currency rates, at least for the industrialized nations, replaced fixed exchange rates and allowed for greater efficiencies and greater growth in both international trade and international finance. Nevertheless, this new, less stable, and more volatile international financial system was plagued by many more bank crises than were experienced under the Bretton Woods system.

As in other nations, U.S. regulation of foreign banks traditionally focused on the operations of foreign banks within U.S. borders. Yet, as financial markets globalized, events in other nations had the potential to cause dramatic, and sometimes devastating, effects on local economies. With the globalization of the banking industry, the systemic risk of a financial crisis has increased, but banking regulation among nations has not developed congruently to meet this greater risk. The Basel Committee, by issuing a series of guidelines for bank supervision, attempts to rectify this situation.

18 The New Palgrave Dictionary of Money and Finance, supra note 17, at 235.
20 Walker, supra note 13, at 23.
21 See Hoggarth et al., supra note 11, at 9.
23 See Dale, supra note 2, at 167–68.
24 See Walker, supra note 13, at 135–36.
efforts to harmonize bank regulation have, thus far, culminated with the issuance of the Core Principles in September 1997.

A. Brief History of the Basel Committee

The 1974 collapse of the Herstatt Bank in Germany and the 1975 failure of Franklin National Bank in the United States led to the creation of the Basel Committee and the issuance of the Concordat, the Committee’s first agreement on bank supervision. The Herstatt Bank failed due to its fraudulent bookkeeping practices, and other German banks were unable to rescue it. Although legal claims against the Herstatt Bank were eventually settled, and although mainly domestic assets were involved, the resolution of the bank’s failure—particularly the incomplete satisfaction of foreign creditors’ claims—set a negative precedent for the settlement of international financial crises and demonstrated the need for greater regulatory cooperation with respect to international banks.

The Franklin National Bank (“Franklin”) failure demonstrated how the abandonment of the Bretton Woods system left banks more exposed to currency rate risk. Franklin, at the time the twentieth largest bank in the United States, closed in 1974. Although weak management and a large amount of non-performing loans contributed to the bank’s failure, Franklin’s collapse occurred largely because

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27 Hess, supra note 26, at 186. West German banks received 45%, foreign banks received 55%, and other creditors received 65% of their respective claims. Id.

28 Id.

29 Walker, supra note 13, at 25.

30 Id. at 26–27.
of foreign exchange trading losses that prompted institutional depositors to withdraw their funds.\textsuperscript{31}

The Basel Committee was organized in 1975 in direct response to the Herstatt Bank and Franklin failures.\textsuperscript{32} The Committee’s members consist of banking regulators from Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, the United Kingdom, and the United States.\textsuperscript{33} The Basel Committee secretariat is located at the offices of the Bank for International Settlements in Basel, Switzerland.\textsuperscript{34} Although some observers have criticized the Committee for its lack of members from emerging markets,\textsuperscript{35} its pronouncements have regularly included consultations with regulators from emerging markets and transition economies.\textsuperscript{36}

The purpose of the Basel Committee is to provide “regular cooperation between its member countries on banking supervisory matters.”\textsuperscript{37} The Committee seeks to harmonize the banking laws of various nations indirectly through the issuance of guidelines developed by consensus among its members.\textsuperscript{38} The discussions held by the Basel Committee are confidential, and the Committee does not publish

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\item \textsuperscript{31} \textit{Id.} at 27–28.
\item \textsuperscript{32} \textsc{Richard Dale, The Regulation Of International Banking} 172 (1984); Ethan B. Kapstein, \textit{Resolving the Regulator’s Dilemma: International Coordination of Banking Regulations}, 43 \textsc{Int’l. Org.} 323, 328–29 (1989). For a detailed discussion on the Basel Committee, see \textsc{Walker, supra note 13, at 17–162} (2001).
\item \textsuperscript{33} \textsc{Bank for Int’l. Settlements, supra note 13. See generally Marilyn B. Cane & David A. Barclay, \textit{Competitive Inequality: American Banking in the International Arena}, 13 \textsc{B.C. Int’l. & Comp. L. Rev.} 273, 319 n.321} (1990) (providing background on the Bank for International Settlements and the Committee).
\item \textsuperscript{34} \textsc{Bank for Int’l. Settlements, 74th Annual Report} 157 (2004). Two deputy directors are permanent staff at the Bank for International Settlements. The remaining professional staff of the Basel Committee are on loan from member nations. \textit{See The Basel Committee on Banking Supervision, at http://www.bis.org/bcbs/aboutbcbs.htm} (last visited Apr. 12, 2005).
\item \textsuperscript{35} \textit{See, e.g., Howard Davies, Is the Global Regulatory System Fit for Purpose in the 21st Century?} 5–7, \textit{available at http://www.bis.org/review/r030606g.pdf} (May 20, 2003).
\item \textsuperscript{36} \textsc{Core Principles, supra note 15, at 1–2. The Basel Committee was very influential in the creation of regional bank supervisory groups such as the Offshore Group of Banking Supervisors. These groups serve as forums for the Basel Committee to communicate efficiently with its peers in emerging markets. See, e.g., Fin. Action Task Force on Money Laundering, \textit{Offshore Group of Banking Supervisors, at http://www1.oecd.org/fatf/Cityorgpages/org-ogbs_en.htm} (last visited Apr. 12, 2005).
\item \textsuperscript{37} Peter Cooke, \textit{The Basle “Concordat” on Supervision of Banks’ Foreign Establishments}, 39 \textsc{Aussenwirtschaft} 151, 151 (1984).
\item \textsuperscript{38} \textit{See id.}
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minutes.\textsuperscript{39} The Committee does, however, publish its findings, and recent standards have involved much more consultation with non-member regulatory authorities, as well as the financial services industry and the general public.\textsuperscript{40} While the Committee has no legal enforcement power itself, it encourages member nations to abide by these regulatory guidelines and to use whatever authority they possess to enact and enforce them.\textsuperscript{41} Typically, the Basel Committee standards are endorsed at the biennial meeting of the International Conference of Banking Supervisors.\textsuperscript{42} The Committee has issued several guidelines on international banking supervision: the Concordat of 1975 (“Concordat”);\textsuperscript{43} the Revised Concordat;\textsuperscript{44} the Capital Adequacy Standards (“Basel I”),\textsuperscript{45} the Minimum Standards for the Supervision of International Banking Groups and Their Cross-Border Establishments (“Minimum Standards”),\textsuperscript{46} the Core Principles,\textsuperscript{47} and, most

\textsuperscript{39} Bank for Int’l Settlements, \textit{supra} note 13. The Basel Committee used to keep minutes of its meetings. Currently, the Committee keeps a detailed action plan as the only written record of its meetings. These documents are for internal use only and are not available to the public. See Carl Felsenfeld & Genci Bilali, \textit{The Role of the Bank for International Settlements in Shaping the World Financial System}, 25 U. Pa. J. Int’l Econ. L. 945, 964 (2004).


\textsuperscript{41} See \textit{Core Principles}, \textit{supra} note 15, at 2.


\textsuperscript{43} \textit{Concordat}, \textit{supra} note 25.

\textsuperscript{44} \textit{Comm. on Banking Regulation and Supervisory Practices, Revised Basle Concordat on Principles for the Supervision of Banks’ Foreign Establishments}, 22 I.L.M. 900, 901 (1983) [hereinafter Revised Concordat].


\textsuperscript{46} \textit{Basle Comm. on Banking Supervision, Minimum Standards for the Supervision of International Banking Groups and Their Cross-Border Establishments} (1992), \textit{available at} http://www.bis.org/publ/bcbsc314.pdf [hereinafter Minimum Standards].

\textsuperscript{47} \textit{Core Principles}, \textit{supra} note 15.
recently, the International Convergence of Capital Measurement and Capital Standards: A Revised Framework ("Revised Capital Accord" or "Basel II"). Appendix A contains a brief timeline of the Basel Committee’s principal standards. The Core Principles and their enforceability are the main focus of this Article.

B. The Concordat of 1975

As a result of the Herstatt Bank failure and the subsequent confusion over the settlement of the bank’s liabilities, the Committee sought to establish an agreement on the respective roles of home country supervisors to ensure supervision over all international financial institutions. The Committee attempted to fulfill this task by issuing the Concordat, which delineated the supervisory responsibilities of home and host country regulators over international banks. By entitling the document a “concordat,” the Committee indicated that the agreement was not a binding treaty, but instead a set of guidelines on bank supervision, adopted by consensus among Basel Committee members.

The objectives of the Concordat were to ensure the adequate regulation of foreign banks and the prevention of foreign banks from escaping supervision. A central tenet of the Concordat was joint responsibility between home and host countries in regulating international banks.

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50 The home or parent regulator is responsible for supervision in the country where the “parent bank” is headquartered and licensed. See Concordat, supra note 25, at 30. The host regulator is responsible for supervision in the foreign country where the “parent bank” is operating an establishment. See id.


52 See id. The word “concordat” refers to a “public act of agreement” (as opposed to a “contract” between private parties). Id.

53 Concordat, supra note 25, at 29–30; see Cane & Barclay, supra note 33, at 321.

54 Dale, supra note 32, at 12. The Concordat set forth five principles:

(1) The supervision of foreign banking establishments should be the joint responsibility of host and parent authorities.

(2) No foreign banking establishment should escape supervision, each country should ensure that foreign banking establishments are supervised, and supervision should be adequate as judged by both host and parent authorities.
The Concordat dealt primarily with the liquidity, solvency, and foreign exchange operations of foreign banks. The host supervisory authority was responsible for regulating liquidity, regardless of the type of banking entity established in the host nation. The Concordat allocated responsibility for solvency between host and home regulators depending on the type of foreign banking establishment involved; subsidiaries and joint ventures were the responsibility of the host regulator, while branches were the responsibility of the home regulator.

The Concordat had several weaknesses. First, despite its attempts to allocate supervisory responsibility, it still left unclear which regulator should act to contain a major bank failure. Also, designation of the host supervisor as the primary solvency regulator of foreign bank subsidiaries ran contrary to the system of consolidated supervision used in most industrialized nations. The allocations of responsibility in the Concordat presented a risk that host regulators, following consolidated

(3) The supervision of liquidity should be the primary responsibility of host authorities since foreign establishments generally have to conform to local practices for their liquidity management and must comply with local regulations.

(4) The supervision of solvency of foreign branches should be essentially a matter for the parent authority. In the case of subsidiaries, while primary responsibility lies with the host authority, parent authorities should take account of the exposure of their domestic banks’ moral commitment in this regard.

(5) Practical cooperation would be facilitated by transfers of information between host and parent authorities and by the granting of permission for inspections by or on behalf of parent authorities on the territory of the host authority. Every effort should be made to remove any legal restraints (particularly in the field of professional secrecy or national sovereignty) which might hinder these forms of cooperation.


55 See Concordat, supra note 25, at 29.
56 See id. at 30. Liquidity is a measure of a bank’s ability to convert assets to cash or cash-equivalents without diminution of the assets’ value. Jerry M. Rosenberg, Dictionary of Banking & Financial services 415 (1985).

57 Concordat, supra note 25, at 30–31. Solvency is a measure of a bank’s ability to generate cash flow sufficient to satisfy its liabilities as they mature and to provide an adequate return to its shareholders. Black’s Law Dictionary 1428 (8th ed. 2004).


59 Dale, supra note 32, at 173. Under consolidated supervision, responsibility for regulating a bank’s foreign subsidiaries is shared between host and parent regulators, with the parent supervisor considering all of the assets and liabilities of the bank, wherever located, in order to determine the bank’s overall solvency. See id. at 176.
supervision, would look to parent supervisors to regulate a bank subsidiary’s solvency, while parent regulators, relying upon language in the Concordat, would look to the host supervisor to perform this task.\textsuperscript{60}

Finally, the Concordat lacked specific supervisory standards for Committee members to employ,\textsuperscript{61} allowing individual nations to interpret the Concordat in inconsistent manners.\textsuperscript{62} The most important and potentially dangerous interpretation involved the mistaken belief that lender of last resort responsibility accompanied supervisory responsibility.\textsuperscript{63} The Committee never intended the Concordat to deal with lender of last resort responsibility.\textsuperscript{64}

The 1982 financial collapse of the Luxembourg subsidiary of Banco Ambrosiano, the largest Italian bank at the time, highlighted the weaknesses of the Concordat. The Luxembourg subsidiary had made US$ 1.4 billion worth of imprudent loans to Latin American companies.\textsuperscript{65} Concurrently, the subsidiary owed nearly US$ 450 million to other creditors.\textsuperscript{66} Unable to pay its creditors, Banco Ambrosiano and its Luxembourg subsidiary collapsed.\textsuperscript{67}

\textsuperscript{60} \textit{Id.} at 173. The “primary motivation” for drafting the Revised Concordat, adopted in 1983, was to “incorporate understandings on applying the principle of consolidated supervision to banks’ international business.” \textsuperscript{61} \textit{Dale, supra} note 32, at 173. \textsuperscript{62} In 1979, the Federal Reserve Board (“FRB”) proposed that U.S. offices of foreign banks report on the structure and condition of their parent banks to the FRB, but regulators in other nations thought this requirement would violate provisions of the Concordat. \textit{Id.} The Federal Reserve eventually received power to enforce such a reporting requirement under the Foreign Bank Supervision Enhancement Act. \textit{Id.} On another occasion, the FRB was faced with a three-way international disagreement as to the Concordat’s meaning. \textit{Id.} Swiss regulators believed that host regulators had primary responsibility for regulating branches and subsidiaries of foreign banks. \textit{Id.} In contrast, regulators in Great Britain believed that host regulators were responsible for supervising only foreign bank subsidiaries. \textit{Id.} Bank regulators in the Netherlands, in yet another interpretation, believed that the parent regulator was responsible for the supervision of its subsidiaries. \textit{Id.} at 173–74. \textsuperscript{63} \textit{Id.} at 174. “Lender of last resort responsibility” refers to the obligation of a central bank or regulator to provide as much liquidity as necessary to a bank in order to meet its obligations to depositors and creditors. \textit{Id.} \textsuperscript{64} See \textit{Cooke, supra} note 37, at 153–54. The Concordat is silent on this point. See \textit{id.} \textsuperscript{65} See \textit{Hess, supra} note 26, at 188–89, 191. \textsuperscript{66} \textit{Id.} at 190. \textsuperscript{67} See \textit{Hess, supra} note 26, at 189–90; Ronnie J. Phillips & Richard D. Johnson, \textit{Regulating International Banking: Rationale, History and Prospects}, in \textit{The New Financial Architecture: International Banking Regulation in the 21st Century} 1–22 (Benton E. Gup ed., 2000).
Neither the Luxembourg nor the Italian regulators claimed supervisory or lender of last resort responsibility for the bank.\textsuperscript{68} The Italian regulators argued that they lacked the legal authority to regulate the Luxembourg subsidiary and bore little or no responsibility for its failure.\textsuperscript{69} Italian regulators pointed to the way that their previous attempts to examine Banco Ambrosiano’s South American offices were rebuffed by local regulators as proof of their inability to regulate Banco Ambrosiano’s foreign subsidiaries. Italian regulators argued that they would not take responsibility for the failure of a bank they were not permitted to supervise properly.\textsuperscript{70} Luxembourg regulators, on the other hand, ignored Italian requests to tighten their supervision of the Banco Ambrosiano subsidiary, believing that a subsidiary operating under the same name as its parent bank (as was the case with the Luxembourg subsidiary of Banco Ambrosiano) should have been supported either by the parent bank or indirectly by the central bank in the parent bank’s home country.\textsuperscript{71} Thus, Luxembourg regulators believed that the Banco Ambrosiano parent bank or the Italian central bank should have supported the Luxembourg subsidiary.\textsuperscript{72}

C. The Revised Concordat of 1983

The Committee responded to the collapse of Banco Ambrosiano by issuing the Revised Concordat in 1983.\textsuperscript{73} The Revised Concordat was not an entirely new agreement, rather it built upon the original Concordat.\textsuperscript{74} Like its predecessor, it was a non-binding agreement that embodied “recommended guidelines of best practices.”\textsuperscript{75} Under


\textsuperscript{69} Dale, supra note 32, at 175; Hess, supra note 26, at 192.

\textsuperscript{70} Hess, supra note 26, at 192–93.

\textsuperscript{71} See Dale, supra note 32, at 175; Dale, supra note 54, at 57. The turmoil resulting from Banco Ambrosiano’s failure ended when two settlement agreements were signed: the first between the liquidators of Banco Ambrosiano and the creditors of the Luxembourg holding company (and its foreign subsidiaries); and the second between the creditors of Banco Ambrosiano and the creditors of the Vatican bank. Hess, supra note 26, at 194–95. In the aftermath of the Banco Ambrosiano affair, the Italian Parliament passed a law that required disclosure of the shareholder structure of banks and also passed enabling legislation for the 1983 European Union Council Directive on Supervision. Id. at 199.

\textsuperscript{72} Hess, supra note 26, at 191.

\textsuperscript{73} Revised Concordat, supra note 44, at 901; see Dale, supra note 49, at 12.

\textsuperscript{74} See Hall, supra note 68, at 166; Cooke, supra note 37, at 152–53; see also Revised Concordat, supra note 44, at 901 (using the original Concordat as a foundation).

\textsuperscript{75} Revised Concordat, supra note 44, at 901.
the Revised Concordat, nations still retained authority to license
banks with few restrictions—even banks they were unable to regulate
effectively.\textsuperscript{76} Furthermore, it provided no incentive for compliance
with its provisions other than the political pressure that bank regulators
could exercise on their recalcitrant colleagues.\textsuperscript{77} Nevertheless,
with the Revised Concordat, the Committee attempted to close the
supervisory gaps that existed under the original Concordat and di-
rectly address the adequacy of foreign bank regulation.

1. “Dual Key” Supervision

As with the original Concordat, a primary objective of the Re-
vised Concordat was to ensure that no foreign bank escaped supervi-
sion, and that each establishment was supervised adequately.\textsuperscript{78} The
Revised Concordat introduced a “dual key” approach whereby both
home and host supervisory authorities assessed the quality of the
other’s supervision of an internationally active bank.\textsuperscript{79} The host jurisdic-
tion had to be satisfied with the supervision over the parent bank
within its home jurisdiction; likewise, the parent bank’s home jurisdiction
had to be satisfied that the foreign operations of its domestic
banks were supervised adequately by the host regulators.\textsuperscript{80}

If the host regulator considered the parent regulator’s supervision insufficient, the host regulator had the right to discourage or prohibit the foreign bank from operating within its jurisdiction or to set stringent conditions for the bank’s continued operation therein.\textsuperscript{81} Likewise, the parent regulator could attempt to extend its jurisdictional reach if it did not believe that the host regulator was providing adequate supervision.\textsuperscript{82} Alternatively, it could discourage or prohibit the parent bank from operating in the host nation.\textsuperscript{83} Using this “dual

\textsuperscript{76} See Mendelsohn, \textit{supra} note 51, at 2 (criticizing the Basel Committee for repeating its failure to address lender of last resort responsibility in the Revised Concordat).

\textsuperscript{77} See \textit{id.} (noting that the Revised Concordat remained “no more than an informal agreement”).

\textsuperscript{78} \textsc{Revised Concordat}, \textit{supra} note 44, at 903; \textit{see} Dale, \textit{supra} note 2, at 169.

\textsuperscript{79} \textit{See} Dale, \textit{supra} note 49, at 12.

\textsuperscript{80} \textit{Id.; see Revised Concordat, supra} note 44, at 903–04. The “dual key” approach is highly dependent on effective communication and active cooperation among host and parent regulators. \textit{See} Dale, \textit{supra} note 49, at 12.

\textsuperscript{81} \textsc{Revised Concordat, supra} note 44, at 903–04; Dale, \textit{supra} note 32, at 175. This provision was a concession to U.S. regulatory authorities, whose previous attempts to monitor the status of foreign parent banks with U.S. offices were met with strong resistance from foreign supervisory authorities. \textit{Id.}

\textsuperscript{82} \textsc{Revised Concordat, supra} note 44, at 903; \textit{see} Hess, \textit{supra} note 26, at 200.

\textsuperscript{83} \textsc{Revised Concordat, supra} note 44, at 903; \textit{see} Hess, \textit{supra} note 26, at 200.
key” approach, the Committee intended to prevent a “race to the bottom”—the tendency for jurisdictions to relax financial regulation and supervision in order to attract more foreign investment.84

In the Banco Ambrosiano case, no regulator took responsibility for the supervision of the Luxembourg-based bank.85 If the Revised Concordat principles had been applied to the Banco Ambrosiano situation, Luxembourg would have had primary responsibility to supervise the subsidiary, but if the parent regulator (Italy) had not been satisfied with that supervision, it could have provided its own supervision.86 The “dual key” system in the Revised Concordat was designed to encourage nations to make their bank supervision practices equivalent to those present in the most stringently regulated financial centers.87 Such convergence, however, required bank regulators to prohibit weakly regulated banks from operating within their jurisdiction and to prevent their own adequately regulated banks from expanding into inadequately regulated jurisdictions.88 The first scenario would result in the loss of foreign investment, the second in forgone international business opportunities.

The Revised Concordat allocated supervisory responsibility between host and parent regulators based on both the nature of the regulatory objective (e.g., liquidity, solvency) and the type of banking establishment.89 The Revised Concordat describes three types of foreign banking establishments: branches, subsidiaries, and joint ventures or consortia.90

The responsibility for foreign bank solvency depended on the type of bank establishment. The parent supervisor was responsible for regulating branch solvency because the branch was still legally a part

84 Dale, supra note 49, at 12.
85 Dale, supra note 32, at 175.
86 See Revised Concordat, supra note 44, at 903. The Revised Concordat calls for a concerned parent regulator to extend its supervision in such a manner “to the degree that it is practicable.” Id.
87 See id.
88 See id.
89 See Hall, supra note 68, at 166–68 (providing a succinct summary of the Revised Concordat).
90 Revised Concordat, supra note 44, at 902. A branch does not have a separate legal status from the parent bank. Id. A subsidiary is a legally independent entity that is wholly-owned or majority-owned by the parent bank. Id. Joint ventures or consortia are “legally independent institutions incorporated in the country where their principal operations are conducted and controlled by two or more parent institutions, most of which are usually foreign and not all of which are necessarily banks.” Id.; see Hal S. Scott, Supervision of International Banking: Post-BCCI, 8 Ga. St. U. L. Rev. 487, 487–510 (1992).
of the parent bank.\textsuperscript{91} Parent and host supervisors had joint responsibility for subsidiaries.\textsuperscript{92} The host supervisor had some responsibility because the subsidiary was a legally independent institution; the parent supervisor had responsibility because of the principle of consolidated supervision (described below) and the effect of the subsidiary’s activities on the overall financial status of the parent bank.\textsuperscript{93} Supervision over the solvency of joint ventures was primarily the responsibility of the regulator in the joint venture’s country of incorporation.\textsuperscript{94}

Under the Revised Concordat, liquidity referred to the ability of a foreign bank to meet its obligations as they fell due; it did not refer to lender of last resort responsibilities.\textsuperscript{95} Host regulators were primarily responsible for supervising the liquidity of branches and subsidiaries.\textsuperscript{96} Parent regulators could also be concerned with liquidity, because branches may call upon the resources of the parent bank and the parent bank may issue comfort letters or other standby credit instruments to its subsidiaries.\textsuperscript{97} For joint ventures, the country of incorporation had primary responsibility over liquidity.\textsuperscript{98}

2. Consolidated Supervision

In addition to the concept of “dual key” supervision, the Revised Concordat adopted the principle of consolidated supervision. Under this principle, the parent supervisor monitored a parent bank’s risk exposure and capital adequacy based on all the operations of the bank, wherever conducted.\textsuperscript{99} The Basel Committee acknowledged that adoption of this concept might extend the traditional jurisdictional limits of a parent regulator’s supervisory responsibility.\textsuperscript{100}

In April 1990, the Basel Committee issued a paper discussing the exchange of information among bank supervisors as a supplement to

\textsuperscript{91} Revised Concordat, supra note 44, at 905

\textsuperscript{92} Id. at 906.

\textsuperscript{93} Id. This provision differs from the original 1975 Concordat, where supervision of a subsidiary’s solvency was primarily the responsibility of the host regulator. See Concordat, supra note 25, at 31–32.

\textsuperscript{94} Revised Concordat, supra note 44, at 906–07.

\textsuperscript{95} Id. at 906.

\textsuperscript{96} Id. at 907.

\textsuperscript{97} See id.

\textsuperscript{98} Id.

\textsuperscript{99} Revised Concordat, supra note 44, at 905; see Dale, supra note 32, at 176.

\textsuperscript{100} Revised Concordat, supra note 44, at 905.
the Revised Concordat. In this paper, the Committee stressed its concern over the prohibition against sharing certain information with supervisors in certain countries. The Committee then set forth its view as to the best practice for sharing prudential information. The Committee stressed that information received under agreements between prudential supervisors was to be be used for supervisory purposes only, and that the confidentiality of the information provided must be assured. If the recipient authority wished to take action based on information received, it first should consult with the sending authority. The statement sought to outline arrangements that would allow for the greatest possible flow of relevant information among bank supervisors. Only through trust and shared information would bank supervisors be able to monitor international bank operations effectively.

3. Weaknesses of the Revised Concordat

Nevertheless, the Revised Concordat, like its predecessor, also contained some weaknesses. Its explicit refusal to address the issue of lender of last resort responsibility presented one major weakness. Theoretically, if banking regulators cooperate to prevent bank failures, they should also cooperate in upholding the international banking system when a failure is imminent. The Committee did not address lender of last resort responsibility because some members of the Committee were not central banks and thus lacked any lending power with which to support failing banks. More fundamentally, the Committee avoided the issue because the central banks of the industrialized nations had stated vaguely that they would support the li-

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102 Id. at 2–3.
103 Id.
104 Id.
105 Id. at 5.
107 See id. at 3.
108 Revised Concordat, supra note 44, at 901 (stating that it does not address lender of last resort responsibility); see Mendelsohn, supra note 51, at 2.
109 David W. Wise, International Prudential Regulation of Commercial Banks, Bank Admin., June 1985, at 58, 62 (stating “[j]ust as laws should provide for their own enforcement, supervision should provide for the eventuality that such supervision can fail”).
110 Mendelsohn, supra note 51, at 2.
liquidity of the international markets in times of crisis.\textsuperscript{111} In drafting the Revised Concordat, the central bankers sought to leave this prior commitment vague in order to encourage private sector discipline and minimize moral hazard.\textsuperscript{112} The central bankers hoped to create a delicate balance between creating confidence in financial markets and discouraging reckless behavior by financial institutions.\textsuperscript{113}

The Revised Concordat purposely blurred host and parent regulatory responsibilities in order to avoid the type of finger-pointing that occurred among regulators after the Banco Ambrosiano failure.\textsuperscript{114} In doing so, however, it also created problems of overlapping authority and responsibility in cases where one regulator was designated the primary regulator, but another also had a strong interest in maintaining effective supervision over a foreign bank.\textsuperscript{115} This overlap created uncertainty for regulators with respect to their supervisory responsibilities.\textsuperscript{116} In theory, the parent regulator should have ultimate responsibility for the safety and soundness of its banks in all of their forms and establishments, foreign and domestic.\textsuperscript{117} The principle of consolidated supervision allows a parent regulator, in the course of enforcing its own regulations, to approve or disapprove of its banks’ foreign operation.\textsuperscript{118} Nevertheless, despite significant improvements over the original Concordat, the Revised Concordat still left gaps in the coordination of international bank regulations.

The difficulty of implementing consolidated supervision seemed evident from the drafters’ treatment of international bank holding companies.\textsuperscript{119} The Revised Concordat designated the host regulator (rather than the parent regulator) as the primary supervisor of subsidiary banks controlled by a bank holding company, but failed to desig-

\textsuperscript{111} See id. (noting statement of support of Euromarkets still applies).
\textsuperscript{112} Id. “Moral hazard” refers to the economic concept whereby an economic actor will pursue risky behavior that it otherwise would not have because of an external subsidy. See Hidden Actions, Moral Hazard and Contract Theory, 2 THE NEW PALGRAVE DICTIONARY OF MONEY AND FINANCE 304 (Peter Newman et al. eds., 1992).
\textsuperscript{113} See Mendelsohn, supra note 51, at 2.
\textsuperscript{114} Wise, supra note 109, at 62.
\textsuperscript{115} Revised Concordat, supra note 44, at 906 (stating that the countries in which joint ventures are incorporated (host countries) have primary responsibility for supervising the joint venture, but that the parent regulators of banks that are shareholders in the joint venture cannot ignore supervision of the joint venture).
\textsuperscript{116} Wise, supra note 109, at 62.
\textsuperscript{117} Id.
\textsuperscript{118} Revised Concordat, supra note 44, at 906.
\textsuperscript{119} See id. at 904.
nate a primary regulator of the bank holding company itself.\textsuperscript{120} This omission would prove to be a very significant gap—one that the Bank of Commerce and Credit International (“BCCI”) would later exploit.\textsuperscript{121}

As banks expanded into new and different lines of business, they tended to develop complex holding company structures. These attenuated and far-flung corporate structures, such as the one maintained by Banco Ambrosiano, often allowed banks to escape effective regulation.\textsuperscript{122} Under the Revised Concordat, a holding company with independent banks operating in different countries could avoid meaningful consolidated supervision because no one regulator had responsibility for the holding company’s overall financial strength.\textsuperscript{123} Likewise, effective supervision of a holding company with both bank and non-bank subsidiaries required the cooperation of multiple regulators that differed not only by geography, but also by function (insurance, securities, banking).\textsuperscript{124}

In the 1980s, BCCI likewise took advantage of a fragmented corporate structure in order to avoid comprehensive regulation.\textsuperscript{125} In a coordinated action on July 5, 1991, regulators in eight nations closed all the BCCI branches located within their jurisdictions.\textsuperscript{126} At the time, BCCI had total assets of approximately US$20 billion and was operating in sixty-nine countries, with the largest concentration of its deposits in the United Kingdom.\textsuperscript{127} Due to the absence of any inter-

\textsuperscript{120} See id.
\textsuperscript{121} See Dale, supra note 49, at 12 (pointing out that BCCI’s structure was such that it could avoid stringent consolidated supervision under the Revised Concordat).
\textsuperscript{122} Banco Ambrosiano consisted of a parent bank in Italy and several foreign subsidiaries, including banks located in Peru, Panama, and Luxembourg. See Hess, supra note 26, at 189–90. The Luxembourg subsidiary, Banco Ambrosiano Holding, itself had a Bahamian subsidiary, Banco Ambrosiano Overseas Ltd. See id. at 190.
\textsuperscript{123} Revised Concordat, supra note 44, at 904.
\textsuperscript{124} See id.
\textsuperscript{126} Max Hall, The BCCI Affair, Banking World, Sept. 1991, at 8. The eight nations were the Cayman Islands, France, Germany, Luxembourg, Spain, Switzerland, the United Kingdom, and the United States. Id. Indeed, on that day, action to shut down BCCI’s activities was taken in more than sixty nations. Id. See generally Duncan E. Alford, Basle Committee Minimum Standards: International Regulatory Response to the Failure of BCCI, 26 Geo. Wash. J. Int’l L. & Econ. 241 (1992) (describing the failure of the international bank BCCI and the complex, coordinated action by bank regulators to minimize depositors’ losses).
national law governing international bank closures, local regulators acted under separate national laws. The closure of BCCI branches continued for several weeks and, by July 29, 1991, forty-four jurisdictions had closed BCCI offices located within their borders.

The immediate reason for the closure of BCCI was the massive fraud committed by BCCI’s senior managers. Through the mid-1980s, the treasury operations of BCCI suffered huge losses, and senior managers siphoned off deposits to cover them. If the depositors withdrew their money, then other deposits were diverted to cover the losses. This practice resulted in an endless series of fraudulent transactions. Senior managers, board members, and representatives of major shareholders participated in the fraud by making fictitious loans, failing to record deposits, and dealing in their own shares in order to manufacture profits. BCCI also used client names to trade on its own account. BCCI managers hid the losses caused by bad trades, unpaid loans, and fraudulent practices by shuttling assets between subsidiaries.

Bull. 902, 905 (1991) [hereinafter Mattingly Statement]. BCCI was no longer accepting retail deposits in its U.S. offices because of actions taken previously by U.S. bank regulators. Id. at 907.

Cf. Claire Makin, Learning from BCCI, INSTITUTIONAL INVESTOPR, Nov. 1991, at 93, 94–95 (discussing various local investigations into BCCI and the lack of overall international accountability). In a 1989 interview, former BCCI chief executive Swaleh Naqvi acknowledged that “[b]ecause we do not have a dominant presence in any single country, the full impact of what we are doing is not visible.” Id. at 94.

Mattingly Statement, supra note 127, at 908.


Lascelles, supra note 131, at 32.

Hall, supra note 126, at 8. For example, BCCI reported loans of US$ 445 million to Ghaith Pharaon, a Saudi business executive, and US$ 796 million to the Gokal family in Pakistan; both borrowers were shareholders of First American Bankshares, which was secretly owned by BCCI. These loans were not secured with any assets, nor were they in fact made to the named individuals. See Jonathan Friedland, Rest in Pieces, FAR E. ECON. REV., Sept. 26, 1991, at 64, 66. See generally JAMES RING ADAMS & DOUGLAS FRANTZ, A FULL SERVICE BANK: HOW BCCI STOLE BILLIONS AROUND THE WORLD (1992) (chronicling the BCCI affair).

All Things to All Men, supra note 131, at 67.

The Many Facades of BCCI, ECONOMIST, July 13, 1991, at 81. In addition, Price Waterhouse discovered a secret “bank within a bank,” controlled by top BCCI officials, which hid losses and plugged holes in the balance sheets by raising deposits without re-
The BCCI affair was “a case of systematic and deliberate criminal fraud . . . [in which] BCCI took maximum advantage of an unsupervised cooperate [sic] structure to conceal and warehouse in bank secrecy jurisdictions billions of dollars in fraudulent transactions.”

BCCI was able to take advantage of technological advances that allowed it to shift funds world-wide very quickly. The BCCI scandal illustrates that, as the banking industry becomes global, the potential for global fraud or mismanagement grows concurrently.

The circumstances surrounding the closure of BCCI called into question the “adequacy of international supervisory arrangements.” The Basel Committee began discussions of the ramifications of the BCCI closure almost immediately. In light of BCCI, the Committee members generally agreed that there was a need to strengthen the provisions of the Revised Concordat. To this end, in July 1992 the Committee issued the Minimum Standards.

D. Minimum Standards

In the Minimum Standards, the Committee tightened its position on international bank supervision and strengthened the principles reflected in the Concordat and the Revised Concordat. The Minimum Standards stated that: (1) all international banks and banking groups should be supervised by home country regulators; (2) international banks should obtain permission from both the host and home country regulators before opening branches or other banking establishments in foreign nations; (3) banking regulators should have the right to gather information from international banks; (4) host regulators can impose restrictive measures against the international banks if the Minimum Standards are not met; and (5) encouragement of

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136 Mattingly Statement, supra note 127, at 905.
137 Hall, supra note 126, at 8.
138 The new Minimum Standards were issued in July 1992, only a year after BCCI was completely closed. See Minimum Standards, supra note 46. The drafters somewhat cryptically noted that they began their work on the standards “[f]ollowing recent developments.” Id. at 1.
139 See id.
140 Id.
142 Minimum Standards, supra note 46, at 1. The 1990 Supplement to the Revised Concordat concerning “Information Flows Between Banking Supervisory Authorities” was not made part of the Minimum Standards. See id. at 1–2.
formation exchanges between regulators in different nations should continue.\textsuperscript{143}

1. Consolidated Supervision Redux

The Minimum Standards stated that all international banks should be subject to consolidated supervision by their home country regulators.\textsuperscript{144} This required that the home country regulator receive reliable information on the global operations of the particular international bank.\textsuperscript{145} Supervisors then would assess this information in monitoring the safety and soundness of international banks.\textsuperscript{146} Under the Minimum Standards, home country bank regulators could prevent the creation of corporate affiliations that undermined the application of consolidated supervision or hindered effective regulation,\textsuperscript{147} and also could prevent the opening of banking establishments in foreign jurisdictions if they were not satisfied with the host country supervision.\textsuperscript{148}

Host country regulators likewise had the responsibility to ensure that the home country regulators had the ability to meet these standards.\textsuperscript{149} The Minimum Standards required that international banks receive permission from both home and host country regulators before opening cross-border banking establishments.\textsuperscript{150} The approval of any new banking establishment was contingent upon a multilateral agreement among regulators allowing each to gather the information necessary for effective supervision.\textsuperscript{151}

The Minimum Standards allocated supervisory responsibilities between home and host country regulators in a similar manner as the Revised Concordat, except in cases where the regulators decide that that allocation is inappropriate.\textsuperscript{152} If, in a particular situation, one

\textsuperscript{143} \textit{International Panel on Banking Revises Minimum Standards}, \textit{Wall St. J.}, July 7, 1992, at C25. The Minimum Standards use the terms “home-country” and “host-country” in lieu of “parent” and “host.” \textit{See generally Minimum Standards, supra note 46.}

\textsuperscript{144} \textit{Minimum Standards, supra note 46, at 3.}

\textsuperscript{145} \textit{Id.}

\textsuperscript{146} \textit{Id.}

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{See id. at 3-4.}

\textsuperscript{149} \textit{Minimum Standards, supra note 46, at 2.}

\textsuperscript{150} \textit{Id. at 3. In determining whether to approve a foreign operation, the host-country regulator can consider the bank’s strength of capital, organization, and operating procedures for risk management. The home-country regulator, of course, should consider the same factors. Id. at 4.}

\textsuperscript{151} \textit{Id. at 4–5.}

\textsuperscript{152} \textit{Id.}
regulator determined that such allocation was inappropriate, then it could reach an explicit agreement with its counterpart on a more appropriate allocation of supervisory responsibility. In the absence of an agreement to the contrary, the Minimum Standards continued to allocate supervisory responsibilities.

The host country regulator had responsibility for determining whether the international bank in fact would be subject to consolidated supervision in the home country. If the host country regulator found that the bank was not receiving effective supervision from the home country regulator, the host country regulator could prevent the opening of the new banking establishment. Alternatively, in its sole discretion, the host country regulator could allow the establishment of branches subject to any regulatory restrictions it deemed necessary and appropriate, but then would have to supervise any such establishment on a \textquoteleft\textquoteleft stand alone' consolidated basis.'

In a statement accompanying the issuance of the Minimum Standards, the Committee stated, \textquoteleft\textquoteleft the minimum standards are designed to provide greater assurances that in the future no international bank can operate without being subject to effective, consolidated supervision.' The Minimum Standards themselves made clear that consolidated supervision is a fundamental regulatory principle adopted by the international bank supervisory community.

The new standards required that a single bank regulator exercise primary regulatory authority over an international bank. The minimum standards make home country regulators the primary regu-

\begin{footnotesize}
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\item 153 \textit{See id. at} 5.
\item 154 \textit{Id. at} 5–6.
\item 155 \textit{See id. at} 6. The host regulator should consider whether the bank is incorporated in a nation with which the host regulator has a mutual understanding for the exchange of information; whether the home-country regulator has given its consent for the new banking establishment; and whether the home-country regulator has the capability to perform consolidated supervision. \textit{Id. at} 5–6.
\item 156 \textit{Id. This course of action is not necessary if the home-country regulators are willing and able to }\textquoteleft\textquoteleft\textit{initiate the effort to take measures to meet these standards.} \textit{Id.}
\item 157 Minimum Standards, \textit{supra} note 46, at 6.
\item 158 \textit{Id. at} 7.
\item 159 Maggie Fox, \textit{Watchdog Writes Standards to Stop BCCI-type Frauds}, \textit{REUTER BUS. REP.}, July 6, 1992, \textit{available in} LEXIS, Nexis Library, WIRES File.
\item 160 Minimum Standards, \textit{supra} note 46, at 2.
\item 161 This prevents any sort of collegial regulatory arrangement, similar to the one that attempted to supervise BCCI for several years. \textit{Learning from BCCI}, \textit{Fin. TIMES LONDON}, July 7, 1992, at 18. Specifically, the Minimum Standards state that all international banks \textquoteleft\textquoteleft should be supervised by a home-country authority that capably performs consolidated supervision.' Minimum Standards, \textit{supra} note 46, at 3.
\end{itemize}
\end{footnotesize}
lator of the foreign banking operations of banks incorporated in their jurisdictions.162

The most important change in the new standards was formalization of the requirement that international banks receive permission from both home and host country regulators before opening foreign banking establishments.163 This double approval was designed to prevent the finger-pointing that had occurred in the past after a bank failure.164

2. Gaps and Weaknesses in the Minimum Standards

Despite their improvements over past guidelines, the Minimum Standards contained a gap that banks could exploit to avoid regulation. A host regulator could still choose to allow a foreign banking establishment to operate in its jurisdiction even if the establishment’s home regulator did not comply with the Minimum Standards.165 The host country regulator need only impose the restrictions it deemed “necessary and appropriate” on this establishment.166

Further, the standards focused on the establishment of new branches and did not explicitly address existing branches.167 Without an explicit statement in the new standards, retroactive application of the standards could vary by nation.168

The Minimum Standards were designed to promote cooperation between home and host countries and encourage the flow of informa-


163 See Minimum Standards, supra note 46, at 4; Ipsen, supra note 162, at 9.


165 Minimum Standards, supra note 46, at 6; see also Rod McNeil, Basel Group’s Bank Supervision Plan to Step Up International Coordination, Thomson’s Int’l Banking Reg., July 13, 1992, at 1, 1–2 (summarizing this provision).

166 Minimum Standards, supra note 46, at 6. The standards nevertheless require the host-country regulator to supervise the establishment adequately. See id.

167 Three of the Minimum Standards’ four principles apply solely to the creation of a new banking establishment. See id. at 3–6. The first principle (requiring adequate home-country consolidated supervision) is phrased as “a condition for the creation and maintenance of cross-border banking establishments” and arguably may apply to existing establishments. Id. at 3; see also Basle Committee on Banking Supervision Issues New Standards to Prevent Fraud, supra note 164, at A-1 (quoting Mr. Corrigan of the Committee as saying that Minimum Standards “would ‘by implication at least’ be able to be applied to existing branches”).

168 Learning from BCCI, supra note 161, at 18. This is expected to be a long and cumbersome process. Id.
tion among bank regulators. The standards were purposely vague, however, in order to allow regulators the flexibility to interpret them on a case-by-case basis.

Like the Concordat and the Revised Concordat, the Minimum Standards were not embodied in an enforceable treaty. The Committee, therefore, relied on regulators’ moral authority and informal pressure for enforcement. Furthermore, national regulators implemented the standards in isolation from one another, causing discrepancies in enforcement among nations. For instance, any penalties for violation of banking laws or regulations based on the standards rested with the individual country regulators.

Some critics argue that the Committee designed the Minimum Standards to prevent the development of large banks in emerging markets, and that banks in less developed nations would have the most difficulty meeting its requirements. While the Committee might have been concerned about emerging market banks operating in industrialized nations in the wake of BCCI, the Committee did not intend to limit the expansion of banks from emerging markets. Rather, the Committee intended to respond more effectively to large international bank failures.

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169 See, e.g., Minimum Standards, supra note 46, at 1–2 (encouraging cooperative efforts), 4–5 (conditioning establishment of cross-border banks on bilateral information exchange agreements).

170 Cf. id. at 2 ("The following four minimum standards are to be applied by individual supervisory authorities in their own assessment of their relations with supervisory authorities in other countries.").


172 McNeil, supra note 165, at 1. The United Nations Center on Transnational Corporations also issued a report in light of the closure of BCCI. United Nations Ctr. on Transnational Corps., New Issues for Transnational Cooperation in Transnational Banking (1992); see Steve Lohr, U.N. Study Assails the Way B.C.C.I. Was Shut by Western Central Banks, N.Y. Times, Feb. 5, 1992, at D7. The report noted the massive losses caused by the bank’s closure and pointed out that the economic damage fell hardest on countries such as Nigeria and Bangladesh, where BCCI was an important institution. United Nations Ctr. on Transnational Corps., supra, at 13–14; Lohr, supra, at D7.


174 Cf. BIS Panel Lines Up Plans to Prevent New BCCIs, Institutional Investor Bank Letter, June 29, 1992, at 1, 9 (stating that the intent of Committee is to head off any future BCCI-type failures).

175 See id.
E. Core Principles for Effective Banking Supervision

The Basel Committee eventually developed more substantive standards for bank regulation. Rather than focusing merely on the coordination of international bank supervision, the Basel Committee provided comprehensive minimum standards for bank supervision when it published the Core Principles in 1997.176

After 1992, several prominent bank failures occurred. In March 1995, the venerable Barings Bank of London (“Barings”) failed after a trader in the Singapore operation, Nicholas Leeson, had lost over 927 million British pounds (US$ 1.1 billion) in the futures market in Singapore.177 Leeson took advantage of his position as both a trader and manager of the settlements operation in Barings’ Singapore office to hide his losses from his managers for several years.178 By the time these losses were discovered, they exceeded Barings’ capital. Despite intense negotiations, the Bank of England refused to support Barings, and the bank was put into receivership in February 1995 and subsequently sold to ING.179

Later in 1995, the Federal Reserve Board revoked the charter of the New York branch of the Daiwa Bank (“Daiwa”) because of its concealment of over US$ 1 billion in unrecorded trading losses incurred in the bond market.180 Daiwa had informed the Japanese Ministry of Finance of this information on August 8, 1995.181 The Ministry of Finance, however, delayed communicating the information to the Federal Reserve Board until September 18, 1995.182 The Federal Reserve promptly issued an order under the Foreign Bank Supervision Enhancement Act closing the Daiwa branch, which wound up its U.S. operations on February 2, 1996.183 The Daiwa closing preceded a 1997 financial crisis that spread across Asia and resulted in the closure

178 See id. at 307–09.
179 See id. at 323.
181 Id. at 216.
182 Id. at 217.
183 Id. at 215.
of many banks and the dramatic decrease in the gross national products of nations such as Thailand, Indonesia, and Malaysia.\textsuperscript{184}

During this volatile period, the finance ministers and bank regulators of the G-7 were becoming uneasy about the stability of the international financial system. At the 1996 G-7 summit in Lyon, France, the leaders (through the Summit Communiqué) requested standard-setting bodies, including the Basel Committee, to draft more comprehensive and detailed financial standards.\textsuperscript{185} The leaders stated in the communiqué that:

[they] welcome the work accomplished by the international bodies concerned with banking and securities regulation . . . [and o]ver the year ahead, [authorities] should seek to make maximum progress on . . . encouraging the adoption of strong prudential standards in emerging economies and increasing cooperation with their supervisory authorities; international financial institutions and bodies should increase their efforts to promote effective supervisory structures in these economies.\textsuperscript{186}

The Basel Committee responded to this call by issuing the Core Principles in September 1997, slightly over one year after the G-7’s request.\textsuperscript{187}

The Core Principles set forth broad guidelines on best practices for bank supervision.\textsuperscript{188} The document does not merely deal with the coordination of supervision of internationally active banks. Instead, it details twenty-four guidelines for supervising entire national banking


\textsuperscript{188} See generally CORE PRINCIPLES, supra note 15 (presenting guiding principles for bank supervision).
systems from the licensing of banks to their closure due to insolvency. Only three of the twenty-five principles deal with cross-border banking, which previously had been the focus of the Basel Committee’s standard-setting work. The remainder set forth guidelines for the supervision of banks, even those without international operations. This document represented a major expansion of the Basel Committee’s work on bank supervision.

The twenty-five principles are divided into seven subject categories: preconditions for effective banking supervision (Principle 1), licensing and structure (Principles 2–5), prudential regulations and requirements (Principles 6–15), methods of ongoing banking supervision (Principles 16–20), information requirements (Principle 21), formal powers of supervisors (Principle 22) and cross-border banking (Principles 23–25). Although a detailed analysis of each principle is beyond the scope of this Article, a summary of some of the key provisions is relevant.

First, the Core Principles state that there are certain economic conditions necessary for an effective bank supervisory system. A nation must have sound macroeconomic policies, effective market discipline, a well-developed legal system, sound accounting principles, an orderly method for closing insolvent banks, and policies that promote financial system stability such as lender of last resort responsibility and depositor protection. Although bank supervisors generally do not create or implement these policies, sound macroeconomic conditions are vital to their ability to regulate banks effectively.

The Core Principles stress the need for the independence of bank supervisors, a sentiment echoed by several commentators. Supervisors require adequate resources both with respect to the number of staff and the independent, consistent funding to perform their jobs. Effective supervisory systems will “have clear responsibilities and objectives for each agency” involved in supervising banks.

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189 Id. at 41–43.
190 Walker, supra note 13, at 131–35.
191 Core Principles, supra note 15, at 11–12.
193 Das, supra note 192, at 13.
194 Id.
Unfortunately, many countries’ financial sector supervisors still do not enjoy adequate independence. For example, recent banking crises have involved connected lending between banks and their owners or related parties at favorable interest rates.\textsuperscript{195} Some of these borrowers used their political influence to prevent bank supervisors from forbidding or even questioning these loans.\textsuperscript{196} In a recent IMF survey of the bank systems, 45% of regulators in emerging markets were not operationally independent or lacked independent funding.\textsuperscript{197}

The language of the Core Principles sets forth the best practices of bank supervision in broad terms. For instance, the Core Principles state that supervisors should set “limits to restrict bank exposures to single borrowers” or “groups of related borrowers.”\textsuperscript{198} In the comments to the Core Principles, the drafters indicate that 25% of capital should be the maximum limit of a bank’s exposure to a single borrower,\textsuperscript{199} but this is not an absolute limit.\textsuperscript{200} Similarly, the Core Principles state that supervisors must ensure that banks “have adequate policies, practices and procedures, including strict ‘know-your-customer’ rules, that promote high ethical and professional standards.”\textsuperscript{201} The Core Principles do not specifically define such rules, other than referring to the more detailed Financial Action Task Force on Money Laundering recommendations.\textsuperscript{202} This vagueness of language was necessary for the various Basel Committee members to reach agreement on the Core Principles, and to encourage several regional groups of bank supervisors to endorse them.\textsuperscript{203}

In addition to the members of the Basel Committee, bank supervisory agencies from non-G-10 nations endorsed the Core Principles.\textsuperscript{204} Representatives from Chile, the People’s Republic of China,

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\textsuperscript{195} Heimann, supra note 192, at 66; Kenen, supra note 184, at 7.

\textsuperscript{196} Heimann, supra note 192, at 66.


\textsuperscript{198} CORE PRINCIPLES, supra note 15, at 26.

\textsuperscript{199} Id.

\textsuperscript{200} Id.

\textsuperscript{201} Id. at 39 (Principle 15).


\textsuperscript{204} CORE PRINCIPLES, supra note 15, at 1.

\end{footnotesize}
the Czech Republic, Hong Kong, Mexico, Russia, and Thailand participated in the drafting process, while officials from Argentina, Brazil, Hungary, India, Indonesia, the Republic of Korea, Malaysia, Poland, and Singapore participated closely in the Core Principles’ development. The Core Principles thus represented one of the first major Basel Committee projects that involved significant participation by non-G-10 nations at the drafting stage. This addressed the recurring criticism that the Basel Committee was exclusively a “rich countries” club.

Besides direct participation during the drafting process, a significant number of nations endorsed the Core Principles after they were issued. At the October 1997 annual meeting of the International Monetary Fund (“IMF”) and the International Bank for Reconstruction and Development (“World Bank”), the Core Principles were endorsed by the attending nations. The Group of 22 endorsed the Core Principles, along with other international financial standards, in an October 1998 report. In the same month, the International Conference of Banking Supervisors endorsed the Core Principles and pledged to implement them during their biennial conference.

As nations began to implement the Core Principles, it became clear that bank supervisors needed additional guidance and explanation. In order to provide such guidance, the Basel Committee issued the Core Principles Methodology (“Methodology”) in 1998. As the Committee noted, “[e]xperience has already shown that the Principles may be interpreted in widely diverging ways, and incorrect interpretations may result in inconsistencies among assessments.” The Methodology restated the language of each of the twenty-five principles, and then went on to describe criteria to be used in assessing whether a particular nation has effectively implemented that principle. The criteria were divided into two groups: (1) essential criteria that are the minimum level of implementation needed for compliance, and (2) additional criteria that represent the best practice of

\[\text{References}\]

205 Id. at 1–2.
207 Id. at 1.
208 Core Principles Methodology, supra note 16, at 3.
209 Id.
210 Id.
211 See id. at 1.
Because of its detail, the Methodology has become the more influential and useful document among bank supervisors.

F. Gaps in the Core Principles

Despite its breadth and specificity compared to other Basel Committee documents, the Core Principles did not address some important issues in the bank supervisory system. First, they did not specifically address whether a country should have a deposit insurance scheme. Although, the Core Principles discuss a systemic safety net as a precondition to effective supervision, they do not include a specific requirement for deposit insurance. The Annex to the Core Principles addresses this issue, and makes no recommendation regarding deposit insurance. It merely highlights the possibility that deposit insurance increases the “risk of imprudent behaviour” by banks and stresses that any deposit insurance program “should be tailored to the circumstances in, as well as historical and cultural features of, each country.”

Furthermore, the Basel Committee did not make any recommendation regarding the best organizational structure for bank supervision. Numerous commentators and policymakers, however, have already dealt with this issue. For instance, one study considered whether there should be a single financial sector regulator similar to the Financial Services Authority in the United Kingdom. Another discussed whether bank supervisory functions should be part of the central bank, which has lender of last resort responsibility, or whether they should be separated to avoid any potential conflict of interest. Australia adopted a “four peaks” approach, allocating regulatory responsibility to each agency by objective: financial stability, prudential

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212 Core Principles Methodology, supra note 16, at 2.
213 See id. at 7.
214 See id.
215 Core Principles, supra note 15, at 44.
216 Id.
217 Id.
supervision, consumer protection, and competition.\textsuperscript{221} Since commentators and influential policymakers have not agreed on a best structure, it is not surprising that the Basel Committee did not make any recommendation on this topic.\textsuperscript{222}

Nor could the Basel Committee agree on common bank accounting standards. Principle 21 of the Core Principles recognizes the importance of proper financial reporting that reflects the operations of banks in a fair, consistent manner.\textsuperscript{223} Furthermore, some commonality of accounting methods among nations is necessary for effective consolidated supervision of international banks, because differing accounting standards make monitoring banks’ financial operations in different nations difficult.\textsuperscript{224} Nevertheless, the Basel Committee was unable to agree on substantive rules for accounting standards.\textsuperscript{225} It appears that more substantive harmonization of bank accounting standards will be left for a future revision of the Core Principles.

With the issuance of the Revised Capital Accord, however, the Basel Committee has resources available to focus on revising the Core Principles. In any such revision, the Basel Committee should strengthen the principle on bank accounting standards. While the Committee has commented regularly on the work of the International Accounting Standards Board and the International Auditing and Assurance Standards Board,\textsuperscript{226} the Committee still must provide further detail on such standards in order to improve the compatibility of bank financial reports among nations.\textsuperscript{227}

\textsuperscript{222} Lastra, \textit{supra} note 218, at 50.  
\textsuperscript{223} Core Principles, \textit{supra} note 15, at 35–36; Core Principles Methodology, \textit{supra} note 16, at 43.  
\textsuperscript{225} Core Principles, \textit{supra} note 15, at 36.  
\textsuperscript{226} See Bank for Int’l Settlements, \textit{supra} note 34, at 168.  
G. Revised Capital Accord

As noted above, the Basel Committee issued another major international financial standard relevant to the Core Principles—the Revised Capital Accord.\(^{228}\) This complex document sets forth various methods whereby internationally active banks can calculate a bank’s minimum required capital.\(^ {229}\) Although a detailed analysis of this document is beyond the scope of this Article, certain provisions are relevant to this discussion because they may create an incentive for nations to implement the Core Principles.\(^ {230}\)

The Revised Capital Accord consists of three policy objectives or “pillars.”\(^ {231}\) The first pillar describes the two principal methods available for calculating minimum capital levels for banks: the standardized approach that establishes categories for different types of risk, and the internal ratings-based approach that allows banks to use their own internal risk valuation method.\(^ {232}\) The theory underlying risk valuation is that a particular bank asset or loan will be evaluated for risk, and a particular weight will be applied to that asset in order to calculate the total risk-weighted assets of the bank.\(^ {233}\)

The original Capital Accord provided a very simple method of calculating minimum capital using risk weight categories.\(^ {234}\) Loans to countries who are OECD members received a risk weight of 20%; loans to nations outside of the OECD received a risk weight of 100%.\(^ {235}\) This meant that banks could allocate less capital to loans to OECD governments or banks incorporated in OECD countries. The Revised Capital Accord provides for a much more sophisticated and complicated method.

\(^{228}\) Revised Capital Accord, supra note 48.

\(^{229}\) See Capital Adequacy Standards, supra note 45, at 1.

\(^ {230}\) See infra notes 430–447 and accompanying text.

\(^ {231}\) Revised Capital Accord, supra note 48, para. 4.

\(^ {232}\) Id. paras. 50–51.

\(^ {233}\) See id.

\(^ {234}\) Capital Adequacy Standards, supra note 45, at 7–8. The 1988 Capital Accord was 26 pages of text compared to the Revised Capital Accord with 251 pages of text. Id.

The second pillar of the Revised Capital Accord refers to the prudential supervision of the risk valuation method chosen. In the prior Capital Accord, only one method of calculating minimum capital was available. In the Revised Capital Accord, two principal methods are available. Bank supervisors must understand and approve the method selected by each particular bank.

The third pillar calls for using market discipline to enforce the Revised Capital Accord. The Basel Committee recommends that banks disclose both their valuation method in general terms and their capital levels to depositors and the general public. The market can then evaluate the method chosen and the amount of capital retained by the bank and reflect any risk in the stock price of the particular bank.

The changes to the formula for calculating minimum capital, particularly the standardised approach in Pillar I, are relevant to this discussion. In determining the risk weight for credits to sovereign and corporate borrowers, banks can refer to external credit assessments from rating agencies such as Standard & Poor’s, Moody’s, or Fitch, or ratings from export credit insurance agencies. These agencies and their analysts take compliance with the Core Principles and other international financial standards into account when determining each country’s sovereign credit rating. Countries that comply with international financial standards, such as the Core Principles, tend to receive more favorable sovereign credit ratings. A favorable credit rating places a country in a lower risk weight category. Therefore, countries that comply with international financial standards, and the banks located therein, will benefit from lower interest rates on loans, because banks will be able to allocate less capital to a loan placed in a

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236 Revised Capital Accord, supra note 48, para. 719.
237 Capital Adequacy Standards, supra note 45, at 7–8.
238 Revised Capital Accord, supra note 48, para. 7.
239 Id. paras. 720–24.
240 Id. para. 809.
241 Id. para. 810.
242 See id. para. 809.
243 Revised Capital Accord, supra note 48, paras. 52–55, 66–68.
244 Id.
245 John Chambers, The Importance of the IMF’s Work on Standards and Codes, Speech to the Annual Meeting of the IMF/IBRD (Sept. 2002), in Ratings Direct (2002); E-mail regarding Sovereign Ratings from Richard Fox, Senior Director of the Sovereign Team at Fitch Ratings, to Duncan E. Alford, Head of Reference, Georgetown University Law Library (July 15, 2004) (on file with author).
246 See Chambers, supra note 245.
247 See Revised Capital Accord, supra note 48, para. 52.
lower risk weight category. A more detailed discussion of the effects of the Revised Capital Accord on enforceability of the Core Principles follows.

II. Implementation

As mentioned above, the Core Principles are a statement of best practices expressed as guidelines. Like other Basel Committee documents, they do not have the force of law and must be implemented at the national level. As such, implementation of the Core Principles has varied significantly by nation. While most developing nations have implemented the Core Principles to a large extent, emerging markets and transition economies have only done so to a more limited degree.\(^{248}\) This section highlights the implementation of the Core Principles in selected important financial markets: the European Union, the United Kingdom, France, Hong Kong, and the United States.

A. European Union

Among the objectives of the European Union (“EU”) are the creation of an internal market and the dismantling of internal trade restrictions.\(^{249}\) The creation of this internal market for financial services has been more difficult and problematic than for manufactured goods. In the 1998 European Council meeting in Vienna, the leaders of the EU called for the prompt integration of the financial services sector among member nations.\(^{250}\) Subsequently, the European Commission proposed a Financial Services Action Plan that outlined the steps (including forty-two legislative measures) to complete the creation of an internal market for financial services.\(^{251}\) As of June 2004, nearly all the required legislation at the EU level had been enacted.\(^{252}\)


Nevertheless, member nations have yet to enact legislation at the national level to implement the various EU directives.\textsuperscript{253} Certain Financial Services Action Plan directives are related to the Core Principles, including the Regulation on the Application of International Accounting Standards\textsuperscript{254} and the Directive on Supplementary Supervision of Credit Institutions.\textsuperscript{255}

The supervision of banks within the EU is primarily the responsibility of member states and is not conducted at the EU level.\textsuperscript{256} The European Central Bank (“ECB”) along with the European System of Central Banks (“ESCB”) controls monetary policy for the member states that are part of the European Monetary Union.\textsuperscript{257} The ECB does not, however, have direct responsibility for the supervision of banks within the EU. Under the Treaty on European Union (“Treaty”), the ECB can only aid in the smooth operation of prudential supervision of banks.\textsuperscript{258} The Treaty does contain a special provision allowing the ECB to assume prudential supervision over banks, but this authority requires a unanimous approval from Member States that would be nearly impossible to obtain.\textsuperscript{259} The proposed constitutional treaty does not change this structure.\textsuperscript{260} Overall, banking law at the EU level currently has little substantive influence on bank supervision within the EU. Most bank supervisory practice is provided for in the national law of the Member States.

\textsuperscript{253} European Comm’n, supra note 252, at 1.
\textsuperscript{258} EC Treaty art. 105(5).
\textsuperscript{259} Id. art. 105(6); see Tom de Swaan, The Changing Role of Banking Supervision, 6 Econ. Pol’y Rev.75, 78 (2000); Lastra, supra note 218, at 56–57.
\textsuperscript{260} Treaty Establishing a Constitution for Europe, July 18, 2003, art. III-77(5)–(6), 2003 O.J. (C169) 42 (currently unratiﬁed).
Nevertheless, the EU is in the midst of restructuring its financial regulatory agencies in order to further integrate the financial services sector within the EU. As part of the Financial Services Action Plan, the European Commission asked a group of prominent politicians involved in monetary and economic affairs (“Committee of Wise Men”) to report on improving the regulation of the securities markets in the EU.261 Led by Alexandre Lamfalussy, the Committee of Wise Men issued a report (“Report of the Wise Men”) recommending changes in the enactment of legislation governing the securities markets in Europe.262 The Report of the Wise Men developed a new legislative process ("Lamfalussy Process"), originally intended for the securities markets, that the European Commission has recommended be extended to the other parts of the financial services sector—namely, banking and insurance.263 The European Council and the European Parliament have in turn agreed on a Directive that applies the Lamfalussy Process to the banking and insurance sectors.264

The Lamfalussy Process creates four levels of lawmaking to implement policy and enact laws governing the financial services sector.265 A weakness of the current EU legislative procedure is the amount of time required to enact legislation after it has been proposed by the European Commission, especially when using the predominant method of enacting EU legislation, the codecision procedure.266 A period of two to two and a half years is not uncommon for

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266 See EU, Key Players in EU Legislation, at http://europa.eu.int/eur-lex/en/about/pap/index.html (last updated Apr. 27, 2004). A detailed description of the codecision procedure used to enact EU legislation is beyond the scope of this article. Generally code-
enacting legislation. Level I of the Lamfalussy Process involves the adoption of directives and regulations using the codecision procedure at the EU level. Level II involves the implementation of the law by providing additional details. This level is analogous to the rulemaking by U.S. administrative agencies such as the Comptroller of the Currency or the Federal Deposit Insurance Corporation. The Report of the Wise Men recommended that a special committee of national supervisory officials be created to develop these details. Level III refers to greater cooperation among national supervisors to “ensure consistent enforcement and implementation.” As with Level II, the Report of the Wise Men recommended the creation of a committee to coordinate supervisory practice among EU member states. Level IV refers to more effective enforcement of EU laws.

Level II and Level III are being implemented by committees established by the European Commission. The European Commission has created the European Banking Committee (formerly the Banking Advisory Committee) as a Level II committee. In addition, in January 2004, the Council created the Committee of European Banking Supervisors as a Level III committee. This committee will coordinate bank supervisory practices so as to create a level playing field for banks within the EU. These committees are so new that there is little basis upon which to evaluate their effectiveness. The EU is clearly attempting to centralize banking supervision as much as possible within the legal

cision requires agreement among the Council of the European Union and the European Parliament before legislation becomes law. See id.


268 ECOFIN, 10th FSAP Progress Report 11, available at http://europa.eu.int/comm/internal_market/finances/docs/actionplan/index/progress10_en.pdf (last visited May 4, 2005). Directives are a type of EU legislation that sets out the objectives of the law but requires member states to enact national legislation to implement the law. See Borchardt, supra note 252, at 63–71.

269 Wise Men Report, supra note 262, at 28.

270 See id. at 28–35.

271 Id. at 37.

272 See id. at 37–38.

273 See id. at 40.


275 European Comm’n, Decision Establishing the Committee of European Banking Supervisors, 2003 O.J. (L3) 28.

limits of the treaty. A clear trend within EU law on financial services is the increased centralization of bank regulation within the EU. Nevertheless, although the EU is moving towards more involvement in bank and financial services supervision and regulation, most supervision of banks operating within the EU still occurs at the national level.

B. United Kingdom

The United Kingdom is not part of the European Monetary Union and has maintained its own independent currency, the pound sterling. In 2000, the British Parliament radically reorganized the agencies supervising and regulating the financial services sector by enacting the Financial Services and Markets Act of 2000. Nine separate agencies that regulated the securities, banking, and insurance sectors were merged into one regulatory agency—the Financial Services Authority (“FSA”). The Bank of England continues to be responsible for monetary policy and serves as the lender of last resort, but its supervisory function has been wholly transferred to the FSA. The failures of BCCI and Barings hurt the credibility of the Bank of England as a supervisor and prompted Parliament, at least in part, to strip the Bank of England of its supervisory function.

The United Kingdom has an active, well-developed financial sector and is particularly strong in international finance. Its stock market is the third largest in the world in terms of market capitalization. The bank supervisory system in the United Kingdom is similarly well-developed and sophisticated, as confirmed by the IMF. In 2003, the IMF evaluated the soundness and stability of the United Kingdom’s financial system as part of its Financial Sector Assessment Program (“FSAP”). Under the FSAP, the IMF sends an inspection

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277 Antonio Sainz de Vicuna, The ESCB and its Role in Banking Supervision, 34 Int’l. Law. 117, 118 (2000). ECB would like to have clear bank supervisory authority. See id.
278 See Financial Services and Markets Act, 2000, c. 8 (Eng.).
team of financial regulators to evaluate and critique each country’s financial system, with the aim of improving the soundness of each country’s financial system and enhancing the stability of the international financial system as a whole.\(^\text{284}\) As part of this assessment, the inspection team also evaluates the implementation of key financial standards, including the Core Principles.\(^\text{285}\)

The 2003 FSAP report concluded that the supervisory system in the United Kingdom is state of the art and fully complies with the Core Principles.\(^\text{286}\) The report determined that the FSA had clear regulatory objectives, was independent, and was separately funded by industry assessments.\(^\text{287}\) Thus, the FSA structure met the independence requirement of Principle 1 of the Core Principles.\(^\text{288}\) The FSA controlled licensing of banks, and British law limited use of the term “bank.”\(^\text{289}\) Likewise, the FSA had the legal authority to approve the transfer of control of financial institutions.\(^\text{290}\)

The report did, however, make some minor recommendations. Adequate staff resources are part of the independence requirement of the Core Principles.\(^\text{291}\) The inspection team, however, noted that there were relatively few bank supervisory personnel in the FSA,\(^\text{292}\) and the staff available to supervise the market operations of banks was thin compared to those supervising securities firms.\(^\text{293}\) Also, the report recommended additional reporting by banks to the FSA, in particular, reports on nonperforming loans, capital adequacy, and other supervisory financial ratios.\(^\text{294}\) The FSA, in its reply to the Assessment Report, generally agreed with the conclusions, but noted that, in its opinion, current supervisory practices met the concerns expressed in the report.\(^\text{295}\)


\(^{286}\) See U.K. FSAP Report, supra note 283, at 1.

\(^{287}\) Id. at 60.

\(^{288}\) Id.; see Core Principles, supra note 15, at 1.

\(^{289}\) U.K. FSAP Report, supra note 283, at 60.

\(^{290}\) Id.

\(^{291}\) Core Principles, supra note 15, at 13.

\(^{292}\) See U.K. FSAP Report, supra note 283, at 62.

\(^{293}\) Id.

\(^{294}\) Id.

\(^{295}\) Id. at 65.
Overall, the United Kingdom is in full compliance with the Core Principles. The FSAP assessment report only raised some minor issues involving reporting and adequate staffing, neither of which rose to a level of non-compliance. In addition, an independent, non-profit, standards-monitoring organization has rated the United Kingdom second in the world with respect to compliance with twelve key standards, including the Core Principles.\(^{296}\)

**C. France**

Unlike the United Kingdom, France has chosen a sector-based regulatory scheme with separate agencies supervising banking, securities, and insurance.\(^{297}\) The banking system in France is regulated by three separate governmental agencies: le Comité des Etablissements de Credit et des Enterprises d’Investissement (“CECEI”), the Commission Bancaire (“Commission”), and the ministre chargée de l’Economie et des Finances (the Ministry of Economy, Finance, and Industry).\(^{298}\)

Before August 2003, an independent agency, la Comité de la Réglementation Bancaire et Financière, regulated bank competition, but the law enacted in August 2003 transferred its powers to the Ministry of Finance.\(^{299}\) The Bank of France (\textit{la Banque de France}) governs monetary policy in a manner similar to that of the Bank of England and the Federal Reserve Board in the United States. The CECEI primarily administers the licensing of banks and the authorization of foreign banking establishments to operate in France.\(^{300}\) The Commission is the primary agency responsible for bank supervision in France.\(^{301}\)

The Commission is composed of six members and is chaired by the Governor of the Bank of France.\(^{302}\) The Director of the Treasury


\(^{301}\) Neau-Leduc, \textit{supra} note 298, at 59.

is a member of the Commission. There are four other members nominated by the Ministry of the Economy, Finance, and Industry, one of whom is generally an advisor to the Conseil d’état and another is an advisor to the Cours de Cassation. The other two members are selected based on their expertise in monetary and banking law. These four nominated members serve terms of six years. The Commission supervises credit institutions for financial soundness and compliance with banking law. The Commission has extensive enforcement powers, from the imposition of fines to the mandatory liquidation and closure of banks. The Commission relies to a certain degree on personnel of the Bank of France, or outside auditors, to conduct bank inspections.

The IMF conducted an FSAP assessment of France during 2004. The assessment report issued to the public in November 2004 found that France generally complied with international standards and confirmed its “financial sector is strong and well-supervised.” The report did note, however, that France should strengthen the cooperation among various regulatory agencies and monitor the potentially risky expansions of certain French banks into both financial and non-financial enterprises. Currently, banks may acquire non-financial enterprises without the approval of CECEI. The FSA recommended that the CECEI be granted the power to supervise any expansion into non-financial industries. The report also criticized the administrative intervention of the French government into the banking market, particularly the setting of the deposit interest rates and the maximum interest rate on loans.

The FSAP assessment also indicated that, given the institutional structure of the French bank regulatory agencies, the independence

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303 Neau-Leduc, supra note 298, at 60.
304 Id.
305 Id.
306 French Banking Act, art. 38; Neau-Leduc, supra note 298, at 60.
307 Neau-Leduc, supra note 298, at 60.
308 Id. at 64–65.
309 Id. at 61.
311 FSSA France, supra note 297, at 3.
312 France Consultation, supra note 310, at paras. 16–17.
313 FSSA France, supra note 297, at 29.
314 Id.
315 See France Consultation, supra note 310, at para. 17.
of the bank supervisor is questionable. The Bank of France and the Treasury have permanent seats on the Commission Bancaire and the other members are appointed by the Ministry of the Economy.\textsuperscript{316} While the members do have fixed terms, the executive branch has extensive control over the membership of the Commission.\textsuperscript{317} In addition, the Commission relies to a significant degree on personnel over whose activities the Commission has no direct control.\textsuperscript{318} Furthermore, Bank representatives serve on the board of the CECEI, creating potential conflicts of interest.\textsuperscript{319} These factors detract from the independence of the bank regulator as compared to Great Britain. Principle 1 of the Core Principles refers to the independence of the regulator, both operationally and with respect to funding and adequate staffing levels.\textsuperscript{320}

Overall, France is in compliance with the Core Principles, though the independence of the regulator may be weaker than in other G-7 nations. An independent assessment group has ranked France nineteenth in the world with respect to compliance with international financial standards.\textsuperscript{321}

D. Hong Kong Special Administrative Region

The Hong Kong Special Administrative Region (“SAR”) is a major global financial center. Its stock market is ranked fifth by market capitalization in the world and nearly every major international bank maintains an office in Hong Kong.\textsuperscript{322} Although Hong Kong had been a British colony since the 19th century and ruled by a governor appointed by the British crown,\textsuperscript{323} sovereignty over Hong Kong was transferred by Great Britain to the People’s Republic of China in

\textsuperscript{316} FSSA France, supra note 297, at paras. 44–45.
\textsuperscript{317} Id.
\textsuperscript{318} Id.
\textsuperscript{319} Id. at para. 45.
\textsuperscript{320} Core Principles, supra note 15, at 1.
\textsuperscript{321} EStandards Forum Weekly Report, supra note 296, at 11.
\textsuperscript{323} Economist Intelligence Unit, Country Profile: Hong Kong S.A.R. 4–5 (2004).
1997. The fundamental legal document now governing Hong Kong is the Basic Law. The Legislative Council in Hong Kong enacts laws with the approval of the Chief Executive, including the Banking Ordinance that governs the structure of the bank regulatory agencies and provides for the supervision of banks.

Banks dominate the credit markets in Hong Kong. The three largest banks account for 57% of deposits. The banking market takes on an oligopolistic character and, until 2000, operated like a cartel. Deposit interest rate setting by the larger banks was phased out in 2001.

Regulation of the financial services market in Hong Kong is organized by traditional sectors—banking, insurance, and securities. The Hong Kong Monetary Authority ("HKMA") is the principal supervisor of banks in Hong Kong, as well as those organized or operating therein. In addition, the HKMA implements monetary policy and supervises the payment and settlements system.

In 2002, the IMF conducted an FSAP inspection of Hong Kong. The report concluded that Hong Kong's financial system is "resilient, sound and overseen by a comprehensive supervisory framework.” Hong Kong bank supervisors were adequately financed and had appropriate enforcement powers to comply with the Core Principles. No bank failures occurred in Hong Kong from 1993 through 2003.

According to the assessment report, the primary weakness of the bank supervisory structure in Hong Kong is the lack of independence of the HKMA. The procedures for appointment, compensation,
dismissal, and terms of office of the senior HKMA officials are not explicit and need to be so.\textsuperscript{338} In addition, current legislation does not delineate the HKMA’s regulatory and supervisory responsibilities, nor its monetary policy objectives.\textsuperscript{339}

Good bank supervisory governance is characterized by independence, accountability, transparency, and integrity. According to the FSAP assessment, Hong Kong’s banking regime needs improvement with respect to the first three.\textsuperscript{340} The Financial Secretary appoints the head of the HKMA.\textsuperscript{341} The “procedures for appointment, terms of office, and grounds for dismissal” of the head of the HKMA are not explicitly provided in legislation.\textsuperscript{342} The Financial Secretary can exempt persons from the Banking Ordinance without limitation.\textsuperscript{343} HKMA lacks a board that oversees its regular operations.\textsuperscript{344} Any appeal of a supervisory order issued by the HKMA goes to the Chief Executive of the SAR, a political official.\textsuperscript{345}

Articles 109 and 110 of the Basic Law vest responsibility for financial market supervision in the government.\textsuperscript{346} The executive branch is predominant in the Hong Kong government, and the Chief Executive has a reserve power to direct statutory bodies, including the HKMA, to take certain actions.\textsuperscript{347} There are few publicly disclosed limits on this reserve power.\textsuperscript{348} The Chief Executive could, for instance, direct the HKMA to issue a banking license or forbid them from revoking a banking license. Section 11 of the Securities and Futures Ordinance, which regulates the securities market, sets conditions on the use of this reserve power in the context of securities regulation.\textsuperscript{349} The FSAP assessment team recommended that similar limits

\textsuperscript{338} Id.
\textsuperscript{339} See id; cf. EC Treaty art. 105 (noting that the European Central Bank’s primary objective is price stability).
\textsuperscript{340} HK FSAP Report, supra note 322, at 33.
\textsuperscript{341} Id.
\textsuperscript{342} Id. The insurance supervisory agencies are part of the Financial Services and Treasury Bureau. Id. They are part of the Hong Kong government and are therefore not independent. Id.
\textsuperscript{343} See id.; Banking Ordinance, Laws of Hong Kong, c. 155, § 13.
\textsuperscript{344} HK FSAP Report, supra note 322, at 34. The Banking Advisory Committee advises the Chief Executive on bank regulation and how it affects business activities of banks. The Financial Secretary chairs this Committee.
\textsuperscript{345} Id.
\textsuperscript{346} Basic Law, supra note 325, arts. 109–110, 29 I.L.M. at 1537.
\textsuperscript{347} HK FSAP Report, supra note 322, at 34.
\textsuperscript{348} See id.
\textsuperscript{349} Securities and Futures Ordinance, Laws of Hong Kong, c. 571, § 11 (2003).
be placed on the use of the reserve power by the Chief Executive in the bank regulatory arena.\(^{350}\)

Thus, Hong Kong’s primary deficiency in complying with the Core Principles is the HKMA’s lack of independence. The Chief Executive of the SAR can intervene in any matter under the Banking Ordinance.\(^{351}\) While the Chief Executive has never used this reserve power, its “presence poses a potential threat to supervisory independence.”\(^{352}\) and raises the serious possibility of government interference into bank supervisory matters. Such concerns are particularly relevant in light of recent outcries over sedition laws proposed by the government, as well as other perceived abuses of power.\(^{353}\)

The HKMA vehemently disagreed with the FSAP Report’s analysis of regulatory independence.\(^{354}\) The HKMA argues that the Chief Executive has never used the reserve power and will only use it as a last resort.\(^{355}\) The restraint on this power is “deeply embedded,” and any abuse of the power would be “politically untenable.”\(^{356}\) This response, however, was written prior to the recent introduction of the sedition law by the Hong Kong government and the subsequent mass protests against the Hong Kong government’s perceived abuse of power.\(^{357}\)

The FSAP report also noted that regulatory arrangements regarding the financial system are “strongly reliant on personal relationships and understanding at the level of agency heads and the government.”\(^{358}\) In order to clarify such arrangements, the relevant agencies should issue a clear statement of policy regarding their relationship in times of financial stress, as well as a public disclosure of the specific roles of the various regulatory agencies.\(^{359}\)

\(^{350}\) HK FSAP Report, supra note 322, at 34–35.

\(^{351}\) Id. at 39.

\(^{352}\) Id.

\(^{353}\) See A Bill Too Far, Economist, July 5, 2003, at 7.

\(^{354}\) See HK FSAP Report, supra note 322, at 41.

\(^{355}\) Id.

\(^{356}\) Id.

\(^{357}\) See The Parade Gets Rained On, supra note 324, at 8; A Bill Too Far, supra note 353, at 7.

\(^{358}\) HK FSAP Report, supra note 322, at 35.

Regarding financial system stability, Hong Kong currently has no deposit insurance scheme.\textsuperscript{360} While a deposit insurance scheme is not a requirement under the Core Principles, it is listed as a technique or tool to enhance financial system stability.\textsuperscript{361} A bill establishing a deposit insurance system was enacted by the Legislative Council with a plan to commence operations in 2006.\textsuperscript{362}

Overall, Hong Kong is in compliance with the Core Principles, although substantial issues have been raised with respect to the independence, accountability, and transparency of its banking regulation system. An observer of the compliance of international standards ranks Hong Kong sixth in the world.\textsuperscript{363}

E. United States

The United States has the largest financial services market in the world.\textsuperscript{364} The complex structure of bank regulation in the United States matches the complexity and size of its financial services market. The hallmark of the U.S. banking system is its dual nature; banks can be chartered either by individual states or by the U.S. government.\textsuperscript{365} While this dual banking system creates a complex licensing and supervisory system, it is unlikely to change. In recent years, the U.S. Congress has concentrated regulatory authority over foreign bank operations and complex financial organizations at the national level with the Federal Reserve System.\textsuperscript{366}

At the federal level, there are three primary bank supervisors in the United States: the Federal Reserve System Board of Governors (“Federal Reserve”), the Office of the Comptroller of the Currency (“OCC”), and the Federal Deposit Insurance Corporation (“FDIC”).\textsuperscript{367} The Federal Reserve governs monetary policy and supervises certain institutions within the U.S. banking system—members of the Federal Reserve system, financial holding companies, and foreign banks operating in the United States.\textsuperscript{368} Each of the Governors of the Federal Re-

\textsuperscript{360} HK FSAP Report, \textit{supra} note 322, at 39.
\textsuperscript{361} Core Principles, \textit{supra} note 15, at 46.
\textsuperscript{362} Deposit Protection Scheme Ordinance, Laws of Hong Kong, c. 581; \textit{see} Insurance for a Rainy Day, S. China Morning Post, May 20, 2004, at 1, available at 2004 WLNR 5971605.
\textsuperscript{363} EStandards Forum Weekly Report, \textit{supra} note 296, at 11.
\textsuperscript{364} U.S. Census Bureau, \textit{supra} note 282, at 872.
\textsuperscript{365} 1–1 Banking Law § 1.04 (Matthew Bender ed. 2004).
\textsuperscript{366} Schooner, \textit{supra} note 280, at 411–12.
serve, including the Chairman, are appointed by the President of the United States for fourteen year terms, subject to confirmation by the U.S. Senate.\textsuperscript{369}

The Comptroller of the Currency supervises national banks.\textsuperscript{370} National banks are credit institutions that have sought a federal charter under the National Bank Act, rather than a banking license from a particular state.\textsuperscript{371} The Comptroller of the Currency is appointed by the President for a five year term and confirmed by the U.S. Senate.\textsuperscript{372} The OCC, part of the U.S. Department of the Treasury, issues regulations on the permissible activities of national banks, conducts on-site and off-site inspections, and has comprehensive enforcement authority.\textsuperscript{373}

The FDIC provides deposit insurance to member banks, for which they pay an insurance premium.\textsuperscript{374} The FDIC also issues regulations governing the activities of member banks, both federally and state-chartered, and has comprehensive enforcement powers over its members.\textsuperscript{375} The FDIC is governed by a five member board, one of whom is the Comptroller of the Currency, one of whom is the Director of the Office of Thrift Supervision, and the other three of whom are appointed by the President with the consent of the Senate.\textsuperscript{376} The appointed directors of the Board serve six year terms. The Chairman of the FDIC is chosen from these three appointed directors and serves a five year term.\textsuperscript{377}

Other types of financial institutions are supervised by separate regulatory agencies. The National Credit Union Association supervises credit unions,\textsuperscript{378} and the Office of Thrift Supervision supervises savings and loan associations.\textsuperscript{379}

The Gramm-Leach-Bliley Act represented a major revision of financial services law.\textsuperscript{380} This act removed the prohibition against the conduct of commercial lending and investment banking activities within the same financial enterprise, a prohibition imposed by the

\begin{itemize}
  \item \textsuperscript{369} 12 U.S.C. § 241.
  \item \textsuperscript{370} Id. § 26.
  \item \textsuperscript{372} Id. § 2.
  \item \textsuperscript{373} Id. §§ 21–43.
  \item \textsuperscript{374} 12 U.S.C. §§ 1811, 1815.
  \item \textsuperscript{375} 12 U.S.C.A. § 1819.
  \item \textsuperscript{376} 12 U.S.C. § 1812(a) (1).
  \item \textsuperscript{377} 12 U.S.C.A. § 1812(b) (1).
  \item \textsuperscript{378} Federal Credit Union Act, id. §§ 1751–1759k (2004).
  \item \textsuperscript{379} Id. §§ 1462–70.
\end{itemize}
Glass-Steagall Act following the Great Depression.\textsuperscript{381} In addition, the act made the Federal Reserve the umbrella regulator for financial holding companies, a new designation for complex financial services organizations.\textsuperscript{382}

The IMF has not yet conducted an FSAP assessment of the United States. However, the U.S. Department of the Treasury conducted a self-assessment of U.S. compliance with the Core Principles in 1998.\textsuperscript{383} The self-assessment concluded that the United States generally complies with the Core Principles.\textsuperscript{384} The bank regulatory agencies are independent and have sufficient staff resources and funding.\textsuperscript{385} The supervisors have the authority to issue licenses and sufficient enforcement authority, from issuing fines to ordering the closure of banks.\textsuperscript{386} The various regulatory agencies have issued appropriate regulations on capital adequacy and loan exposure.\textsuperscript{387}

The only weakness highlighted in the self-assessment was the lack of mandatory “know-your-customer” rules to discourage the use of the banking system for money laundering or criminal activity.\textsuperscript{388} Since the issuance of the self-assessment, the U.S. Department of the Treasury has issued regulations requiring banks to institute a Customer Identification Program.\textsuperscript{389} These regulations meet the requirement of “know-your-customer-rules” set forth in Principle 15 of the Core Principles.\textsuperscript{390}

Overall, the United States is compliant with the Core Principles. According to its own self-assessment, it has fully implemented the Core Principles.\textsuperscript{391} Furthermore, an independent observer has

\begin{itemize}
  \item \textsuperscript{384} See generally U.S. Dep’t of the Treasury, \textit{supra} note 383 (finding that the United States, for the most part, follows the Core Principles).
  \item \textsuperscript{385} Id. at 3.
  \item \textsuperscript{386} Id. at 10–12.
  \item \textsuperscript{387} See id. at 16–19.
  \item \textsuperscript{388} Id. at 35.
  \item \textsuperscript{389} 31 C.F.R. § 103 (2004).
  \item \textsuperscript{390} Core Principles, \textit{supra} note 15, at 6.
  \item \textsuperscript{391} See \textit{supra} note 384 and accompanying text.
\end{itemize}
ranked the United States first in the world for compliance with international financial standards, including the Core Principles. 392

F. Emerging Markets

Implementation of the Core Principles by emerging markets has been more problematic. Generally, the industrialized nations and, in particular, those represented on the Basel Committee, comply with the Core Principles. As seen by recent bank failures, however, this does not mean that the financial systems of the industrialized nations are not risk-free. 393 According to one source, nearly 70% of nations do not adhere to the principle of consolidated supervision in regulating banks, and approximately 45% do not have an independent bank regulator. 394 Offshore financial centers have been of particular concern. In fact, the IMF, in conducting the FSAP, has given priority to assessing forty-four offshore financial centers. 395 As of March 2004, the IMF has completed its assessment of forty-two of these forty-four. 396 Compliance with international financial standards among these offshore financial centers tended to increase with income per capita. 397 According to the IMF, about 40% of the offshore financial centers need to strengthen the bank supervisors’ independence, the supervisors’ available resources, and their ability to conduct onsite and offsite examinations of banks. 398

III. Enforcement of the Core Principles

As discussed above, the Core Principles, like nearly all international financial standards, are “soft law.” 399 They are not treaties en-

396 Id. at 6.
397 Id. at 7.
398 Id. at 8.
399 Soft law means “[g]uidelines, policy declarations, or codes of conduct that set standards of conduct but are not legally binding.” Black’s Law Dictionary 1397 (8th ed.
forceable under international law. The members of the Basel Committee did not intend to create a treaty and did not negotiate the Core Principles as a treaty.

Developing international financial standards as soft law has some advantages. This type of law is flexible and allows the parties to consider specific national conditions or attributes in implementing the standards. For instance, the Core Principles are sensitive to the fact that bank regulatory structures differ greatly among nations. The United Kingdom has a single regulator—the Financial Services Authority—for the entire financial sector. The United States has several bank regulators at the federal level—the Federal Reserve, the Comptroller of the Currency, and the FDIC—and numerous bank regulators at the state level. The Core Principles do not require a specific regulatory structure for compliance. They allow nations to maintain their current structure as long as certain underlying principles, such as independence of the regulator, adequate funding, and adequate staffing, are met. As a practical matter, requiring a specific regulatory structure would be virtually impossible because the reorganization of regulatory agencies typically requires legislation that likely is not within the power of bank regulators alone.

Another advantage that non-binding standards provide is the relative ease with which countries reach agreement on them. The nations recognize the non-binding nature of the agreement and thus tend to be more inclined to accept their substantive standards.

Finally, soft law is particularly effective in industries characterized by rapid change, such as the financial services sector, where improvements in technology and communications allow for new financial products and new methods of delivering financial services.

Nevertheless, soft law also has its disadvantages. This type of law is not directly enforceable by a court or any other judicial authority or tribunal. No court or other legal authority would use the standard as a basis for legal action because the parties never intended to enter into an enforceable agreement.


400 See supra notes 278–296 and accompanying text.
401 See supra notes 364–392 and accompanying text.
403 Id. at 3.
404 See Ho, supra note 248, at 648 n.2.
Furthermore, because the agreements are not legally enforceable, nations can vary in their own interpretation and implementation of the standards. No central authority mandates a particular interpretation; therefore, nations can implement the standards with greater flexibility. For example, the recently announced Revised Capital Accord is intended to apply only to internationally active banks, yet the Basel Committee has never specifically defined what constitutes an “internationally active bank.” The United States has stated that the provisions of the Revised Capital Accord will only apply to internationally active banks (probably the largest thirty or so banks in the United States). In contrast, the EU is planning to enact a directive that requires all banks within the EU to meet the capital requirements under the Revised Capital Accord. Thus, the EU and the United States have interpreted the applicability of the Revised Capital Accord in divergent manners.

Traditionally, the Basel Committee has relied on peer pressure among its members to enforce its standards, including the Core Principles. Bank regulators that freely agree to standards and fail to implement them will likely suffer a loss of reputation within the Committee. Given the Basel Committee’s constant activity reviewing financial supervisory practices around the world, a failure to implement a standard in good faith would likely weaken a nation’s position with respect to future negotiations on new or revised standards.

A. Financial Sector Assessment Program

The IMF and the World Bank have taken on the role of assessing nations’ compliance with international financial standards. The IMF has identified twelve key standards, one of which is the Core Principles. 

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405 Revised Capital Accord, supra note 48, at 1.
Principles, as benchmarks of its assessment program.\textsuperscript{410} In the late 1990s, the IMF organized an assessment program that focused solely on a nation’s implementation of these standards.\textsuperscript{411} The IMF and the World Bank typically send a team of experienced bank supervisors to a nation to evaluate the nation’s compliance with these standards. The IMF then issues its findings from this inspection in documents entitled Reports on Standards and Codes (“ROSC”).\textsuperscript{412}

Subsequently, in 1999, with the cooperation of the World Bank, the IMF expanded and strengthened the ROSC program by creating the FSAP.\textsuperscript{413} The FSAP takes a broader assessment of the overall financial stability and soundness of a nation’s financial system and reviews the nation’s fiscal and monetary policies.\textsuperscript{414} A component of this assessment is a review of the implementation of the twelve key standards,\textsuperscript{415} and, in determining the level of compliance with these standards, the FSAP team compares both the letter of the law and actual practice.\textsuperscript{416}

The IMF publishes the FSAP reports and the ROSC on a particular country only if that country agrees to publication.\textsuperscript{417} Publication of these reports is needed to increase transparency of bank regulatory systems and improve market discipline. Unfortunately, countries do not always consent. In the report on the forty-two offshore financial centers, only twenty-two of the jurisdictions had consented to publication of the FSAP report as of April 2004.\textsuperscript{418}

In 2003, the IMF Board considered instituting a policy of publishing all FSAP reports but decided to maintain its current policy of publishing these reports only with the permission of the nation as-

\textsuperscript{410} IMF, \textit{supra} note 285.


\textsuperscript{413} IMF ROSC Reports, \textit{supra} note 411; see Weber, \textit{supra} note 17.

\textsuperscript{414} Id.

\textsuperscript{415} See IMF, \textit{supra} note 285.


\textsuperscript{417} IMF, \textit{supra} note 409, at 29.

Nevertheless, the IMF did agree to publish the annual Article IV surveillance reports of each member nation beginning July 1, 2004. Article IV surveillance refers to reviews of member nations’ foreign exchange policies, as required by Article IV of the IMF Articles of Agreement. In recent years, these surveillance reports have expanded into an overall review of the monetary policy, fiscal policy, and financial services sector of a particular nation. In the past, the IMF only published the Article IV reports with the permission of the nation assessed.

Publication of the FSAP reports and the ROSCs improves the transparency of national regulatory practices and the soundness of national financial systems. The IMF and World Bank encourage publication of these reports, as do other standard-setting bodies, such as the Financial Stability Forum. A refusal to agree to the publication of the report by the assessed country may indicate serious non-compliance with the standards. Presumably, a jurisdiction complying with the Core Principles and other standards, or making good progress in compliance with the standards, would want to advertise that fact.

Credit rating agencies, such as Fitch Ratings and Standard and Poor’s, review the publicly available reports on compliance with standards when determining a country’s sovereign rating. Compliance with international financial standards is a positive factor in rating a nation’s ability to repay its debt. A better credit rating typically reduces the interest rate that a country must pay on its sovereign debt. This reduction in the interest rate and, thus, borrowing costs, provides an incentive for nations to comply with standards and to agree to publish the independent assessment of the IMF.

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420 Id.
422 Fin. Stability Forum, supra note 419, at 29.
425 See Chambers, supra note 245; Fox, supra note 245.
426 Fox, supra note 245.
For example, emerging market countries’ compliance with these standards is linked to higher credit ratings and lower spreads. After examining data on ratings and spreads from twenty-nine countries, researchers at the IMF concluded:

Our findings suggest that improved adherence to standards, and the higher ratings that result, could help a country mitigate the impact of an external crisis by supporting continued access to external borrowing. Adherence can help prevent crises by reducing spreads and helping the authorities remain solvent in cases it otherwise might not have remained solvent.

Other IMF reports likewise confirm that compliance with international financial standards improves sovereign credit ratings and decreases borrowing costs.

B. Revised Capital Accord

The Revised Capital Accord provides another opportunity to enforce the Core Principles. Pillar I of the Revised Capital Accord defines methods for calculating the minimum required capital for banks. Under the standardized method described in Pillar I, banks may use the ratings by external credit assessment agencies to calculate risk weights for sovereign debt and for debt owed by corporations and banks. The higher the sovereign rating, the lower the risk weight and the lower the amount of capital allocated to that particular credit. The credit rating agencies consider compliance with international financial standards, including the Core Principles, in deter-


428 See id.


430 Revised Capital Accord, supra note 48, at 12-14.

431 Id. at 23–26.

432 See id. at 12–14.
Rating agencies review and evaluate ROSCs and FSAP reports, among other sources of information, in determining sovereign ratings. By complying with international financial standards, national governments make their debt, and loans to corporate borrowers in that nation, more attractive to international banks, because those banks can allocate less capital to those loans and, therefore, increase their profit margins on the loans.

The standardized method also allows banks to consider export credit insurance ratings in determining risk weights. Export credit insurance provides coverage in the event that a nation prevents payments for exports. The insurance premium is dependent on many factors, one of which is the stability of the nation’s financial and political system. In calculating insurance premiums, export credit insurance agencies consider a nation’s compliance with international financial standards, including the Core Principles, and will review any available ROSCs or FSAP reports.

Thus, the provisions of the Revised Capital Accord provide an incentive for nations to implement the Core Principles. Full implementation of the Core Principles will lower borrowing costs for countries, and the borrowers located therein, and reduce the export credit insurance premiums that exporters will pay for coverage. Banks and international businesses therefore have an incentive to exert political pressure on governments to comply with these international financial standards in order to reduce these costs of doing business. International banks and businesses will focus their operations on countries that have complied with international financial standards in order to lower their interest payments on loans and export credit insurance premiums, respectively.

One weakness of reliance on sovereign ratings, however, is that rating agencies do not necessarily analyze all nations. Fitch Ratings issued sovereign ratings for approximately ninety countries in 2004.

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434 Chambers, supra note 245.
435 Revised Capital Accord, supra note 48, at 15-16.
438 See id. at 22–24.
Moody’s and Standard and Poor’s analyzed approximately 100 countries each.\textsuperscript{440} The IMF currently has 184 member nations.\textsuperscript{441} Thus, approximately seventy jurisdictions are not currently rated by one of these three major credit rating agencies.\textsuperscript{442} The largest and most important countries are rated (sometimes by all three agencies), but some less developed nations are not rated and therefore will be unable to take advantage of the lower risk weight categories. The Revised Capital Accord places loans to non-rated countries in the 100\% risk weight category.\textsuperscript{443} Nevertheless, credit rating agencies will likely expand their coverage in the near future, so unrated nations obviously have an incentive to encourage agencies to evaluate them for a rating.\textsuperscript{444}

The second pillar of the Revised Capital Accord focuses on the prudential supervision of a bank’s risk management methods.\textsuperscript{445} Pillar II refers to the Core Principles as part of the overall supervisory process, and states that the Revised Capital Accord complements “the extensive supervisory guidance” in the Core Principles and the Methodology.\textsuperscript{446} In other words, a review of capital adequacy is not a stand-alone process, but is part of the overall supervision of banks. Bank supervisors should apply other supervisory guidance issued by the Basel Committee in addition to the minimum capital adequacy levels of the Revised Capital Accord.\textsuperscript{447}

C. IMF and World Bank Loan Conditions

Conditionality of loans by the IMF and the World Bank provides another enforcement mechanism for the Core Principles. After the


\textsuperscript{442} The author analyzed the country lists of the four credit rating agencies: Standard and Poor’s, Moody’s, Fitch Ratings, and Capital Intelligence, a ratings agency based in Cyprus with its website at http://www.ciratings.com (last visited May 4, 2005).

\textsuperscript{443} Revised Capital Accord, supra note 48, at 15.

\textsuperscript{444} See Vojta & Adams, supra note 433, at 26. EStandards Forum is planning to increase its monitoring and ratings to included 180 countries. Id.


\textsuperscript{447} See Revised Capital Accord, supra note 48, at 174.
Mexican financial crisis in 1994, the IMF and its member nations created a special lending facility for use by nations in financial distress—the New Arrangements to Borrow ("NAB"). 448 Under this new facility, the IMF can issue loans to provide liquidity to national economies. 449 One of the conditions of lending from any of the IMF loan facilities, including the NAB, is compliance with international financial standards or an agreement to implement such standards. 450 One objective behind the IMF loan program is to improve the operation of national financial sectors, one aspect of which is compliance with international financial standards. 451 Of course, a weakness of this enforcement method is that compliance is obtained only after a crisis occurs. Ideally, countries should comply with international standards in an effort to prevent such financial crises in the first place.

IV. Next Steps

The enforcement capabilities of the Core Principles have improved since the 1980s. While enforcement of the Core Principles does not approach the level of enforcement available with binding international treaties, significant improvements in enforcement mechanisms have been made.

What are the next steps in international bank regulation and supervisory cooperation? As the chart in Appendix A and the discussion above show, the history of the Basel Committee standards indicates that standards are developed and then improved in incremental steps. The Basel Committee has typically reacted to bank and financial crises by amending and improving international standards. It has not issued standards in a proactive attempt to anticipate weaknesses in the international financial system.

This reactive approach to standard setting has resulted in standards that are increasingly detailed in their language, while at the same time increasingly broad in their scope. The Basel Committee

449 See id.
initially issued standards related only to the cooperation of supervisors in cross-border banking. Since the Concordat, however, the standards have become steadily more detailed. Then, at the urging of the G-7, the Basel Committee issued broad standards for the entire bank supervisory system, not just for the international coordination of bank supervision, with the Core Principles in 1997.

With regard to capital adequacy, the Basel Committee issued the original Capital Accord in 1988. This accord set substantive minimum capital levels, marking the first time that bank regulators had ever agreed on such a standard. The Revised Capital Accord, issued in June 2004, further develops and revises these standards on minimum capital adequacy.

Given the Basel Committee’s history, incremental change and improvement to the standards will likely continue to be the trend in the development of international bank regulation. Nations tend to be cautious about regulating their financial sectors because of the importance of financial institutions to national economies, especially in emerging markets. Agreeing to an international standard potentially means a loss of national sovereignty, something to which nations are generally very reluctant to concede. Nevertheless, broader and more detailed international standards will be the norm, if for no other reason than improved technology will further increase trade in financial services, pushing nations to revise and expand international financial standards in order to improve the stability of an increasingly global financial system.

Is an international treaty on banking regulation likely in the next decade? While the possibility cannot be ruled out, agreement on a treaty is unlikely in the near future. The international financial system changes quickly as new products are introduced and new markets develop. Treaties are viewed as too rigid to accommodate these rapid changes. In addition, in the event of a financial crisis, bank supervisors desire flexibility to craft a solution to the crisis and fear that a treaty may unexpectedly and unduly restrict their responsiveness.


Nevertheless, a treaty does have numerous enforcement mechanisms that are not available with voluntary international standards.

In 1998, Tony Blair, the Prime Minister of Great Britain, proposed a new international body to improve stability in the international financial system.455 This agency would combine the responsibilities of the Bank for International Settlements, the IMF, and the World Bank.456 The idea went nowhere. No supranational body regulating the international financial system is likely in the near future because of nations’ concerns regarding a loss of sovereignty.457 The EU, in implementing its Financial Services Action Plan and the Lamfalussy Process, is approaching the creation of a supranational regulator of financial services. Even there, member states and the European Parliament are setting limits on the extent of convergence.458 Under the EU’s founding documents, the member states have transferred their sovereign power in certain areas to the EU, but not the prudential supervision of banks and credit institutions.459

Many commentators applaud the establishment of the Financial Stability Forum and expect it to become more prominent in the financial regulatory arena.460 The goal of the Financial Stability Forum is to coordinate the international regulation of the banking, insurance, and securities sectors as financial institutions frequently provide all three types of services.461 Regulators are often organized along sectoral lines and therefore do not easily cooperate in the supervision of complex financial institutions that operate in all three lines of business. As these institutions increasingly offer all types of financial services in such an integrated manner, sectoral supervision is beginning to make less sense. The consolidated supervision of these complex financial institutions becomes more difficult and can place excessive regulatory costs on financial institutions that have to prepare and file multiple reports with several different regulatory agencies.

456 Id.
458 See Randzio-Plath, supra note 264, at 10.
459 EC Treaty, supra note 249, art. 105(5)–(6).
Emerging markets, such as India, China, and certain Latin American countries, will likely continue to become more involved in the Basel Committee process. Emerging market countries made a significant contribution to the Basel Committee’s Core Principles\(^{462}\) and have continued to contribute to Basel Committee activities. The central banks from certain emerging markets, such as China and India, joined the Bank for International Settlements in 1996.\(^{463}\) As emerging markets become more important in the international financial system, their involvement and influence in the Basel process will undoubtedly grow. In 1948, the developed nations (North America, Western Europe, and Japan) accounted for 58.8% of merchandise world trade, while emerging markets accounted for 6.9% of merchandise world trade.\(^{464}\) In 2002, the developed nations’ percentage of world trade was 64.1%, while the emerging markets’ percentage had increased to 9.5%.\(^{465}\) In 1985, banks located in the G-7 nations accounted for 79.5% of all outstanding loans in the world. In 2003, the G-7 banks accounted for 61.5%—an 18% decrease.\(^{466}\) Although the G-7 banks predominate international lending, other banks, including those from emerging markets, are gaining market share. Over the long run, emerging markets will very likely increase their share of international lending and world trade, gaining commensurate influence in the Basel Committee process. As stakeholders in this process, emerging markets will thus be more likely to implement the Core Principles and other international financial standards on a consistent basis.

**Conclusion**

The Core Principles have generally been a success in the developed world. They represent a logical evolution and expansion of the Basel Committee’s activities in light of the globalization of world financial markets. The Basel Committee has involved regulators from the emerging markets more extensively in the past decade, but the Core Principles have thus far not been implemented as consistently in


\(^{465}\) Id.

emerging markets. Soft law is currently the principal approach to harmonize bank regulation and supervisory practices (at least outside of the EU). The surveillance of international financial standards compliance by the IMF and the World Bank represents a new enforcement technique for the Core Principles and other key international financial standards. The Revised Capital Accord itself reinforces the enforcement of the Core Principles. The world undoubtedly will experience additional financial crises in the future. The cooperation and trust among bank supervisors engendered by the process of negotiating the Core Principles, the Revised Capital Accord, and other international banking standards will increase the likelihood of an effective resolution of any future financial crisis.
## Appendix A

### Basel Committee on Banking Supervision

#### Historical Development of Major Supervisory Standards

|------|------|------|------|------|------|------|
 RIGHTS-BASED APPROACHES TO EXAMINING WAIVER CLAUSES IN PEACE TREATIES: LESSONS FROM THE JAPANESE FORCED LABOR LITIGATION IN CALIFORNIA COURTS

Dinusha Panditaratne*

Abstract: Waiver clauses, which purport to bar claims for reparations, appear in numerous historical and contemporary peace agreements, including in the 1951 Treaty of Peace with Japan. This Article questions the validity of many such waivers under the Constitution and applicable international law. However, as demonstrated in a series of federal court decisions from 2000 to 2003 which rejected the reparations claims of former forced laborers in wartime Japan, judges are induced by political considerations to uphold the validity of waiver clauses. How can courts reconcile their duty to protect the fundamental rights of claimants with the realpolitik considerations at play? One answer lies in adopting established interpretive approaches to limit the scope of a waiver clause. The waiver clause in the 1951 Treaty, like many of its counterparts in other treaties, contains several ambiguities. This Article outlines three rights-based interpretive approaches and demonstrates how these could have been invoked to construe one particularly ambiguous aspect of the waiver in the 1951 Treaty, in a manner which would have reconciled competing policy imperatives.

Introduction

From 1999 through 2003, numerous former prisoners of war (POWs) and civilians who were forced laborers in wartime Japan filed suits against the corporations for whom they had worked.¹ Their

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¹ Over thirty individual and class action suits against Japanese corporations—and in certain cases, their U.S. subsidiaries and affiliates—were filed between 1999 and 2001 alone. See Kinue Tokudome, POW Forced Labor Lawsuits Against Japanese Companies (Japan Policy Research Inst. Working Paper No. 82, Nov. 2001), at http://www.jpri.org/publica
claims were triggered by Section 354.6 of the California Code of Civil Procedure\(^2\) which purported to grant any World War II slave laborer or forced laborer the right to sue for compensation.\(^3\)

In 2000 and 2001, however, federal district courts dismissed the plaintiffs’ claims on the ground that they were incompatible with the 1951 Treaty of Peace with Japan\(^4\) (1951 Treaty) and, specifically, with the waiver clause contained in Article 14(b) of that treaty, which states:

\[\text{[a]ny Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate.}\]

\[\text{Id. Section 354.6 defines “forced labor” and “slave labor” differently. Section 354.6(a)(1) provides that:}\]

“Second World War slave labor victim” means any person taken from a concentration camp or ghetto or diverted from transportation to a concentration camp or from a ghetto to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

\[\text{Id. By contrast, Section 354.6(a)(2) provides that:}\]

“Second World War forced labor victim” means any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers, or prisoner-of-war of the Nazi regime, its allies or sympathizers, forced to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

\[\text{Id. The term “forced laborers” will be used in this Article when referring to the former forced laborers in Japan who filed claims pursuant to Section 354.6, given that the definition of a “slave labor victim” in Section 354.6(a)(1) makes reference to “concentration camps” and “ghettos,” concepts which are associated with wartime Europe rather than wartime Japan. Furthermore, the definition of a “forced labor victim” in Section 354.6(a)(2) expressly refers to “civilians” and “prisoners of war,” terms which describe the wartime status of plaintiffs in the cases examined in this Article. See id.}\]

Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.\(^5\)

Additionally, the district courts held that Section 354.6 was an unconstitutional infringement by California of the foreign affairs power of the federal government. The district courts’ decisions were subsequently affirmed by the United States Court of Appeals for the Ninth Circuit in the case of *Deutsch v. Turner Corp.*\(^6\) The Ninth Circuit’s decision in *Deutsch* effectively ended the hopes of victims of forced labor in wartime Japan of obtaining compensation on the basis of Section 354.6. In October 2003, the United States Supreme Court refused a petition for the writ of certiorari with respect to the Ninth Circuit’s decision.\(^7\)

This Article does not delve into the longstanding debate regarding the capacity of states to legislate on matters of foreign policy under federal constitutional law. Consequently, it does not assess the courts’ refusal to grant the forced laborers’ claims for compensation on the ground that Section 354.6 was unconstitutional for violating the federal foreign affairs and war powers. There are reasons to support the position of the Ninth Circuit in *Deutsch* as well as the Supreme Court’s position in recent decisions\(^8\) that the federal arm of government is supreme over states in the realm of foreign affairs, which have already been elucidated by other commentators.\(^9\)

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\(^5\) Id. art. 14(b), 3 U.S.T. at 3183, 136 U.N.T.S. at 64.

\(^6\) *Deutsch II*, 324 F.3d 692 (9th Cir. 2003), amending and superseding *Deutsch v. Turner Corp.*, 317 F.3d 1005 (9th Cir. 2003) ("*Deutsch I*.")


\(^8\) See, e.g., *Garamendi*, 539 U.S. at 397.

ever, now that states clearly have been restricted in legislating on matters affecting foreign policy, it is imperative to examine what role the courts should have in overseeing provisions in treaties and federal executive agreements.

It is an underlying tenet of this Article that in a federal democracy, both states and courts have a vital role to play in ensuring pluralistic government with counter-majoritarian checks. And if states are to be circumscribed from playing any significant role in foreign affairs, even where their intention is only to protect individual rights, then there is an even greater need for courts to act as judicial overseers of treaties and other international agreements entered into by the federal government. It is a matter for particular concern when courts retreat from examining agreements which infringe upon the rights of individuals to make claims for serious human rights violations, especially when those violations have not been committed by other nations per se, but by corporations or other private parties. Yet such a judicial retreat was precisely what occurred when the federal district courts and the Ninth Circuit were called on to examine the validity and import of Article 14(b) of the 1951 Treaty on former forced laborers’ claims for compensation.

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10 See Ronald Dworkin, Taking Rights Seriously 140–49 (1977) (discussing the role of the courts in protecting rights). States and courts are intrinsically more likely to protect individual rights than the federal arms of government, which have a greater tendency to be concerned with broader matters such as national security and the maintenance of trade and other relations with foreign countries. By contrast, states and local communities are responsive to a narrower field of stakeholders, and courts focus (at least in civil matters) on resolving disputes among individuals and other private parties.

11 See Jordan J. Paust, Customary International Law and Human Rights Treaties are Law of the United States, 20 Mich. J. Int’l L. 301, 320–21 (1999) (noting the historical foundation of the view that U.S. judges should be vigilant protectors of individual rights against government encroachment). Paust comments that “the Founders had worried about the dangers of oppression and denial of rights by a government that is a mere instrument of the majority” and that “[j]udicial power is an integral part of the constitutional design for the separation of powers.” Id.

12 At least one commentator has criticized the courts’ deferential approach to executive agreements (i.e., agreements which are neither treaties ratified by the Senate, nor made with other congressional approval) that waive private claims against non-sovereign entities. See Ingrid Brunk Wuerth, The Dangers of Deference: International Claim Settlement by the President, 44 Harv. Int’l L.J. 1 (2003) (arguing that a series of such agreements, which were made during the final months of the Clinton administration, conflict with the Treaty and Supremacy Clauses of the Constitution and “mark an important departure from prior practice by resolving pending U.S. litigation against private companies rather than claims against foreign sovereigns”). Even with respect to treaties and congressionally approved executive agreements, courts should adopt a rights-based examination and interpretation of such documents. See infra Parts II, IV.

13 See infra Parts II, IV.
Section 354.6 is only one example of numerous pieces of state and local legislation which show that human rights values now have taken root in political and law-making culture.\textsuperscript{14} If states no longer are able to act on matters which affect foreign affairs, the courts must approach the inspection and interpretation of treaties and other international agreements entered into by federal powers in a manner which supports these human rights values.\textsuperscript{15} Indeed, this rights-based approach by courts in assessing treaty provisions is strongly supported by historical judicial precedent, as evinced in earlier Supreme Court cases, such as \textit{Asakura v. City of Seattle}.\textsuperscript{16} This Article suggests how such a rights-based approach could have been implemented by the courts that assessed Article 14(b) in the Japanese forced labor cases, and thereby also indicates how it could be pursued in the context of other provisions in peace treaties which adversely impact human rights. Clauses similar to Article 14(b) appear in numerous international peace agreements, including several that have been concluded in recent years.\textsuperscript{17}


\textsuperscript{15} Some commentators argue that states can and should play a significant role in protecting human rights in a federal democracy. \textit{See, e.g.}, Bradley, \textit{supra} note 9. Others trumpet the role of courts—especially federal courts—in upholding rights. \textit{See, e.g.}, Paust, \textit{supra} note 11. It is not the purpose of this Article to debate whether states or courts have the greater contribution to make to protecting rights. Suffice to say that, now that states have been circumscribed in their protective role, \textit{see supra} notes 6–8 and accompanying text, it is all the more important that courts are vigilant in upholding rights to ensure a check and balance against a majoritarian federal government.

\textsuperscript{16} \textit{Asakura v. City of Seattle}, 265 U.S. 332, 342 (1924) (“Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.”).

In particular, this Article demonstrates that, in rejecting the forced laborers’ claims on account of Article 14(b) of the 1951 Treaty, the courts neglected to properly examine the validity and scope of Article 14(b) of the 1951 Treaty. It is argued that the courts had strong grounds to declare Article 14(b) invalid under both international law\(^\text{18}\) and domestic constitutional law because of the severe, rights-based implications of Article 14(b). Yet it also must be acknowledged that political considerations strongly deter judicial invalidation of treaty provisions, even if those provisions condone gross violations of human rights. Accordingly, this Article suggests how courts can undertake their examination of treaty provisions in a manner that takes into account these realpolitik considerations while also maintaining their historical role as guardians of individual rights. Specifically, courts could, and should, adopt rights-based interpretive approaches in construing the scope of treaty provisions, which would involve identifying any ambiguities in such provisions and resolving such ambiguities in favor of those whose rights have been infringed.

Part I of this Article comprises a brief historical background to the relevant issues in the Japanese forced labor litigation and a brief

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\(^{18}\) The grounds for Article 14(b)’s invalidity would be international law as it is applied in U.S. courts.
account of Section 354.6 and the case law that followed it. In Part II, the validity of Article 14(b) is critically assessed, from an international law perspective as well as from a domestic constitutional perspective. Part III contains an exploration of the political considerations at stake in the Japanese forced labor cases, as a means of understanding why the courts were reluctant to invalidate Article 14(b). In Part IV, the author first discusses several ambiguities in the text of Article 14(b). The author examines the utility of interpretive methods in protecting rights while still taking into account political considerations, and presents three distinct, rights-based interpretative approaches which could be adopted to resolve such ambiguities. Finally, in Part V, the application of these interpretive approaches is exemplified by demonstrating how they could have been employed to resolve one of the starker ambiguities in the meaning of Article 14(b).

I. Background

A striking aspect of the Japanese forced labor litigation is that the courts inquired primarily into the legal, rather than factual, aspects of the plaintiffs’ claims. At the outset of each case, the courts largely accepted the veracity of the plaintiffs’ harrowing stories of forced labor at the hands of the defendants, stories which mirror the numerous historical accounts of forced labor in wartime Japan. Thus it was uncontested that the claims of the plaintiffs in the Section 354.6 litigation implicated grave violations of human rights. In Deutsch, for example, Circuit Judge Reinhardt described how corporations and their managers, with the cooperation and encouragement of their governments, subjected many individuals to vicious cruelties and forced them to work long hours without pay. The slave workers were often underfed, physically beaten, exposed to dangerous conditions,

19 See Deutsch II, 324 F.3d at 703 (“Plaintiffs-Appellants . . . seek damages and other remedies for lost wages and for other atrocious injuries they suffered in the course of their forced labor.”); In re World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 942 (N.D. Cal. 2000) (“Japanese Forced Labor Litig. I”) (“James King is one of the plaintiffs in these actions against Japanese corporations for forced labor in World War II; his experience, and the undisputed injustice he suffered, are representative.”) (emphasis added).
and denied medical care.\textsuperscript{23} Furthermore, many were murdered, and others died as a result of the maltreatment they suffered.\textsuperscript{24} In \textit{Taiheiyo Cement Corp. v. Superior Court},\textsuperscript{25} the California Court of Appeal heard the claim of a former Korean forced laborer, and described the circumstances of the plaintiff, Jae Won Jeong, as follows: “Refusing to join the Japanese military, Jeong was taken to a slave labor camp in Korea operated by a Japanese cement company. Along with other Korean nationals, Jeong was subjected to physical and mental torture and forced to perform physical labor without compensation . . . .”\textsuperscript{26}

Japan captured approximately 27,000 U.S. POWs and 140,000 Allied POWs in total.\textsuperscript{27} Historians have estimated that by 1945, as many as 50,000 Allied POWs, 30,000 Chinese, and between 600,000 and 1 million Koreans were forced to labor for Japanese industry, frequently in the most dangerous and arduous of industries, such as coal mining, in which Japanese men and women were reluctant to work.\textsuperscript{28} It has been estimated that 38.2\% of U.S. POWs in Japan died in captivity, although it is unclear precisely how many of these deaths are attributable to forced labor.\textsuperscript{29} By contrast, a little over 1\% of U.S. POWs died while in German wartime captivity.\textsuperscript{30}

The surrender of Japan on August 15, 1945, following the United States’ use of atomic bombs on the cities of Hiroshima and Nagasaki,\textsuperscript{31} and the subsequent occupied rule of Japan for seven years under the leadership of General MacArthur,\textsuperscript{32} eventually led to the signing of the 1951 Treaty. The terms of the Treaty, which took effect

\textsuperscript{23} Deutsch II, 324 F.3d at 704.
\textsuperscript{24} Id.
\textsuperscript{25} Taiheiyo Cement Corp. v. Superior Court, 129 Cal. Rptr. 2d 451 (Cal. Ct. App. 2003) ("Taiheiyo I"). The decision preceded, and was contradicted by, the decision of the Ninth Circuit in Deutsch II. In Taiheiyo I, the court agreed that the 1951 Treaty barred the claims of plaintiffs from signatory nations, but affirmed the constitutionality of Section 354.6 with respect to plaintiffs from non-signatory nations, thereby upholding the claim of a Korean victim of forced labor made pursuant to Section 354.6. This decision was later vacated, however, in Taiheiyo Cement Corp. v. Superior Court, 12 Cal. Rptr. 3d 32 (Cal. Ct. App. 2004), where the court reconsidered their decision in light of the Supreme Court’s decision in American Insurance Ass’n v. Garamendi, 539 U.S. 396 (2003), and held that Section 354.6 was, after all, unconstitutional and preempted by the 1951 Treaty. See 12 Cal. Rptr. 3d at 42.
\textsuperscript{26} Taiheiyo I, 129 Cal. Rptr. 2d at 454.
\textsuperscript{27} Reynolds, supra note 21, at 2, 12.
\textsuperscript{28} McClain, supra note 21, at 489.
\textsuperscript{29} Reynolds, supra note 21, at 11.
\textsuperscript{30} Id.
\textsuperscript{31} The United States dropped a nuclear bomb on Hiroshima on August 6, 1945 and on Nagasaki on August 9, 1945.
\textsuperscript{32} Colin Mason, A Short History of Asia 240 (2000).
on April 28, 1952, were not designed to punish Japan for its wartime role nor to exact heavy reparations from it, but rather to pave the way for Japan’s future economic prosperity and political stability, which would ensure its status as a U.S. and Western ally.\textsuperscript{33} It was, apparently, with this objective in mind, that the United States and other Western Allied Powers agreed to the waiver set forth in Article 14(b) of the 1951 Treaty.\textsuperscript{34}

In enacting Section 354.6 almost half a century later, the Californian legislature was not seeking to override the terms of the 1951 Treaty, nor even to provide a means of legal redress to victims of Japanese forced labor.\textsuperscript{35} Rather, the foremost objective of the legislators was to assist the cause of slave and forced labor victims in Germany and other European countries during World War II, whose negotiations with German companies for war reparations had come to a standstill.\textsuperscript{36} But when a mass settlement of claims against German industry and government was achieved in December 1999, and against the Austrian industry and government in October 2000, Section 354.6 essentially became obsolete with regard to German and other Euro-

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\item \textsuperscript{33} See McClain, supra note 21, at 556.
\item \textsuperscript{34} See 1951 Treaty, supra note 4, art. 14(a), 3 U.S.T. at 3180–90, 136 U.N.T.S. at 60–61 (recognizing explicitly “that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation”); Japanese Forced Labor Litig. I, 114 F. Supp. 2d at 946–47. Limited compensation was granted to certain categories of war victims from Allied nations. In the United States, the War Claims Act of 1948 established the War Claims Commission (WCC), see Reynolds, supra note 21, at 3, which paid American POWs between $1 and $2.50 per day of imprisonment and paid limited types of civilian American internees $60 per month of detention. Id. at 6–7. However, substantial categories of former war victims and forced laborers were excluded from the WCC scheme. These included several thousand POWs in U.S. territories (e.g. Filipino POWs) and U.S. civilians interned in most Asian countries who had received State Department warnings to leave those countries. For further details on the WCC scheme, see id. at 3–9. More recently, forced laborers have pursued legal and political means to obtain additional compensation, especially after Congress approved granting $20,000 to Japanese-Americans detained in the United States during World War II. See Civil Liberties Act of 1998, 50 U.S.C. § 1989b-4 (2000). Thus, POWs and civilian internees filed suit in Japanese courts in 1995 for a net individual payment of $20,000, but the Japanese courts refused these claims, citing Article 14(b) of the 1951 Treaty. Reynolds, supra note 21, at Summary. Several bills have been unsuccessfully introduced in Congress to provide additional compensation to forced laborers. Id. at 21–23. Currently, a bill entitled the “Justice for United States Prisoners of War Act of 2003,” which directs courts not to interpret Article 14(b) as a bar to forced laborers’ claims for compensation, is being considered by Congress. See Justice for United States Prisoners of War Act of 2003, H.R. 1864, 108th Cong. (2003).
\item \textsuperscript{36} See id. There is a distinction between “slave labor” and “forced labor.” See supra note 3.
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pean slave and forced labor victims and, consequently, became of greatest use to victims of Japanese forced labor.\footnote{37 See Bayzler, supra note 35, at 22–25, 27.}

Following the implementation of Section 354.6, several cases were filed by former POWs and civilian internees of various nationalities against Japanese corporations who were alleged to have engaged forced labor.\footnote{38 See supra note 1 and accompanying text.} Most of these cases were filed in state courts, but were then removed to and consolidated in the United States District Court for the Northern District of California, where they were heard by Judge Vaughn Walker.\footnote{39 See, e.g., Deutsch II, 324 F.3d at 705–06; Bayzler, supra note 35, at 27; Brannon P. Denning, International Decision: American Insurance Ass’n v. Garamendi and Deutsch v. Turner Corp., 97 Am. J. Int’l L. 950, 955 (2003).} In the first of a series of decisions, Judge Walker denied the claims of the plaintiffs who were former U.S. and Allied POWs in *In re World War II Era Japanese Forced Labor Litigation*\footnote{40 Japanese Forced Labor Litig. I, 114 F. Supp. 2d 939 (N.D. Cal. 2000).} (Japanese Forced Labor Litigation (2000)), on the basis that the claims were incompatible with the 1951 Treaty.\footnote{41 Id. at 945.} The district court looked specifically to Article 14(b) of the 1951 Treaty and held that, as the plaintiffs were former members of the U.S. and other Allied armed forces, Article 14(b) constituted a clear waiver of their claims.\footnote{42 Id. at 942.}

Judge Walker left open, however, the question of the impact of Article 14(b) on the claims of plaintiffs who were not former U.S. or Allied POWs.\footnote{43 Id. at 942. The court stated the following: This order does not address the pending motions to dismiss in cases brought by plaintiffs who were not members of the armed forces of the United States or its allies. Since these plaintiffs are not citizens of countries that are signatories of the 1951 treaty, their claims raise a host of issues not presented by the Allied POW cases and, therefore, require further consideration in further proceedings.} He addressed that question a year later in the cases of *In re World War II Era Japanese Forced Labor Litigation (Filipinos)*\footnote{44 See, e.g., Deutsch II, 324 F.3d at 705–06; Bayzler, supra note 35, at 27; Brannon P. Denning, International Decision: American Insurance Ass’n v. Garamendi and Deutsch v. Turner Corp., 97 Am. J. Int’l L. 950, 955 (2003).} and *In re World War II Era Japanese Forced Labor Litigation*\footnote{45 Japanese Forced Labor Litig. II, 164 F. Supp. 2d 1153 (N.D. Cal. 2001) (“Japanese Forced Labor Litig. II”).} (Japanese Forced Labor Litigation (2001)). In the former case, Judge Walker determined that, although the Filipino plaintiffs were not former U.S. or Allied
soldiers, their claims were nevertheless barred by Article 14(b) because the Philippines, having signed and ratified the 1951 Treaty, was an “Allied Power” pursuant to the terms of the Treaty.\footnote{See Japanese Forced Labor Litig. II, 164 F. Supp. 2d at 1157. The Philippines was named in Article 23 of the 1951 Treaty as a state to which the Treaty would be presented for signature and ratification. 1951 Treaty, supra note 4, art. 23, 3 U.S.T. at 3189, 136 U.N.T.S. at 74. Article 25 of the 1951 Treaty states that “the Allied Powers shall be the States at war with Japan, or any State which previously formed a part of the territory of a State named in Article 23, provided that in each case the State concerned has signed and ratified the Treaty.” Id. art. 25, 3 U.S.T. at 3190, 136 U.N.T.S. at 74.} In \textit{Japanese Forced Labor Litigation (2001)}, Judge Walker decided that, by contrast, Article 14(b) did not bar the claims of plaintiffs of Korean and Chinese descent because neither Korea nor China were signatories to the 1951 Treaty.\footnote{See Japanese Forced Labor Litig. III, 164 F. Supp. 2d at 1165–68.} Those plaintiffs’ claims, however, were denied nonetheless.\footnote{Id. at 1168 (“Simply because the claims of the Korean and Chinese plaintiffs derived from section 354.6 are not preempted by the Treaty of Peace with Japan does not mean that they can go forward, however.”).} Judge Walker held that Section 354.6 of the California Code of Civil Procedure was an unconstitutional infringement on the exclusive foreign affairs power of the federal government of the United States,\footnote{Id. at 1168–78.} and that the plaintiffs’ remaining claims pursuant to the Federal Alien Tort Claims Act\footnote{Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).} (ATCA) were time-barred.\footnote{See Japanese Forced Labor Litig. III, 164 F. Supp. 2d at 1179–82.}

The appeals of plaintiffs in all of the aforementioned cases were heard and dismissed in \textit{Deutsch}, where the Ninth Circuit reiterated that Section 354.6 amounted to an “unconstitutional intrusion on the foreign affairs power of the United States,”\footnote{Deutsch II, 324 F.3d at 719. The Ninth Circuit held that Section 354.6 also infringed the exclusive power of the federal government in matters relating to war. According to the Ninth Circuit, “the Constitution allocates the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including the authority to resolve war claims, is central to the foreign affairs power in the constitutional design.” Id. at 713–14.} and that the forced laborers’ remaining claims pursuant to the ATCA and the Torture Victims Protection Act\footnote{Torture Victim Protection Act, 28 U.S.C. § 1350 (2000).} were time-barred.\footnote{See Deutsch II, 324 F.3d at 716–18.} Furthermore, the Ninth Circuit held that Article 14(b) of the 1951 Treaty barred all reparations claims in U.S. courts, even by claimants who were not nationals of parties to the 1951 Treaty.\footnote{See \textit{id.} at 714 n.14.} However, just a week prior to the Ninth Circuit’s decision in \textit{Taiheiyo} had taken a mark-
edly different approach. While the California Court of Appeal agreed that the 1951 Treaty barred the claims of plaintiffs from signatory nations, it affirmed the constitutionality of Section 354.6 with respect to plaintiffs from non-signatory nations, thus upholding the claim of a Korean victim of forced labor made pursuant to Section 354.6.\textsuperscript{56} The Supreme Court’s refusal in October 2003 to hear an appeal of the Ninth Circuit’s decision in \textit{Deutsch}, however, made clear that the decision in \textit{Deutsch}, rather than in \textit{Taiheiyo}, prevails.\textsuperscript{57}

II. Validity of Article 14(b) of the 1951 Treaty of Peace with Japan

Article 14(b) of the 1951 Treaty is typical of a so-called “waiver clause” in a peace treaty, in that it purports to waive or otherwise prevent civil claims by a state and its nationals (potential plaintiffs) against another state and its nationals (potential defendants).\textsuperscript{58} A fundamental question, however, is whether a state can waive claims of reparative justice on behalf of its nationals, including its private citizens. In other words, is Article 14(b) even a legally valid treaty provision, either under international law or domestic constitutional law? Judge Walker in \textit{Japanese Forced Labor Litigation} (2000) determined that, under domestic law, the federal government can indeed waive the claims of its citizens against another state and that state’s nationals, and thereby affirmed the legality of Article 14(b).\textsuperscript{59} Judge Walker looked to the decision of the Supreme Court in \textit{Dames & Moore v. Regan}\textsuperscript{60} as clear authority for this view.\textsuperscript{61} In that case, Justice Rehnquist stated:

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\textsuperscript{56} See generally \textit{Taiheiyo I}, 129 Cal. Rptr. 2d 451, 472 (upholding the claims of plaintiffs from nonsignatory nations).

\textsuperscript{57} See supra note 7 and accompanying text.

\textsuperscript{58} See supra note 17 for examples of other peace treaties that contain waiver clauses. A waiver clause is also sometimes referred to as an “immunity clause,” although there appears to be a technical distinction between the two types of clauses. It would seem that an immunity clause purports to grant immunity from criminal prosecution, while a waiver clause purports to prevent civil claims.

\textsuperscript{59} \textit{Japanese Forced Labor Litig. I}, 114 F. Supp. 2d at 948.

\textsuperscript{60} 453 U.S. 654 (1981).

\textsuperscript{61} \textit{Japanese Forced Labor Litig. I}, 114 F. Supp. 2d at 948. In reaching the conclusion that the federal government can waive the claims of its citizens, Judge Walker relied heavily upon the views of the U.S. government as they were reflected in statements of interest and elsewhere. See, e.g., \textit{Japanese Forced Labor Litig. III}, 164 F. Supp. 2d at 1176; \textit{Japanese Forced Labor Litig. I}, 114 F. Supp. 2d at 948.
Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are “sources of friction” between the two sovereigns. *United States v. Pink*, 315 U.S. 203, 225 (1942). To resolve these difficulties, nations have often entered into agreements settling the claims of their respective nationals.\(^{62}\)

Judge Walker’s conclusion, however, warrants further scrutiny. At the outset, it is instructive to consider whether a state can waive the claims of its nationals for human rights abuses under customary international law. This is not an esoteric consideration, given that there is judicial and academic authority for the view that international law, whether part of customary international law or self-executing treaties,\(^{63}\) is automatically part of U.S. law.\(^{64}\) There are two divergent strands of this view. The stricter form of this view is that international law is directly applicable by U.S. judges and thus a treaty or statutory provision which is invalid under later-developed customary international law would have no effect in U.S. courts.\(^{65}\) In its more lenient form, the view that international law is part of U.S. law holds that legislative and executive acts should be *construed* in light of international law, and accordingly, courts should endeavor to interpret treaties in a

\(^{62}\) *Regan*, 453 U.S. at 679.


\(^{64}\) The *Paquete Habana*, 175 U.S. 677, 700 (1900). In *The Paquete Habana*, the Supreme Court stated that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.” *Id.;* see Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). Regarding the substance of international law to be applied by U.S. courts, the Second Circuit has opined that “it is clear that courts must interpret international law not as it was in 1789, but as has evolved and exists among the nations of the world today.” Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980). Commentators who have supported the view that international law is automatically part of U.S. law include Professor Paust, who stated that “the customary law of nations is part of the law of the United States, even with respect to private duties.” Paust, *supra* note 11, at 336. As a logical extension of the later-in-time rule expounded in *Reid v. Covert*, 354 U.S. 1 (1957), that in case of inconsistency between a treaty and statute, the most recent one must prevail, Professor Henkin, among others, has argued that newly developed customary international law would also prevail over earlier statutes and treaties, assuming that the United States has been party to its development and Congress has not indicated rejection of such law. *Louis Henkin, International Law as Law in the United States.* 82 MICH. L. REV. 1555, 1563–69 (1984).

\(^{65}\) For a defense of this view, see Henkin, *supra* note 64, at 1561, 1564–65.
manner which does not conflict with customary international law. Yet neither Judge Walker, nor the courts in Taiheiyō and Deutsch, paused to consider the validity or meaning of Article 14(b) from the perspective of international law.

A. Validity of Waiver Clauses Under International Law

International law consists primarily of rules contained in treaties and rules forming part of customary international law. A state is bound by every treaty to which it is a party, but it is usually permitted to disavow a rule of customary international law; for example, by consistently objecting to a customary rule or by ratifying a treaty which permits or mandates divergence from the rule. However, there exists a special category of customary international law known as *jus cogens* norms (for example, the norms prohibiting genocide and torture), from which no divergence is permitted. *Jus cogens* norms, which are also known as “peremptory norms,” are regarded as inalienable. Accordingly, states always are bound by them and moreover, a treaty can-

66 See Curtis A. Bradley & Jack L. Goldsmith, Foreign Relations Law: Cases and Materials (2003) (stating that it is unlikely that “international law is part of our law,” but acknowledging that an “interpretive role is where customary international law may have its most significant effect in the U.S. legal system”).

67 There is no discussion in Deutsch II or Taiheiyō I as to the validity or meaning of Article 14(b) under international law. See generally Deutsch II, 324 F.3d 692; Taiheiyō I, 129 Cal. Rptr. 2d 451 (both cases lacking treatment of the subject). In Japanese Forced Labor Litigation I, Judge Walker notes plaintiffs’ argument “that waiver of plaintiffs’ claims renders the treaty unconstitutional and invalid under international law” but does not address the international law component of this argument. 114 F. Supp. 2d at 948.

68 Customary international rules are norms that nation states both (1) actually practice, and (2) accept as legally binding. The first of these two requirements is commonly referred to as *usus* and the latter is known as *opinio juris*. See Ian Brownlie, Principles of Public International Law 4–9 (5th ed. 1998); Wesley A. Caan, Jr., On the Relationship Between Intellectual Property Rights and the Need of Less-Developed Countries for Access to Pharmaceuticals, 25 U. Pa. J. Int’l Econ. L. 755, 912 (2004). Pursuant to Article 38(1) of the Statute of the International Court of Justice, “the general principles of law” constitute a third source of international law, aside from treaties and custom. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(c), 59 Stat. 1055, 1060, annexed to U.N. Charter.

69 See Brownlie, supra note 68, at 10. 12–13.

70 See id., at 514–15; see also United States v. Matta-Ballesteros, 71 F.3d 754, 764 n.5 (9th Cir. 1995). Note, however, that some commentators disagree that *jus cogens* norms constitute part of customary international law. See, e.g., Anthea Elizabeth Roberts, Traditional and Modern Approaches to Customary International Law, 95 Am. J. Int’l L. 757, 783 (2001).

71 Brownlie, supra note 68, at 514–16; V. D. Degan, Sources of International Law 217, 226 (1997).
not contain any provision that conflicts with such norms. Article 53 of the Vienna Convention on the Law of Treaties (VCLT) thus states:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 64 of the VCLT similarly provides that a treaty is void if it conflicts with a norm which attains *jus cogens* status after the treaty enters into force.

The least controversial peremptory norms include the law of genocide, the principle of racial non-discrimination, and the prohibition against slavery. The prohibition against forced labor was, at the time the 1951 Treaty entered into force in 1952, an undisputed norm of treaty law as well as of customary international law. The 1929 Convention on Prisoners of War and the 1949 Third Geneva Convention prohibited states from using POWs as forced laborers, and the International Labor Organization (ILO) Convention No. 29 of

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72 See Brownlie, *supra* note 68, at 516; Degan, *supra* note 71, at 217, 226.
73 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. The VCLT was signed, but not ratified, by the United States. See id. Nevertheless, its provisions are widely accepted as part of customary law and have been cited by U.S. courts on numerous occasions. See, e.g., State v. Pang, 940 P.2d 1293, 1322 n.88 (Wash. 1997) (stating that “although the United States has not ratified this treaty, it is accepted as the authoritative guide to treaty law and practice and declaratory of customary international law”).
74 VCLT, *supra* note 73, art. 53, 1155 U.N.T.S. at 344.
75 Id. art. 64, 1155 U.N.T.S. at 347 (“If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”).
1930 contained similar proscriptions on using civilian forced laborers.\textsuperscript{80} By analogy to the prohibition against slavery, the prohibition against forced labor is now also widely accepted as a \textit{jus cogens} norm, both in judicial and academic commentary.\textsuperscript{81} The ILO has also recently described forced labor as a violation of a \textit{jus cogens} norm.\textsuperscript{82} At the least, forced labor can be regarded as violating a \textit{jus cogens} norm when it is practiced in a manner equivalent to slavery; signified, for example, by imposing forced labor for an indefinite amount of time (thereby presuming ownership rights by the perpetrator and a loss of personhood of the victim) and in highly abusive conditions, as almost invariably occurred in wartime Japan.\textsuperscript{83}

As Article 14(b) purportedly prevents compensation for forced labor, certain commentators have argued that Article 14(b) conflicts with a \textit{jus cogens} norm and is therefore void.\textsuperscript{84} However, it must be recognized that waiver clauses like Article 14(b) do not \textit{per se} permit

\begin{flushright}
\textsuperscript{80} Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55 (ratified by 164 countries, including Japan). Article 4 provides that: “The competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations.” \textit{Id.} art. 4, 39 U.N.T.S. at 58–59.

\textsuperscript{81} See, e.g., Cleveland, \textit{supra} note 76, at 27. In identifying \textit{jus cogens} norms, Cleveland states that the “prohibition against slavery reasonably may be read to include the prohibition against forced and bonded labor.” \textit{Id.; see also Japanese Forced Labor Litig. III}, 164 F. Supp. 2d at 1179 (“Given the Ninth Circuit’s comment . . . that slavery constitutes a violation of \textit{jus cogens}, this court is inclined to agree . . . that forced labor violates the law of nations.”). For a contrary view that appears to be in the minority, see Pia Zara Thadhani, \textit{Regulating Corporate Human Rights Abuses: Is Unocal the Answer?}, 42 \textit{Wm. & Mary L. Rev.} 619, 633–34 (2000) (“Forced labor involves involuntary and abusive conduct, however, unlike slavery, it does not involve ownership rights in other human beings. This is not to say that forced labor should be condoned under any standard, but if allowed, this definitional flexibility might lead U.S. courts to sanction deviant conduct that does not rise to the level of a \textit{jus cogens} violation.”).


\textsuperscript{83} See Nat’l Coalition Gov’t of Burma v. Unocal, Inc., 176 F.R.D. 329, 353 (C.D. Cal. 1997) (“With respect to allegations of forced labor, although the parties have not yet fully briefed the issue, for purposes of the pending motion, the Court concludes that the allegations of forced labor raise the potential that plaintiffs could state a claim for slavery or slave trading, which appear to be \textit{jus cogens} violations.” (emphasis added)).

\textsuperscript{84} Karolyn A. Eilers, \textit{Article 14(b) of the 1951 Treaty of Peace with Japan: Interpretation and Effect on POW’s Claims Against Japanese Corporations}, 11 \textit{Transnat’l L. & Contemp. Probs.} 469, 479 (2001); see also Karen Parker & Jennifer F. Chew, \textit{Compensation for Japan’s World War II War-Rape Victims}, 17 \textit{Hastings Int’l & Comp. L. Rev.} 497, 538 (1994) (arguing that Article 14(b) is void if it “effectively nullifies . . . \textit{jus cogens} rights or allows violations of \textit{jus cogens} to go uncompensated”).
or condone forced labor.\textsuperscript{85} Rather, Article 14(b) waives the right to claim for compensation or reparations for forced labor “in the course of the prosecution of the war.”\textsuperscript{86} A pertinent question, therefore, is whether a peremptory norm encompasses the right to compensation for a violation of that norm. Put in the language of Article 53 of the VCLT,\textsuperscript{87} is a government’s purported waiver of individual claims for compensation for a violation of a peremptory norm in “conflict with” that peremptory norm, and therefore void? There is no authoritative case law or commentary on this issue,\textsuperscript{88} but it has been argued that a treaty which bars compensation claims for forced labor, or any other violation of a \textit{jus cogens} norm, is void under international law because it frustrates the very purpose and realization of that norm.\textsuperscript{89} Indeed, this argument is particularly forceful with respect to treaty provisions that bar compensation for violations of the \textit{jus cogens} norms prohibit-

\textsuperscript{85} See 1951 Treaty, supra note 4, art. 14(b), 3 U.S.T. at 3183, 136 U.N.T.S. at 64.

\textsuperscript{86} Id.

\textsuperscript{87} See VCLT, supra note 73, art. 53, 1155 U.N.T.S. at 344.

\textsuperscript{88} The most relevant case law and commentary addresses whether the international norm of sovereign immunity precludes claims against a state or other sovereign entity for a violation of \textit{jus cogens} norms. The majority of relevant U.S. and international cases have upheld sovereign immunity as a defense against such claims for \textit{jus cogens} violations. See, e.g., Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994); Controller and Auditor Gen. v. Davison [1996] 2 N.Z.L.R. 278; Al-Adsani v. United Kingdom, 2002-34 Eur. Ct. H.R. 1751 (2001). At least two factors, however, argue against using these cases as precedent for upholding the validity of a treaty provision which waives claims against a state and its nationals. Most obviously, the defense of sovereign immunity is only available to states or state-owned entities, not to private corporations or other non-state actors. See Rosalyn Higgins, Problems and Process: International Law and How We Use It 78–79 (1994). Secondly, the application of the defense of sovereign immunity appears to be narrowing, as courts and legislators try to balance it with human rights concerns. Thus, there is some authority for the view that sovereign immunity does not bar criminal prosecutions for \textit{jus cogens} norms. See Regina v. Bow St. Metro. Stipendiary Magistrate Ex. P. Pinochet Ugarte, [2000] A.C. 147. Even in civil suits, the defense of sovereign immunity has been held inapplicable when the state entity was acting \textit{qua} private party (i.e. \textit{de jure} gestions, as distinct from \textit{jus imperii} or public law authority) when violating \textit{jus cogens} norms. See Ilias Bantekas, State Responsibility in Private Civil Action--Sovereign Immunity--Immunity for Jus Cogens Violations--Belligerent Occupation--Peace Treaties, 92 Am. J. Int’l L. 765 (1998).

\textsuperscript{89} Eilers, supra note 84, at 487. Note that such a finding would not necessarily render the 1951 Treaty void. According to established principles of interpretation, Article 14(b) should be interpreted to the extent possible to be compatible with international law and especially with international human rights. See infra Part IV. Even where it is impossible to reconcile the treaty provision with international law, the offending provision may be severable. As noted by Brownlie, pursuant to Article 44 of the VCLT, severability may be possible where a norm crystallizes to a \textit{jus cogens} status after the conclusion of a treaty, as appears to be the case with the norm prohibiting forced labor with respect to the 1951 Treaty. See Brownlie, supra note 68, at 627. But severability may not be possible in practice. See infra note 145.
ing forced labor or slavery. Unlike with other *jus cogens* norms, such as those prohibiting torture or genocide, the absence of due compensation is intrinsic to the violation of norms prohibiting forced labor or slavery because such absence partly evidences the lack of a consensual employment relationship.

Of course, while a waiver of legal claims for a violation of a *jus cogens* norm is likely to frustrate the purpose and realization of that norm (and therefore be void), this is not *always* the case. Some or all of the parties who agreed to the waiver may have provided alternative means of redressing those violations, for example, by establishing a substantial fund to comprehensively compensate the victims. The most judicious approach for courts would be to take into account the sufficiency and comprehensiveness of such alternative means of redress to determine whether the operation of the waiver provision does in fact frustrate the *jus cogens* norm against forced labor. If the parties have established sufficient and comprehensive alternative measures to compensate the would-be claimants, a court could reasonably uphold the waiver provision.

At a minimum, the courts in the *Japanese Forced Labor Litigation* cases, *Taiheiyo*, and *Deutsch* were remiss not to address the validity of Article 14(b) on the ground of international law as it applies in U.S. courts. But had they undertaken such an inquiry, they plausibly would have found that Article 14(b) was invalid under international law for “conflicting with” a *jus cogens* norm; specifically, the norm prohibiting forced labor. Although Article 14(b) does not directly permit violation of this *jus cogens* norm, it appears to frustrate the

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90 As noted earlier, the absence of compensation is not intrinsic to the violation of *jus cogens* norms other than the prohibitions on slavery and forced labor. With respect to these other *jus cogens* norms, such as the prohibition on torture or genocide, sufficient alternative means of redress may include non-compensatory measures, such as the creation of a human rights or “truth and reconciliation” commission to investigate those violations, or prosecution by the Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90.

91 To expand on the test provided by Eilers, that a provision which defeats the purpose of a *jus cogens* norm is void, sufficient and comprehensive compensation would avoid frustrating the “purpose and realization” of the norm prohibiting forced labor. See Eilers, *supra* note 84, at 484–90.


93 See *supra* notes 81–89 and accompanying text.
purpose and realization of the norm in the absence of sufficient and comprehensive alternative means of redress.\textsuperscript{94}

B. Federal, Executive Power to Waive Claims of U.S. Nationals

Aside from the standpoint of international law, it is highly contentious whether Article 14(b) is constitutionally valid under U.S. law.\textsuperscript{95} In this respect, Judge Walker (although not the courts in Taiheiyo and Deutsch)\textsuperscript{96} at least addressed the issue of whether Article 14(b) overstepped the constitutional bounds of treaty-making.\textsuperscript{97} However, as is shown in the following paragraphs, the district court relied on inapt judicial precedent in concluding that Article 14(b) was a constitutionally valid treaty provision. Judge Walker could not cite any judicial precedent to support the validity of a treaty provision which waived individual claims against a corporation (rather than a country), especially where those claims were based on human rights violations.\textsuperscript{98}

Article II, section 2, clause 2 of the U.S. Constitution provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .”\textsuperscript{99} It is well-settled that there are constitutional limits to this treaty-making power. As the Supreme Court held over a century ago in De Geofroy v. Riggs: “[t]he treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the

\textsuperscript{94} The federal government did establish the WCC scheme in 1948. See supra note 34 and accompanying text. This would not, however, appear to qualify as a “sufficient and comprehensive” alternative means of redress. Even if compensation of between $1 and $2.50 a day paid under the WCC scheme was deemed sufficient compensation in real terms (taking into account the fiscal standards of the time), it was hardly comprehensive, given that the scheme did not provide compensation for many of the plaintiffs in the Californian forced labor litigation (for example, Filipino POWs).

\textsuperscript{95} See infra notes 100–125 and accompanying text.

\textsuperscript{96} The issue presumably was not considered in Taiheiyo I because the court determined that the 1951 Treaty was inapplicable to the plaintiff’s claims, as he was not a national of a country which became party to the 1951 Treaty at the time it came into effect. See Taiheiyo I, 129 Cal. Rptr. 2d at 458–60. In Deutsch I, the Ninth Circuit considered the 1951 Treaty more as an exercise of the federal government’s war powers, rather than of the treaty-making power, and the court simply appeared to assume the provisions of the 1951 Treaty were within the scope of these war powers. See Deutsch I, 317 F.3d at 1023–24.

\textsuperscript{97} See supra notes 61–62 and accompanying text.

\textsuperscript{98} See Japanese Forced Labor Litig. I, 114 F. Supp. 2d at 948 (relying on Regan, 453 U.S. 654, which concerned commercial claims rather than human rights-based claims).

\textsuperscript{99} U.S. Const. art. II, § 2, cl. 2.
government or of its departments, and those arising from the nature of the government itself and of that of the States.”

In rejecting the plaintiffs’ arguments that the United States could not constitutionally waive claims of its nationals against foreign governments and their nationals, Judge Walker in *Japanese Forced Labor Litigation* (2000) referred to the Supreme Court’s statement in *Regan* that the United States has repeatedly exercised its “sovereign authority to settle the claims of its nationals against foreign countries.” However, there are key distinctions between the decision in *Regan* and the cases relating to Section 354.6, particularly concerning the type of claims which were at issue. Most obviously, the claims before Judge Walker and the courts in *Taiheiyo* and *Deutsch* were not against the country of Japan, nor any of its officials or government entities, but against private corporations incorporated or constituted in Japan.

Additionally, in upholding the executive’s nullification of claims against Iran, the Court in *Regan* placed weight on the fact that the President had “provided an alternative forum, the [Iran-United States] Claims Tribunal, which is capable of providing meaningful relief” and would possibly “enhance the opportunity for claimants to recover their claims.” Such a meaningful alternative forum was not provided to the forced labor litigants whose claims purportedly were waived by Article 14(b).

Moreover, the petitioners’ claims in *Regan* implicated commercial or proprietary interests, as distinct from the serious human rights considerations which were raised by the plaintiffs’ claims in the Section 354.6 cases. These distinctions and their intersection with one another are further considered below.

Since the Supreme Court in *Regan* only determined the validity of agreements which settled claims against other countries, the case

100 De Geofroy v. Riggs, 133 U.S. 258, 267 (1890) (emphasis added). While there is also plenty of judicial authority in support of a wide treaty-making power, this has generally been provided in cases where the power has been weighed against states’ rights. The ambit of the power has not been conclusively determined where it conflicts with fundamental human rights, especially rights that are not specifically protected in the Constitution. Thus, the Second Circuit in *United States v. Wang Kun Lue*, 134 F.3d 79, 83 (2d Cir. 1998), recognized that “[a]dmittedly, there must be certain outer limits, as yet undefined, beyond which the executive’s treaty power is constitutionally invalid” (emphasis added).


102 Or corporations whose parent or subsidiary entities were incorporated in Japan.


104 See supra notes 34, 94.

105 The petitioner in *Regan* was a corporation with claims arising out of contracts and business in Iran. See 453 U.S. at 664.
cannot be regarded as authoritative on the power of the federal government to waive the claims of U.S. citizens against the nationals of other countries.\(^{106}\) Ironically, a statement of interest filed by the United States with the court indicated a better understanding of this distinction than was grasped by Judge Walker. In its statement of interest, the United States argued that the Court’s reasoning in \textit{Regan} strongly supports similar authority to settle claims of private citizens (even against \textit{private citizens} of another nation) when there is a compelling public policy justification for doing so.\(^{107}\)

An immediate question which arises from this contention is whether there was judicial authority to support the capacity of any branch of government to waive the claims of its citizens against the private citizens of another country. One relevant precedent cited by the United States in its statement of interest was the 1801 case of \textit{United States v. Schooner Peggy}\(^{108}\) and its dicta that “if the nation has given up vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a cause for proper compensation.”\(^{109}\) However, the claims at issue in \textit{Schooner Peggy} were of a proprietary nature, and did not raise human rights concerns.\(^{110}\) This factor substantially devalues its applicability to \textit{Japanese Forced Labor Litigation} (2001) and other Section 354.6 cases. In fact, the statement of interest could cite no judicial precedent for validating a purported waiver of claims of U.S. citizens against foreign nationals for violations of human rights.\(^{111}\) While the cases of \textit{Regan} and \textit{Schooner Peggy} sup-

\(^{106}\) \textit{Cf. Japanese Forced Labor Litig. I}, 114 F. Supp. 2d at 948; \textit{see also} Wuerth, \textit{supra} note 12, at 5 (“[T]hose cases [that] involved claims against foreign sovereigns . . . do not provide a basis for executive authority over claims against private individuals. In \textit{Dames \\& Moore v. Regan}, for example, the Supreme Court upheld an executive order nullifying claims against Iran.”).


\(^{108}\) 5 U.S. (1 Cranch) 103 (1801).

\(^{109}\) \textit{Id.} at 110.

\(^{110}\) \textit{See id.} at 103–06. Specifically, the case concerned the restoration of a trading ship captured by an U.S. ship to its owners, who were French citizens. \textit{See id.}

\(^{111}\) Aside from \textit{Regan} and \textit{Schooner Peggy}, four other cases were cited by the United States at note 7 of its Statement of Interest, \textit{supra} note 107, in support of its proposition that Article 14(b) constitutes a valid waiver of claims: Belk v. United States, 858 F.2d 706 (Fed. Cir. 1988); \textit{Asociacion de Reclamantes v. United Mexican States}, 735 F.2d 1517 (D.C. Cir. 1986); Ozanic v. United States, 188 F.2d 228 (2d Cir. 1951); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796). Yet the first three of these cases concern claims against sovereign na-
port the validity of a waiver or settlement of commercial or proprietary claims by the federal government, it was disingenuous of the United States to argue, and erroneous of the district court to accept, that these cases support the validity of Article 14(b), which purports to waive claims against private citizens or corporations for grievous violations of fundamental human rights.

However, after the decisions of Judge Walker and the decisions in Taiheiyo and Deutsch, the Supreme Court in Am. Ins. Ass’n v. Garamendi appeared to validate certain settlements of individual claims against corporations, even though the claims were not of a purely monetary or proprietary nature but implicated grave violations of human rights. Garamendi concerned the constitutional validity of California’s Holocaust Victim Insurance Relief Act of 1999 (HVIRA), which required every insurance company operating in California to disclose, upon penalty of loss of its state business license, certain information about insurance policies they or their affiliates wrote in Europe between 1920 and 1945. The state HVIRA legislation was enacted against the backdrop of a federal settlement of claims against insurance companies which had been negotiated by the President. In determining the constitutionality of the HVIRA, the Court examined the Presidential power to make executive agreements which settle individual claims and posited that such a power, which had been most clearly enunciated in Regan with respect to the claims of U.S. nationals against foreign governments, was also exercisable with respect to claims against corporations. As the Court put it after examining Regan and other relevant authorities: “[t]he executive agreements at issue here do differ in one respect from those just

112 Garamendi, 539 U.S. at 396.
113 See id. at 401–03. The facts in Garamendi implicated a settlement of insurance claims by Jewish survivors of World War II, whose policies had either been confiscated by Nazi Germany as part of its genocidal program or dishonored by insurance companies. See id.
114 Id. at 408–12.
115 Id. at 405–08.
116 Executive agreements are created and implemented differently than treaties, but the issue of the validity of waivers arises regardless of whether the waivers are contained in executive agreements or treaties.
117 See id. at 415–16.
mentioned insofar as they address claims . . . . against corporations, not the foreign governments. But the distinction does not matter."  

The *Garamendi* decision, however, should not be regarded as a post facto validation of the Ninth Circuit’s and federal district courts’ approval of Article 14(b) in the Japanese forced labor litigation cases. There are at least two critical factors which distinguish Article 14(b) from the federal settlement of claims upheld by the Court in *Garamendi*. First, and most obviously, *Garamendi* concerned a substantial settlement of claims, rather than a waiver of claims. The Supreme Court in *Garamendi* observed that the federal government negotiated a settlement agreement under which Germany agreed to establish a foundation of 10 billion deutsch marks, contributed equally by the German Government and German companies, to compensate the companies’ victims during the Nazi era. By contrast, Article 14(b) of the 1951 Treaty purports to constitute a complete waiver of claims by victims of wartime forced labor in Japan. The Court in *Garamendi* cited its decision in *Regan*, but failed to acknowledge the distinction between the relatively substantial settlement of claims at issue in *Garamendi* and the nullification of claims in *Regan*. The distinction is an important one. It is perhaps understandable that courts are reluctant to assess the adequacy of settlements for human rights abuses, particularly when the settlements result from arduous negotiations for the side of the victims. Nevertheless, courts must be vigilant with regard to agreements which purport to prevent any and all claims for compensation for such abuses.

The second distinguishing factor between the settlement of claims at issue in *Garamendi* and Article 14(b) is that the former explic-
itly settled claims against corporations,\(^{124}\) whereas Article 14(b) ambiguously waived claims against Japan and “its nationals.”\(^{125}\) As discussed in Parts IV and V below, it is by no means clear that the term “nationals” as used in Article 14(b) encompasses corporations.\(^{126}\)

III. Policy Considerations

The discussion in Part II indicates strong bases for considering Article 14(b) invalid under international law and scant authority for upholding the constitutional validity of Article 14(b) under domestic law. The Ninth Circuit’s and federal district courts’ exploration of Article 14(b)’s validity therefore clearly seems wanting. It is essential, however, to consider why courts hearing the Japanese forced labor cases neglected to properly examine the validity of Article 14(b) and indeed, why courts are generally reluctant to explore the validity of any treaty provision even where compelling grounds exist for doing so.

It is tempting to believe that judicial reluctance to examine the validity of a treaty provision in any given case stems from a principled weighing of policy considerations which relate to that case. In the various Japanese forced labor litigation cases, for instance, one may wish to surmise, optimistically, that the courts’ reluctance to properly explore the validity of Article 14(b) arose from an articulation and careful evaluation of the manifold policy considerations at stake in those cases. It could be supposed that the courts eventually decided to uphold the government’s use of the claims of private citizens as “bargaining chips”\(^ {127}\) with Japan, favoring the goals of peaceful and prosperous re-

\(^{124}\) See *Garamendi*, 539 U.S. at 415. Note the Court’s statement that the Government agreed that whenever a German *company* was sued on a Holocaust-era claim in an American court, the Government of the United States would submit a statement that “it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German *companies* arising from their involvement in the National Socialist era and World War II” and its reference to a “letter from President Clinton to Chancellor Schröder committing to a ‘mechanism to provide the legal peace desired by the German government and German *companies.*”

\(^{125}\) See *1951 Treaty*, *supra* note 4, art. 14(b), 3 U.S.T. at 3183, 136 U.N.T.S. at 64.

\(^{126}\) See *infra* notes 165–170 and accompanying text.

\(^{127}\) The phrase (in its singular and plural versions) was used in both the majority and minority judgments in *Regan*. See, *e.g.*, *Regan*, 453 U.S. at 673–74; see also *id.* at 691 (Powell, J., concurring in part and dissenting in part) (“The Government must pay just compensation when it furthers the Nation’s foreign policy goals by using as ‘bargaining chips’ claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts. The
lations with that country over the need to support the notion and practice of individual rights. This account of the courts’ reluctance to invalidate or even examine the legality of Article 14(b) raises concerns as to the strength of judicial commitment to upholding individual rights, but it at least supposes that judges are willing to articulate and undertake a balancing of policy considerations to some extent.

However, there is a more perturbing explanation as to why judges are so reluctant to invalidate treaty provisions and, indeed, to even examine their validity. Specifically, in cases which raise foreign policy issues, the federal government has come to enjoy an almost subservient judicial deference to its acts and decisions, in contrast to a greater judicial readiness to review domestic governmental acts and decisions. Judges are so wary of overturning, or even altering or interfering with, foreign policy decisions, that they often simply refuse to adjudicate cases with foreign policy implications and resort to an array of doctrines to justify their refusal even to embark on an adjudicative process. The most notable of these doctrines is the political question doctrine, but judges also resort to the principle of international comity, the act of state doctrine, and the principal extraordinary powers of the President and Congress upon which our decision rests cannot, in the circumstances of this case, displace the Just Compensation Clause of the Constitution.

This occurred despite the fact that Article 14(b) purported to insulate corporate entities for egregious violations of such rights, rather than to insulate a government from commercial claims, as in Regan. See David J. Bederman, Defe rence or Deception: Treaty Rights as Political Questions, 70 U. Col o. L. Rev. 1439, 1440 (1999) (commenting that “there is very real cause for concern in unbridled judicial deference to executive branch decision making in the foreign relations area”). See generally Thomas M. Franck, Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs? (1992) (discussing the broad deference that the judiciary gives to the political branches in foreign affairs).


See, e.g., Baker v. Carr, 369 U.S. 186 (1962) (establishing that matters of international law can be seen as political questions).

See, e.g., Hilton v Guyot, 159 U.S. 113 (1895); Bi v. Union Carbide Chem. & Plastics Co., 984 F. 2d 582 (2d Cir. 1993) (both referencing the principle of comity).

principle of ripeness.\textsuperscript{134} Even if they do decide to adjudicate on the case and ostensibly disavow the application of the political question doctrine or comparable canons, in practice, judges habitually rule in favor of the government’s position on the merits, often without even considering the consistency of that position.\textsuperscript{135} Indeed, judges sometimes extend this extraordinary deference\textsuperscript{136} to the executive’s position without acknowledging and examining the public policy considerations which arise from it. This was evident in \textit{Garamendi}, where the majority opinion of the Supreme Court did not mention the human rights factors at stake and simply declared that, while “a sharp line between public and private acts works for many purposes in the domestic law, insisting on the same line in defining the legitimate scope of the Executive’s international negotiations would hamstring the President in settling international controversies.”\textsuperscript{137}

It is therefore unsurprising that the U.S. government’s statement of interest submitted in \textit{Japanese Forced Labor Litigation} (2001) recognized that there needed to be “a compelling public policy justification,” to validate a waiver of private claims, yet failed to identify the relevant public policy considerations at play.\textsuperscript{138} Given the practice of judicial deference, it appears that the government simply assumed that the district court would not need to know which public policies were identified as relevant by the government\textsuperscript{139} and furthermore, would not question its judgment that there were federal, executive policies that justified the waiver in Article 14(b).\textsuperscript{140}

Judicial unwillingness to (1) review federal acts related to foreign policy and (2) balance competing policy considerations appears to be magnified when judges are called upon to determine and apply international law.\textsuperscript{141} It was therefore somewhat predictable that, although some courts in the various Japanese forced labor cases considered the validity of Article 14(b) under domestic constitutional law,

\begin{itemize}
\item \textsuperscript{134} See, e.g., Goldwater v. Carter 444 U.S. 996, 997–1002 (1979) (Powell, J., concurring in the judgment) (referring to ripeness).
\item \textsuperscript{135} See Bederman, \textit{supra} note 129, at 1464–68.
\item \textsuperscript{136} See \textit{id.} at 1465–66.
\item \textsuperscript{137} \textit{Garamendi}, 539 U.S. at 415.
\item \textsuperscript{138} See Murphy, \textit{supra} note 107, at 142 (citing Statement of Interest of United States of America, \textit{In re} World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939 (N.D. Cal. 2000) (No. MDL-1347) (filed Aug. 9, 2000)).
\item \textsuperscript{139} See \textit{id.}
\item \textsuperscript{140} See \textit{id.}
\end{itemize}
none of them paused to consider its validity under international law as it is applied in the United States. In contrast to their forebears, many judges in the United States are now reluctant to apply norms of international law, including international human rights law, aside from their applicability to limited, specified contexts such as the ATCA. Thus, while judges have frequently considered *jus cogens* norms in determining the ambit of the ATCA, they clearly are uncomfortable with invoking Article 53 or Article 64 of the VCLT to invalidate or override treaties for violations of customary international law, even of a *jus cogens* status.

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142 See *supra* note 67 and accompanying text.
143 See Paust, *supra* note 11, at 306–07, for a commentary on the historical practice of applying international law, including human rights, in U.S. courts. For example, Paust refers to “the continuous use of customary international law both directly and indirectly by federal courts for more than 200 years. . . . In fact, Chief Justice Marshall recognized in 1810 that our judicial tribunals ‘are established . . . to decide on human rights.’” *Id.* at 307.

> Courts essentially remain convinced that the use of extra-constitutional material, including international human rights decisions, to give meaning to the content and scope of constitutional guarantees is illegitimate. . . . Despite precedents from international human rights tribunals asserting that the death penalty violates international human rights, and notwithstanding citations of those precedents in United States death penalty litigation (in support of the argument that the death penalty is unconstitutional), the Supreme Court has never considered such arguments germane.


145 Recall that the VCLT provides, somewhat overzealously and impractically, that a whole treaty is void if any one of its provisions violates a *jus cogens* norm that existed at the time the treaty was concluded, *supra* note 73, art. 53, 1155 U.N.T.S. at 344, or a *jus cogens* norm that emerged after the treaty came into force, *id.* art. 64, 1155 U.N.T.S. at 347. Assuming that the norm prohibiting forced labor evolved into a *jus cogens* norm after the 1951 Treaty came into effect, under international law, a court would be bound to take the extraordinary position that the entire 1951 Treaty is void, rather than just the offending provision (Article 14(b)). In order for Article 14(b) to be severable from the rest of the 1951 Treaty, it would have to satisfy stringent criteria pursuant to Article 44 of the VCLT, *id.* art. 44, 1155 U.N.T.S. at 343 (e.g., the offending clause must not have been an essential basis of the consent of the other party or parties to be bound by the treaty), but these would be unlikely to be satisfied. Hence, the VCLT hardly encourages due judicial consideration of treaty provisions that violate *jus cogens* norms and this may be an additional reason why judges in the Japanese forced labor litigation were reluctant to examine the validity of Article 14(b) under international law.

146 Also, the Court in *Paquete Habana*, 175 U.S. at 700, stated that customary international law was meant to apply in the absence of a treaty or “controlling executive or legislative act or judicial decision.” *But see* Henkin, *supra* note 64, at 1564 (noting that “[t]he status of customary international law and the law of the United States in relation to treaties
How then should a court address challenges to a waiver clause like Article 14(b)? In the interest of transparency, courts at least must be willing to recognize and articulate the competing public policy considerations at stake. On the one hand, it can be argued that (1) the terms of the 1951 Treaty, including Article 14(b), were vital in creating a lasting peace with Japan, (2) the executive branch of the federal government was best placed to frame the terms of this peace, and (3) Japan’s displeasure with the Californian suits threatens the harmony of U.S.–Japanese relations, which is essential for economic and security reasons. Such policy arguments buttress judicial reluctance to invalidate Article 14(b). On the other hand, the plaintiffs in the Californian suits suffered such atrocious violations of human rights that to deny them redress is innately unjust and tantamount to condoning the actions of the perpetrators. Furthermore, human rights norms have undergone an exponential development and influence in the decades since World War II, to the extent that concerns about human rights have expanded beyond the confines of international organizations, nations’ foreign affairs, and state departments to permeate the consciences of local polities and communities.

If judges are to disallow or discourage local initiatives to protect human rights, they also must not abdicate their established role as guardians of individual rights. This judicial role is critical when considering the natural tendency of federal governments to be preoccupied with national trade and security issues, to the comparative neglect of the seemingly “microcosmic” concerns of individual rights. One obvious undesirable consequence of judicial obeisance to federal

or acts of Congress has not been authoritatively determined”). It should also be noted that Article 2(3) of the International Covenant on Civil and Political Rights (“ICCPR”) provides the right to an “effective remedy” for forced labor (which is prohibited in Article 8 of the ICCPR). See International Covenant on Civil and Political Rights, Dec. 16, 1966, arts. 2(3), 8, 999 U.N.T.S. 171, 174, 175. The United States has declared the substantive provisions of the ICCPR to be not self-executing, but the covenant arguably has the force of customary international law. See id.


148 See supra notes 19–26 and accompanying text.

149 Aside from Section 354.6, other examples of such state and local laws include the Massachusetts Burma law, MASS. GEN. LAWS ch. 7, §§ 22G–M (2004), and the HVIRA, CAL. INS. CODE §§ 13800–13807 (1999).


151 Paust, supra note 11, at 320–21.
foreign policy agreements, especially when individual rights are implicated, is the stark inequalities in the application of such rights. For example, former forced laborers who worked for European companies under Nazi rule endured similar judicial reluctance to enforce their claims for compensation, because of waiver clauses in post-war peace treaties, but now are receiving compensation as a result of intensive efforts by the federal government.\textsuperscript{152} By contrast, former forced laborers who worked for Japanese corporations have not benefited from any such federal foreign policy efforts.\textsuperscript{153} If judges readily assumed their role as protectors of individual rights, they could avoid, or at least lessen, such a disparity in the rights of former forced laborers caused by the inconstant and politicized inclinations of the federal government.

Regrettably, there may be instances where a waiver of human rights claims may be indispensable in bringing about the conclusion of a war or other international crisis. In these circumstances, a government may need to agree to a waiver clause, even though the resulting impunity will undoubtedly be painful to bear for those persons who have suffered at the hands of that state and its nationals, as well as being inequitable from the perspective of any person and organization seeking to uphold basic human rights in our world. Courts may be compelled on policy grounds to uphold such a waiver.\textsuperscript{154} However, even in those cases, judges should articulate the varied policy considerations at stake and, in particular, remain mindful of upholding their responsibility to protect individual human rights to the extent possible. Judges should protect rights in a manner reconcilable with the text of the waiver clause, while adopting an approach consistent with judicial precedent. An important means by which courts can balance, to some degree, the competing interests of federalized foreign relations with the need to protect basic human rights is through \textit{interpretation}, a tool which enables judges to avoid the seemingly drastic action of invalidating a treaty or any of its provisions. The following section highlights the need to determine the scope of Article 14(b) and outlines three interpretive methods which were open to judges in the forced labor litigation cases. U.S. judges have previously used the lat-

\begin{footnotes}
\footnote{152} Bayzler, \textit{supra} note 35, at 29–31.

\footnote{153} For a commentary on the disparity between federal government efforts with respect to Europe and Japan, see id. at 28 n.79.

\footnote{154} Indeed, the making and maintaining of a lasting peace is generally a necessary precursor to the entrenchment of human rights and other “goods” in any community.
\end{footnotes}
ter two of these methods in cases where individual rights have conflicted with federal acts in the sphere of foreign relations.  

IV. INTERPRETATION AS A TOOL FOR PROTECTING RIGHTS AND BALANCING POLICY CONSIDERATIONS: INTERPRETIVE APPROACHES IN INTERNATIONAL AND DOMESTIC LAW

A. Ambiguities in Article 14(b)

Having assumed or swiftly determined that Article 14(b) is a legally valid treaty provision, the courts hearing the Japanese forced labor claims proceeded to pay perfunctory consideration to the meaning or scope of Article 14(b). This was despite the claimants’ arguments that there were several ambiguities in the language of Article 14(b) that precluded their claims from the scope of the waiver.

For example, claimants pointed to the phrase in Article 14(b), “claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war,” and questioned whether the defendants, being corporations rather than government entities or members of the armed forces, could have acted in prosecuting the war.

The claimants further argued that the aforementioned phrase in Article 14(b) of the 1951 Treaty could not have been intended to preclude claims of Allied POWs and civilian internees, given that the reciprocal waiver clause in Article 19, which barred claims of Japanese nationals against Allied Powers and their nationals, specifically waived the claims and debts arising in respect to “Japanese prisoners of war.

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155 See, e.g., United States v. Payne, 264 U.S. 446 (1924); United States v. Rauscher, 119 U.S. 407 (1886); see also infra, Part IVC–D.

156 For example, in response to the plaintiff’s arguments of vagueness and ambiguity in the text of Article 14(b), Judge Walker commented that “[t]he court does not find the treaty language ambiguous, and therefore its analysis need go no further.” Japanese Forced Labor Litig. I, 114 F. Supp. 2d at 945. In Deutsch I, the court noted the plaintiff’s arguments as to the meaning of Article 14(b). Deutsch I, 317 F.3d at 1025–26. But, given its finding that Section 354.6 was an unconstitutional intrusion into foreign affairs, the court did not proceed to address such arguments. See id. The Mitsubishi Materials decision constitutes a notable exception to the otherwise perfunctory analysis of the meaning of Article 14(b) by courts in the Japanese forced labor cases. See Mitsubishi Materials, 6 Cal. Rptr. 3d at 164 (noting the plaintiff’s argument as to the meaning and scope of Article 14(b)); see also id. at 170–75 (addressing some of these arguments).

157 For a summary recitation of these arguments, see Japanese Forced Labor Litigation I, 114 F. Supp. 2d at 948, and Mitsubishi Materials, 6 Cal. Rptr. 3d at 164.

158 Japanese Forced Labor Litig. I, 114 F. Supp. 2d at 948; see Deutsch I, 317 F.3d at 1025 n.12.
The claimants argued that, had the parties to the 1951 Treaty intended to preclude the claims of Allied POWs and civilian internees, Article 14(b) would have mirrored the wording of Article 19 and contained specific reference to these categories of persons.\textsuperscript{160}

The claimants also cited the limiting nature of the introductory clause of Article 14(b): “[e]xcept as otherwise provided in the present Treaty . . . .”\textsuperscript{161} The claimants noted that Article 26 of the 1951 Treaty provides that if Japan makes a war claims settlement with any country granting it greater advantages than those provided by the 1951 Treaty, then Japan must grant those same advantages to the parties to the 1951 Treaty.\textsuperscript{162} They then pointed out that, since the conclusion of the 1951 Treaty, the Japanese government had entered into war claims settlement agreements with other countries (including the Netherlands, the Philippines, Vietnam, Russia, and Burma) permitting nationals of those countries to sue Japanese nationals, or to receive reparations or payments from Japan or Japanese companies in compensation for their forced labor, on terms far more favorable than U.S. veterans.\textsuperscript{163}

Perhaps the most ambiguous aspect of Article 14(b) is the use of the phrase “Japan and its nationals,” raising the specific question of whether the term “nationals” can be deemed to include the defendant.

\textsuperscript{159} 1951 Treaty, \textit{supra} note 4, art. 19(b), 3 U.S.T. at 3187, 136 U.N.T.S. at 70. The article provides that:

\begin{itemize}
\item[(a)] Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war or out of actions taken because of the existence of a state of war, and waives all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory prior to the coming into force of the present Treaty.
\item[(b)] The \textit{foregoing waiver includes} any claims arising out of actions taken by any of the Allied Powers with respect to Japanese ships between 1 September 1939 and the coming into force of the present Treaty, as well as any claims and debts arising in respect of Japanese prisoners of war and civilian internees in the hands of the Allied Powers, but does not include Japanese claims specifically recognized in the laws of any Allied Power enacted since 2 September 1945.
\end{itemize}

\textit{Id.} art. 19(a)–(b), 3 U.S.T. at 3187, 136 U.N.T.S. at 70 (emphasis added).

\textsuperscript{160} \textit{Japanese Forced Labor Litig. I}, 114 F. Supp. 2d at 945.

\textsuperscript{161} 1951 Treaty, \textit{supra} note 4, art. 14(b), 3 U.S.T. at 3183, 136 U.N.T.S. at 64.

\textsuperscript{162} \textit{Id.} art. 26, 3 U.S.T. at 3190–91, 136 U.N.T.S. at 76 (“Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.”).

corporations (i.e. juridical persons) as well as individuals (i.e. natural persons), particularly given that the defendants were multinational corporations.\textsuperscript{164} There is considerable evidence that the parties did not intend or assume the term “nationals” to encompass corporations. Specifically, the practice of other nations with respect to treaties in the immediate post-war era was to assume that the term “nationals” did \textit{not} include corporations. If the term “nationals” was defined, this was usually done so as to limit or expand the categories of \textit{private individuals} who should be deemed nationals for the purposes of that treaty.\textsuperscript{165} Where the parties to a treaty that was concluded in the immediate post-war era intended that corporations be treated in the same way as private citizens, they separately referred to “nationals” and “companies” (or to “nationals” and “corporations”).\textsuperscript{166} It was only during and after the 1960s that states more frequently adopted express definitions of the term “nationals” that encompassed corporate entities, and such definitions specified the circumstances under which a corporation would be deemed a “national” under the treaty.\textsuperscript{167} But even this change

\begin{itemize}
  \item \textsuperscript{164} \textit{Mitsubishi Materials}, 6 Cal. Rptr. 3d at 164 n.3.
  \item \textsuperscript{165} See Treaty of Peace, Apr. 28, 1952, P.R.C.-Japan, 136 U.N.T.S. 45 [hereinafter China-Japan Treaty] (including corporations in the definition of “juridical persons” but not “nationals”). Article 10 of that treaty states:
    
    For the purposes of the present Treaty, nationals of the Republic of China shall be deemed to include all the \textit{inhabitants and former inhabitants} of Taiwan (Formosa) and Penghu (the Pescadores) and their descendents who are of the Chinese nationality in accordance with the laws and regulations which have been or may hereafter be enforced by the Republic of China in Taiwan (Formosa) and Penghu (the Pescadores).

    \textit{Id.} art. 10 (emphasis added).
  \item \textsuperscript{166} See, e.g., Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, art. VII(1) 4 U.S.T. 2063, 2069. Article VIII(1) refers in pertinent part to “[n]ationals and \textit{companies} of either Party” (emphasis added), clearly indicating that corporate entities were not assumed to be “nationals.” \textit{Id.} art. VIII(1), 4 U.S.T. at 2070. Likewise, the Treaty of Commerce, Establishment and Navigation of 1959 between the United Kingdom and Iran separately defined “nationals” and “companies.” See Brownlie, supra note 68, at 426–27; see also Treaty of Friendship, Commerce, and Navigation, Feb. 2, 1948, U.S.-Italy, arts. I–III, 63 Stat. 2255, 2256–60 (referring separately to “nationals,” “corporations,” and “associations,” although similar rights are granted under the Treaty to persons or entities falling under these three categories).
  \item \textsuperscript{167} See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, \textit{opened for signature} Mar. 18, 1965, art. 25, 17 U.S.T. 1270, 1280, 575 U.N.T.S. 159, 175–76 [hereinafter ICSID Convention] (defining the term “national of another Contracting State” to mean any natural or juridical person). A corporation qualifies as a juridical person and would appear to be considered a national of the state in which it is incorporated or where its headquarters are situated. \textit{See id.} The Treaty Establishing the European Economic Community, Mar. 25, 1957, 294 U.N.T.S. 5 [hereinafter Treaty of Rome], can be regarded as a half-way house between post-war treaties and treaties that
of practice usually has been employed with respect to tax-related and other commercially oriented treaties.\textsuperscript{168} In the absence of an express definition of the term “nationals” to include corporations, the prevailing practices of the United States, other countries, and international organizations in drafting international documents, especially of a non-commercial nature, still appear to regard “nationals” and “corporations” as distinct categories.\textsuperscript{169} For instance, a relatively recent United Nations Security Council resolution provided that: “Iraq . . . is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of its unlawful invasion and occupation of Kuwait . . . .”\textsuperscript{170} The drafters of the 1951 Treaty surely must have been aware of the conventional perception that “nationals” and “companies” were distinct types of persons. If their intention was for companies or corporations to be considered “nationals,” this would have warranted an express provision or clarification to that effect. In the absence of such express language, there are strong grounds to consider that Article 14(b) should not be deemed to waive claims against corporations.

Yet, with respect to all these aspects which are open to interpretation, the near consistent stance of the courts in the Japanese forced labor litigation was simply to deny ambiguities and insist that Article came into effect in the 1960s or later. Article 58 provides that “Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.” \textit{Id.} art. 58, 294 U.N.T.S. at 57; see Brownlie, supra note 68, at 427.

\textsuperscript{168} ICSID Convention, supra note 167, art. 25, 17 U.S.T. at 1280, 575 U.N.T.S. at 175–76; Treaty of Rome, supra note 167, art. 58, 294 U.N.T.S. at 57.

\textsuperscript{169} In fact, it remains a common practice of the United States to categorize “nationals” and “companies” separately even in \textit{commercially}-oriented treaties. Thus, for example, the Treaty Concerning Business and Economic Relations, 1990, U.S.-Poland (Congressional Treaty Number: 101–18) contains numerous instances of the phrase “nationals and companies” (emphasis added), such as in Articles III, VI, and IX. The Treaty Concerning the Reciprocal Encouragement and Protection of Investments, 1986, U.S.-Egypt, (Congressional Treaty Number: 99–24) also contains several instances of the same phrase, such as in Articles II and X. The Treaty Concerning the Reciprocal Encouragement and Protection of Investment, 1994, United States-Uzbekistan (Congressional Treaty Number: 104–25) uses the term “nationals or companies” in Article II and the term “national or company” in Article IX, again indicating that the United States continues to regard “nationals” as natural persons. Indeed, Article I of each of the three aforementioned treaties goes so far as to define “nationals” as natural persons and “companies” as legally constituted entities.

14(b) was “clearly” broad enough to preclude the plaintiffs’ claims.171 Responding to the plaintiffs’ arguments relating to the scope of Article 14(b), Judge Walker in *Japanese Forced Labor Litigation* (2000), for example, curtly stated that “[t]he court does not find the treaty language ambiguous, and therefore its analysis need go no further.”172 Judge Walker, and the other judges who heard the plaintiffs’ arguments in the Japanese forced labor litigation, may have benefited from the adoption of (or at least awareness of) more systematic interpretive approaches, three of which are outlined below. These approaches are not abstract rights-based theories that are often unappealing to judges, but rather practical methods for resolving disputes in which rights are potentially contravened by a treaty provision. In applying such approaches, it still is possible that the judges nevertheless would have concluded that Article 14(b) should be interpreted to bar the plaintiffs’ claims in the forced labor litigation, but at the very least, they would have done so after undertaking a procedural analysis befitting their judicial status as guardians of individual rights.

B. *Interpretation of Treaties under the VCLT*

As noted above, the VCLT, although not ratified by the United States, is accepted as declaratory of customary international law and therefore accepted as binding in U.S. law.173 Article 31 of the VCLT sets forth the general rule of interpretation of treaties:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. . . . There shall be taken into account, together with the context . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . . [and] any relevant rules of international law applicable in the relations between the parties.174

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171 *See supra* note 156 and accompanying text.
172 *See supra* note 156 and accompanying text.
173 *See supra* note 73 and accompanying text.
174 VCLT, *supra* note 73, art. 31, 1155 U.N.T.S. at 340 The entire text reads as follows:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
Article 32 of the VCLT provides that recourse may be had to supplementary means of interpretation.\textsuperscript{175} This includes the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or alternatively, to determine the meaning when the interpretation according to Article 31 either leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.\textsuperscript{176}

Application of the interpretive principles set forth in the VCLT would not appear to immediately resolve the meaning of ambiguous phrases in Article 14(b). Article 31 of the VCLT requires that both “subsequent practice” and “relevant rules of international law” be taken into account.\textsuperscript{177} These two criteria, however, could produce contradictory results. For instance, it is the subsequent practice of the U.S. government that Article 14(b) be interpreted to bar compensation claims by former POWs and other forced laborers against Japan, and multinational corporations identified as Japanese, such as Nippon Steel Corporation, Mitsubishi International Corporation, and Mitsui & Co. Ltd.\textsuperscript{178}

\begin{itemize}
\item[(a)] any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
\item[(b)] any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
\end{itemize}

3. There shall be taken into account, together with the context:

\begin{itemize}
\item[(a)] any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
\item[(b)] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
\item[(c)] any relevant rules of international law applicable in the relations between the parties.
\end{itemize}

4. A special meaning shall be given to a term if it is established that the parties so intended.

\textsuperscript{175} Id. art. 32, 1155 U.N.T.S. at 340.
\textsuperscript{176} Id., 1155 U.N.T.S. at 340. The entire article reads as follows:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

\begin{itemize}
\item[(a)] leaves the meaning ambiguous or obscure; or
\item[(b)] leads to a result which is manifestly absurd or unreasonable.
\end{itemize}

\textsuperscript{177} See id. art. 31, 1155 U.N.T.S. at 340.
\textsuperscript{178} Bayzler, \textit{supra} note 35, at 29. The Japanese government appears to have shared the same interpretation, given that its view that allowing the Section 354.6 claims could im-
Yet relevant rules of international law argue against an interpretation that bars the forced laborers’ claims in the Japanese forced labor litigation cases. For example, Article 8 of the Universal Declaration of Human Rights, which is widely accepted as declaratory of customary international law, provides that everyone must have “the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” Article 4 of ILO Convention No. 29, ratified by both the United States and Japan, states that each “competent authority shall not impose or permit the imposition of forced or compulsory labor for the benefit of private individuals, companies or associations.”

How should this apparent conflict between the “subsequent practice in the application of the treaty” and the “relevant rules of international law” be resolved? It should be recalled that a treaty provision which bars compensation for forced labor is likely to conflict with a jus cogens rule of international law, especially when that forced labor was carried out in a manner akin to slavery and was not sufficiently

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179 Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 183d plenary mtg., U.N. Doc. A/810 (1948) [hereinafter UDHR]. Article 8 provides that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” Id. art. 8, at 73 (emphasis added).


182 See Convention Concerning Forced or Compulsory Labour, supra note 80, art. 4, 39 U.N.T.S. at 58–59.

183 Similarly, application of the interpretive criteria expressed in Article 32 of the VCLT yields contradictory results. See VCLT, supra note 73, art. 32, 1155 U.N.T.S. at 340. The travaux préparatoires of the 1951 Treaty does not indicate whether the parties intended to bar compensation claims for forced labor by Allied POWs and civilians against Japanese corporations. The “circumstances of [the treaty’s] conclusion,” however, suggest that the parties did not intend to bar compensation claims by forced laborers against Japanese corporations. For example, as argued in Part IV, infra, in the era that the 1951 Treaty was concluded, the prevailing practice was to interpret the term “nationals” to exclude corporations, unless corporations or other juridical persons were specifically included within a definition of “nationals.” Additional relevant “circumstances of [the treaty’s] conclusion” include the fact that Article 19 of the 1951 Treaty specifically prohibited “claims and debts arising in respect to Japanese prisoners of war and civilian internees in the hands of the Allied Powers,” supra note 4, art. 19, 3 U.S.T. at 3187, 136 U.N.T.S. at 70, whereas no such express prohibition on “claims in respect to Allied POWs and civilian internees in the hands of the Japanese” appeared anywhere in the 1951 Treaty.
and comprehensively redressed by other compensatory measures, as appears to be the case with forced labor in wartime Japan. An interpretation of Article 14(b) which causes it to conflict with a *jus cogens* norm would render the 1951 Treaty or at least Article 14(b) void under international law, pursuant to the provisions of Article 53 or Article 64 of the VCLT. Although Article 31 of the VCLT requires judges interpreting treaties to take into account both “subsequent practice” when interpreting the treaty as well as “relevant rules of international law,” a logical consequence of the supreme status of *jus cogens* rules in international law is that, where an interpretation according to “subsequent practice” conflicts with an interpretation according to a relevant *jus cogens* rule of international law, the latter should be preferred.

As noted above, however, the United States has not ratified the VCLT. And it has been observed that the principles of interpretation set forth in the VCLT are not identical to domestic principles of treaty interpretation developed in U.S courts. There are two such domestic principles of interpretation, which judges have previously applied when interpreting treaty provisions, that are relevant to determining the meaning and scope of Article 14(b). Neither of these principles were applied by the judges in the Japanese forced labor litigation cases. The first is the principle that federal acts, including treaties, should be interpreted in a manner consistent with *customary international law* and especially, with human rights norms embedded therein. The second is the principle that, irrespective of international law *per se*, courts should interpret treaties in a manner protective of *individual rights*, whether those rights derive from the Constitution, the common law, or international law. The following two sections will summarize the development of these approaches in U.S. jurisprudence and demonstrate their applicability to resolving the ambiguities in the text of Article 14(b).

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184 See *supra* note 94 and accompanying text.
185 See *supra* notes 74–75, 89 and accompanying text.
186 See *supra* note 174 and accompanying text.
187 See *supra* note 73.
189 See *infra* Part IVB.
190 See *infra* Part IVC.
C. Interpretive Impact of Customary International Law in U.S. Law

Despite the pronouncements of the U.S. Supreme Court in *The Paquete Habana* and *Charming Betsy*, and of eminent commentators like Professors Paust and Henkin concerning the automatic effect of international law in U.S. courts, it remains unlikely that a treaty or statute would be invalidated by a U.S. court for failure to comply with customary international law. The more widely accepted impact of customary international law on U.S. domestic law is that customary international law modulates the interpretation of congressional and executive acts. In particular, there is strong authority for the view that legislative and executive acts must be interpreted to be consistent with customary international law, especially, but not exclusively, with the human rights norms embedded therein.

The genesis of this canon of interpretation is the Supreme Court’s holding almost two hundred years ago in *Charming Betsy* that “an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.” The canon, which subsequently was applied to the interpretation of treaties, is clearly of relevance to the Japanese war reparations cases given that several terms and phrases in Article 14(b) are open to various plausible interpretations (such as whether “nationals” of Japan include corporations, especially multinational corporations (MNCs), and whether the phrase “in the

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191 See supra note 64 and accompanying text.
192 See supra note 64 and accompanying text.
193 See supra note 64 and accompanying text.
194 See Van Deven, supra note 181, at 1113, who observes that an inquiry into whether the 1951 Treaty is invalid for conflicting with customary international law may be a “novelty” for U.S. courts (citing Restatement (Third) of Foreign Relations Law § 115 cmt. d (1987), which states that “[i]t has also not been authoritatively determined whether a rule of customary international law that developed after, and is inconsistent with, an earlier statute or international agreement of the United States should be given effect as the law of the United States”); see also Tag v. Rogers, 267 F.2d 664, 666 (D.C. Cir. 1959) (stating that it has long been settled that “the federal courts are bound to recognize [treaties, statutes, or constitutional provisions] as superior to canons of international law,” and adding that “[t]here is no power in this Court to declare null and void a statute adopted by Congress or a declaration included in a treaty merely on the ground that such provision violates a principle of international law”).
195 See Bradley & Goldsmith, supra note 66, at 483.
196 See Paust, supra note 11, at 306–07.
197 Murray v. Schooner Charming Betsy, 6 (2 Cranch) U.S. 64, 118 (1804).
199 A multinational corporation (MNC) can be defined as a “cluster of corporations of diverse nationality joined together by ties of common ownership and responsive to a
course of the prosecution of the war” encompasses actions by private companies). Given that forced labor violates a customary international norm (indeed, most often a *jus cogens* norm) and that customary international law provides that states should ensure remedies for violations of fundamental rights, this historical canon of interpretation would oblige courts to interpret ambiguous language of Article 14(b) in a manner favorable to victims of forced labor seeking compensatory remedies.

The *Charming Betsy* canon was implicitly applied in *United States v. Rauscher*, where the Court interpreted the Webster-Ashburton Treaty of 1842 in light of customary international law. After surveying various commentary on the issue of whether a person extradited for a specific offense pursuant to an extradition treaty could be tried for any other offense, the Court in *Rauscher* implied a term in the Webster-Ashburton Treaty that an extradited person could not be tried for any offense other than the specific crime for which he was extradited.

The Court reiterated the general principle that treaties must be construed in light of customary international law in later decisions, such as in *Santovincenzo v. Egan*, where it stated that “[as] treaties are contracts between independent nations, their words are to be taken in their ordinary meaning ‘as understood in the public law of nations.’”

However, the decision in *Rauscher* was qualified by the Supreme Court’s controversial decision more than a century later in *United States v. Alvarez-Machain (Alvarez-Machain I)*, which concerned the abduction of a Mexican citizen, who was brought from Mexico to the United States and indicted on criminal charges. The Court was called on by the Mexican national to imply a term in the 1978 Extradition Treaty between the United States and Mexico prohibiting common management strategy.” Raymond Vernon, *Economic Sovereignty at Bay*, 47 Foreign Aff. 110, 114 (1968–1969).

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200 See Deutsch I, 317 F.3d at 1025 n.12; *Japanese Forced Labor Litig. I*, 114 F. Supp. 2d at 948; *Mitsubishi Materials*, 6 Cal. Rptr. 3d at 164.

201 See UDHR, supra note 179, art. 8, at 73.


203 A Treaty to Settle and Define the Boundaries Between the Territories of the United States and the Possessions of Her Britannic Majesty in North America; for the Final Suppression of the African Slave Trade; and for the Giving up of Criminals, Fugitive from Justice, in Certain Cases, U.S.-G.B., Aug. 9, 1842, 8 Stat. 576.


205 *Santovincenzo*, 284 U.S. at 40 (citing *Riggs*, 133 U.S. at 271).


abductions, in light of customary international law as evidenced, for example, by the Charters of the United Nations and the Organization of American States.\textsuperscript{208} This time, the Court refused to interpret the treaty in accordance with customary international law, stating that “only the most general of international law principles” supported an implied term prohibiting abductions.\textsuperscript{209} The Court did not overrule \textit{Rauscher}, but stated that in that case, the Court had implied a term which was supported by the \textit{actual practice} of nations with regard to extradition treaties, a factor that the Court deemed absent on the facts in \textit{Alvarez-Machain I}.\textsuperscript{210}

Given the decision in \textit{Alvarez-Machain I}, the Californian courts in the Japanese forced labor cases could arguably be forgiven for overlooking the interpretive impact of customary international law on treaties. There does not appear to be a specific and observed international custom which prohibits a government from waiving reparations claims of its nationals in peace treaties for human rights abuses suffered by such nationals.\textsuperscript{211}

Even in the face of \textit{Alvarez-Machain I}, there is a compelling reason why the courts in the Japanese war reparations cases should nevertheless have interpreted Article 14(b) in a manner that allowed compensation claims by forced laborers. Namely, the customary international norm implicated in the Japanese war reparations cases is a fundamental, or \textit{jus cogens}, norm.\textsuperscript{212} In comparison, the norm at issue in \textit{Alvarez-Machain I}–the prohibition against abductions–is not of a comparably high status.\textsuperscript{213} While customary international norms are usually contingent on both state practice (specifically, widespread and consistent

\begin{itemize}
\item \textsuperscript{208} \textit{Alvarez-Machain I}, 504 U.S. at 666.
\item \textsuperscript{209} \textit{Id.} at 669.
\item \textsuperscript{210} \textit{Id.} at 667–68. Hence, in the language of Roman law, the Court in \textit{Alvarez-Machain I} appeared to hold that only \textit{lex lata} (the law as actually \textit{practiced}) could be used to inform the meaning of a treaty provision, and not \textit{lex ferenda} (the law as it \textit{should} be). \textit{See id.} For an analysis of (descriptive) \textit{lex lata} and (normative) \textit{lex ferenda}, and how these two concepts intersect in the “modern” approach to customary international law, see Roberts, \textit{supra} note 70, at 763.
\item \textsuperscript{211} There is a general, and frequently violated, customary norm that states should ensure judicial remedies for violations of fundamental rights. \textit{See, e.g.}, UDHR, \textit{supra} note 179, art. 8, at 73. This would appear to be an insufficiently specific norm under the specificity test set forth in \textit{Alvarez-Machain I}, as it is not a norm relating to a specific type of treaty (e.g. extradition treaties or peace treaties). \textit{Cf.} \textit{Alvarez-Machain I}, 504 U.S. at 658 (interpreting a particular treaty).
\item \textsuperscript{212} \textit{See supra} note 81 and accompanying text.
\item \textsuperscript{213} The norm prohibiting abductions is not included on lists of established \textit{jus cogens} norms. \textit{See, e.g.}, \textit{Brownlie}, \textit{supra} note 68, at 515 (lacking mention of prohibition of abductions in its list of established \textit{jus cogens} norms).
\end{itemize}
state practice of the norm) and opinio juris (the belief of states that the practice is legally obligated), jus cogens norms constitute a special, “superior” category of customary international law.\textsuperscript{214} Jus cogens norms depend heavily on evidence of opinio juris and will not be undermined by contrary state practice.\textsuperscript{215} This view was recently reflected in the dicta of the Ninth Circuit in \textit{Alvarez-Machain v. United States et al.}\textsuperscript{216} (\textit{Alvarez-Machain II}), which reiterated that:

Customary international law, like international law defined by treaties and other international agreements, rests on the consent of states. A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm. . . . In contrast, jus cogens embraces customary laws considered binding on all nations and is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested

\textsuperscript{214} See id. (referring to jus cogens norms as “overriding principles” and as “rules of customary law which cannot be set aside by treaty or acquiescence”).

\textsuperscript{215} See Roberts, supra note 70, at 790; Oscar Schacter, \textit{Entangled Treaty and Custom, in International Law at a Time of Perplexity} 717, 733–35 (Yoram Dinstein ed., 1989). In theory, a jus cogens norm can be modified by a subsequent norm of the same character. See VCLT, supra note 73, art. 53, 1155 U.N.T.S. at 344. Given the fundamental normative status of a jus cogens norm, however, such modification would be most unlikely to occur. See Degan, supra note 71, at 228.

\textsuperscript{216} \textit{Alvarez-Machain v. United States}, 331 F.3d 604 (9th Cir. 2003) (en banc) (“\textit{Alvarez-Machain II}”). Following \textit{Alvarez-Machain I}, the criminal case against Alvarez-Machain was heard on remand, but, in an ironic twist, was thrown out for lack of evidence. See United States v. Alvarez-Machain, No. CR-87–422-(G)-ER (C.D. Cal. Dec. 14, 1992). Following this dismissal, Alvarez-Machain sued the United States for, \textit{inter alia}, violation of the Federal Tort Claims Act (FTCA) and the ATCA. 331 F.3d at 608. After a series of decisions considered whether Alvarez-Machain could proceed with such a suit, in 2002 the Ninth Circuit granted a rehearing \textit{en banc} and issued its decision in 2003 in \textit{Alvarez-Machain II}, where it held (1) that transborder abduction does not violate customary international human rights law, as required to be actionable under ATCA because prohibition of such acts is not an international norm which is specific, universal, and obligatory, \textit{id.} at 617–20, but (2) that the prohibition of arbitrary arrest and detention is such a norm which is actionable under the ATCA, and Alvarez-Machain, therefore, has a remedy for his unilateral, nonconsensual, extraterritorial arrest and detention, \textit{id.} at 620, and (3) the limited waiver of sovereign immunity of the United States operates in this case as neither the “foreign activities” exception or the “intentional tort” exception, \textit{id.} at 637–40. The Supreme Court very recently reversed the Ninth Circuit’s holdings, determining \textit{inter alia} that the prohibition of arbitrary arrest and detention is \textit{not} a binding customary norm and is not actionable under the ATCA. See \textit{Sosa v Alvarez-Machain}, 124 S. Ct. 2739 (2004). However, nothing in the Court’s decision repudiated the Ninth Circuit’s dicta regarding the identification of jus cogens norms. Indeed, a majority of the Court recognized that grave violations of fundamental human rights norms, such as torture and slavery, are actionable under the ATCA. See \textit{id.} at 2765–66.
choices of nations. Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent...217

*Alvarez-Machain I* concerned a human rights norm, but not one which approached the status of *jus cogens*. By contrast, the imperative nature of a *jus cogens* norm is not affected by contrary state practice and, once established by evidence of a strong *opinio juris*, a *jus cogens* norm can continue to inform the interpretation of statutes regardless of non-compliance by nations.218 It is submitted that these decisions nuance the principle laid down in *Alvarez-Machain I*, which established that a treaty should be interpreted in light of customary international law only when there exists a specific norm in customary international law that is supported by the actual practice of nations with respect to the same type of treaty being examined.219 In particular, where the relevant norm is a *jus cogens* norm, the treaty should be interpreted to avoid inconsistency with that norm, even if it is *disregarded* in practice, since *jus cogens* norms are predicated on *opinio juris* rather than state practice.220 Moreover, the specificity of the norm and the type of treaty at issue should not be matters for examination, given that *jus cogens* norms are, by definition, established norms of universal applicability.221

In short, a two-stage interpretive test to resolve an apparent conflict between a treaty and customary international law appears to emerge from a combined reading of the *Charming Betsy*, *Rauscher*, *Alvarez-Machain I*, and *Alvarez-Machain II* cases. Normally, a treaty need only be interpreted so as to avoid inconsistency with specific and observed rules of customary international law in relation to the type of treaty being examined.222 However, where a *jus cogens* norm is at stake, the treaty should be interpreted so as to avoid inconsistency with such a norm regardless of whether it is supported by the actual practice of nations with respect to the same type of treaty being examined.223

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217 *Alvarez Machain II*, 331 F.3d at 613 (quoting Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714 (9th Cir.1992)).
218 For example, the ATCA was interpreted in light of the *jus cogens* norm prohibiting torture in *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 & n.15 (2d Cir. 1980). If *jus cogens* norms affect the interpretation of statutes regardless of non-compliance by nations, then presumably such norms would comparably affect the interpretation of treaties.
219 See *Alvarez-Machain I*, 504 U.S. at 666–68.
220 See supra note 215 and accompanying text.
221 See supra notes 70–74 and accompanying text.
223 See *Alvarez-Machain II*, 331 F.3d at 609.
Applying this test to the interpretation of Article 14(b) of the 1951 Treaty in the Japanese forced labor cases, which appeared to violate the *jus cogens* norm prohibiting forced labor, the courts were bound to interpret Article 14(b) in a manner which did not preclude claims for compensation by victims of forced labor. One of the particular ways in which the courts could have so interpreted Article 14(b) is discussed in Part V below.

**D. Rights-Based Interpretation of Treaties in Judicial Precedent**

Aside from the interpretive impact of customary international law, however, there is also an established judicial custom in U.S. courts that ambiguous treaty provisions are to be construed in a manner that protects express and implied rights, whether or not the source of such rights is in international law. As meticulously documented by Professor Paust, there is a long and distinguished history of case law that obligates judges to adopt a rights-based approach to interpreting treaty provisions. Professor Paust has shown how this interpretive principle emerged from a series of Supreme Court decisions and continued to be applied by the Supreme Court and other courts in the twentieth century. In *Hauenstein v. Lynham* (1879), for example, the Court declared that “[w]here a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred.” And in *United States v. Payne* (1924), the Court applied itself to “[c]onstruing the treaty liberally in favor of the rights claimed under it, as we are bound to do . . . .” Significantly, courts have not used the word “rights” in this context to denote only *constitutional* rights, such as free speech or due process. U.S. courts have applied the principle articulated in cases like

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224 See Paust, *supra* note 11, at 325.
225 See id. at 325 n.118.
226 See id.
227 100 U.S. 483, 487 (1879) (“If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted?”); see also Riggs, 133 U.S. at 271–72 (stating that “where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred”).
Hauenstein and Payne to construe treaty provisions in favor of rights as diverse as the right of an individual to trade as a pawnbroker, the retention of citizenship and political rights of women who marry aliens, and inheritance rights to real property. Thus, both constitutional and non-constitutional rights must be considered in examining a contentious treaty provision. At the outset, if the provision violates an individual right entrenched in the Constitution (or indeed, any article of the Constitution), the provision will have exceeded the executive’s treaty-making power and therefore be invalid. However, even if the provision does not clearly violate a constitutional right and is a valid exercise of the treaty-making power, its meaning may be ambiguous. In this case, if there are competing interpretations, judges should adopt the interpretation which is more protective of a (non-constitutional) right.

Of course, when a treaty provision is open to competing interpretations, there are several aspects to be considered. These include the intentions of parties and the purpose of the treaty, which may be ascertained by examining the travaux préparatoires of the treaty, diplomatic correspondence, conditions and circumstances existing at the time the treaty was entered into, the practice of signatory nations since the treaty came into effect, how the provision is cur-

229 See Asakura, 265 U.S. 332, 334–35 (discussing whether the business of a pawnbroker was a “trade,” as such term was used in the Treaty of Commerce and Navigation Between the United States and Japan, Apr. 5, 1911, U.S.-Japan, 37 Stat. 1504).

230 See Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 244–47 (1830) (determining whether the petitioner was a “subject” or “citizen” as within the meaning of the Definitive Treaty of Peace Between the United States of America and his Britannic Majesty, 1793, U.S.-G.B., 8 Stat. 81).

231 See generally Riggs, 133 U.S. 258 (1890) (analyzing whether Article 7 of the Consular Convention Between the United States of America and His Majesty, the Emperor of the French, Feb. 23, 1853, U.S.-Fr., art. 7, 10 Stat. 992, 996, gave French citizens the right to inherit land from a citizen of the United States).

232 Arguably, a treaty provision can exceed the treaty-making power even if the Constitution has not been explicitly breached, such as where the provision waives or settles claims of a non-commercial or non-proprietary nature, especially when the claims arose from a violation of human rights. But see generally Am. Ins. Ass’n v. Garamendi, 539 U.S. 396 (2003) (making this argument more difficult for judges to adopt).

233 See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658, 675 (1979) (“[I]t is the intention of the parties . . . that must control any attempt to interpret [a] treat[y].”).

234 Block v. Compagnie Nationale Air Fr., 386 F.2d 323, 337 (5th Cir. 1967).


rently interpreted by the executive branch, and other extraneous factors. It is beyond the scope of this Article to provide detailed analyses of these factors in treaty interpretation and their interaction with one another, either under international law as set forth in the VCLT or as they have been articulated and applied by U.S. courts. Such an analysis would be a considerable undertaking, especially because courts have not been a model of clarity in enunciating a hierarchy of principles in treaty interpretation. Although the Supreme Court has clearly stated that courts should look first to the language of the treaty, it has not provided clear guidance on the interplay of extraneous factors which should be considered by judges when a textual analysis of a treaty provision does not yield a clear answer.

Nevertheless, it is at least clear that the protection of individual rights is at least one factor which the courts should take into account when construing an ambiguous treaty provision. In this respect, the Ninth Circuit’s and federal district courts’ assessment of Article 14(b) of the 1951 Treaty in the Japanese forced labor cases (without weight being accorded to the rights at stake) was clearly wanting. Moreover, as has been pointed out above, there are strong conceptual grounds why this rights-based approach should not be neglected. A democratic political system is conceptually predicated on the role of judges as protectors of individual rights, as a counter-balance to the majoritarian priorities of the legislature and executive. Furthermore, this judicial role is even more imperative in a federal system when state and local governments have actively sought to protect rights via legislation and other means, but have been discouraged or prevented from doing so by courts on the grounds of undue interference in foreign affairs.


241 See id. at 373 (stating that “[o]nly when a treaty provision is ambiguous have we found it appropriate to give authoritative effect to extratextual materials”). But, the Court did not provide guidance on the hierarchy or weight of these extrinsic factors in the same manner as provided in the VCLT. Compare id. with supra notes 174–176.

242 Paust, supra note 11, at 325.

243 See supra Introduction.

244 See supra notes 10–11 and accompanying text.

245 See supra notes 8–11 and accompanying text.
V. Applying Interpretive Rights-Based Approaches to Article 14(b) of the 1951 Treaty

To recapitulate, there are certain established rules and principles which are applicable to determining the validity and scope of a treaty provision like Article 14(b) of the 1951 Treaty. These rules and principles were largely overlooked by the courts in the Japanese forced labor cases. In determining the validity of Article 14(b), courts should have considered, firstly, whether it violates a *jus cogens* norm, either explicitly or by frustrating the purpose and realization of that norm,\textsuperscript{246} and secondly, whether the treaty provision was constitutional.\textsuperscript{247} Even if a court determined Article 14(b) was a valid treaty provision (either because such a determination was technically correct as a matter of law, or because a contrary determination would be unfeasible on policy grounds), the court should have then proceeded to examine its scope.\textsuperscript{248} This stage of analysis must venture beyond merely inquiring into the subjects to whom the treaty applied and a facial interpretation of the language of the provisions, two aspects with which the judges in the Japanese forced labor cases were preoccupied.\textsuperscript{249} Rather, the courts should have identified the terms and phrases in Article 14(b) that were ambiguous or contentious, and then armed themselves with interpretive approaches to construe those terms and phrases. The construction of ambiguous treaty provisions should not simply be a matter of individual judges deciding which interpretation appears more convincing to him or her.\textsuperscript{250} In the first place, there is strong authority for the view that, where a *jus cogens* norm is implicated, judges should endeavor to construe the provision in a manner compatible with upholding that norm.\textsuperscript{251} Secondly, both judicial precedent and policy considerations direct judges, in a situation where several competing interpretations present themselves, to prefer the interpretation which is most favorable to individual rights.\textsuperscript{252}

\textsuperscript{246} See *supra* Part IIA.
\textsuperscript{247} See *supra* Part IIB.
\textsuperscript{248} See *supra* note 156 and accompanying text.
\textsuperscript{249} See *supra* notes 46, 156 and accompanying text.
\textsuperscript{250} As, for example, Judge Walker did in *Japanese Forced Labor Litig. I*, 114 F. Supp. 2d at 948, in discussing the ambit of the phrase “in the course of the prosecution of the war” in Article 14(b).
\textsuperscript{251} This accords with the first and second interpretive approaches outlined *supra* Part IV.
\textsuperscript{252} This accords with the third interpretive approach outlined *supra* Part IV.
How should the above analyses of international law, domestic constitutional law, and U.S. judicial precedent be applied in assessing the validity and scope of Article 14(b)? With respect to its validity, Article 14(b) appears to be void under international law for “conflicting with”253 a *jus cogens* norm, given that it purports to deny compensation to nationals of Allied Powers who were forced laborers.254 Many of the plaintiffs had not previously received any compensation at all for their labor, and others, namely former American POWs and civilian internees, had received only limited amounts under the WCC scheme (between $1 and $2.50 a day, which are trifling in comparison to the amounts received by some victims of World War II human rights abuses by European corporations).255 There is also no precedent to support the constitutional validity of a treaty provision that purports to prevent compensation claims for human rights abuses against corporations rather than foreign governments.256 There are therefore strong grounds for a court to invalidate Article 14(b).

In reality, however, invalidating a treaty provision would be too radical a decision for almost all judges to make. Yet the judges in the Japanese forced labor cases were bound to recognize (as most of them did)257 the serious rights-based interests at stake.258 The most constructive and feasible approach for judges to have adopted, which would have balanced the different policy concerns at stake, would have been to narrowly interpret the waiver in Article 14(b) in determining its scope. While it is not possible to explore in this Article how each and every ambiguity in Article 14(b) could have been resolved, the section below demonstrates how one of the most ambiguous aspects of Article 14(b) would have been construed had the courts adopted any one of these rights-based interpretive approaches identified in Part IV. Specifically, the following section discusses whether a corporation, especially an MNC,259 can be considered a “national” of a state, and thereby be entitled to the protective effect of the waiver in Article 14(b) of the 1951 Treaty.

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253 See VCLT, *supra* note 73, arts. 53, 64, 1155 U.N.T.S. at 344, 347.
254 See *supra* Part IIA.
255 See *supra* notes 34, 119, 152–153.
256 See *supra* Part IIB.
257 See the first two paragraphs located *supra* Part I.
258 See id.
259 For a representative definition of an MNC, see *supra* note 199.
A. Interpreting “Nationality”

In *Japanese Forced Labor Litigation* (2000), Judge Walker rejected the notion that the scope of Article 14(b) was unclear and instead found the language of the waiver in Article 14(b) to be “strikingly broad” and “straightforward.” As such, the district court did not even entertain the possibility that the term “nationals” in Article 14(b) did not encompass corporations, and that, therefore, the defendant corporations did not enjoy the benefit of a waiver extended to “Japan and its nationals.” Yet there are sound reasons why the term “national” is ambiguous and why courts could and should have determined that Article 14(b) did not waive claims against corporations, but only against Japan and private Japanese citizens. Furthermore, even if judges accepted that a waiver against “nationals” includes waivers against corporations in general, they ought to have considered the argument that the benefit of the waiver should not extend to MNCs.

As a factual matter, the 1951 Treaty did not define the term “nationals” to include corporations; indeed, the treaty did not provide a definition of the term at all. Yet, as indicated in Section A of Part IV, an examination of treaty practice in the post-war era reveals that nation-states considered the term “nationals” to be *exclusive* of corporate entities. If a treaty was intended to apply to both individuals and corporate entities, it would contain distinct references to “companies,” as well as to “nationals.” Since the 1960s, commercially-oriented treaties have more frequently expressly defined the term

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261 Id.
262 There was no consideration of this argument in the district court’s decision in *Japanese Forced Labor Litigation I*, 114 F. Supp. 2d 939 (N.D. Cal. 2000), in *Japanese Forced Labor Litig. III*, 164 F. Supp. 2d 1160 (N.D. Cal. 2001), or in the Ninth Circuit’s decision in *Deutsch I*, 317 F.3d 1005 (9th Cir. 2003). In *Japanese Forced Labor Litigation I*, Judge Walker only reiterated the statement of the U.S. government that the “1951 Treaty of Peace with Japan . . . precludes the possibility of taking legal action in United States domestic courts to obtain additional compensation for war victims from Japan or its nationals—including Japanese commercial enterprises.” 114 F. Supp. 2d at 947(emphasis added). The argument was expressly noted in *Mitsubishi Materials*, 6 Cal. Rptr. 3d at 164, but not examined by that court.
263 See supra notes 164–170 and accompanying text.
264 See supra note 4.
265 See supra notes 164–170 and accompanying text.
266 See supra note 166 and accompanying text.
“nationals” to include corporations. But in the absence of such an express inclusion, particularly with respect to non-commercial international documents, the practice of regarding the term “nationals” as exclusive of corporations continues. It is therefore curious that none of the courts which heard the Japanese war reparations claims recognized or accepted the ambiguity of the scope of the term “nationals” as it is used in Article 14(b) of the 1951 Treaty. It should be noted that the lack of clarity as to whether the term “nationals” in Article 14(b) encompasses corporations also stands in clear contrast to the facts of Garamendi, where the settlement in question was expressly aimed at shielding corporations from further claims.

Given the evident ambiguity of the term, the courts hearing the Japanese war reparations cases should have investigated whether there was a prevailing international practice to define “nationals” in treaties as encompassing corporations. From an examination of treaty practice on this matter, it is certainly a plausible conclusion that the absence of any express reference to corporations in a definition of the term “nationals” in the 1951 Treaty signifies that the term was not intended to include corporations, or, at the least, that it was an unresolved issue that the parties could not agree upon which would thus be left for courts to determine. Pursuant to the first two of the three interpretive approaches outlined in Part IV, since a jus cogens norm is adversely affected by broadly construing the term “nationals” to encompass corporations, there is a particular reason for courts to narrowly construe the ambit of the term. Similarly, pursuant to the third interpretive approach identified above, where several competing interpretations of a treaty provision present themselves, judges should follow the strong historical precedent in U.S. courts that demands that they select the interpretation which is most favorable to individ-

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267 See supra note 167 and accompanying text; Brownlie, supra note 68, at 426 (“On the plane of international law and relations a great many treaty provisions define ‘nationals’ to include corporations . . . .”).
268 See supra notes 169–170 and accompanying text.
269 See supra note 262.
270 See supra notes 136–137 and accompanying text.
271 Note that the intention of the parties at the time of entering into the treaty is significant, not their later interpretations.
272 The latter possibility is particularly conceivable, given that several other post-war settlements with Japan allowed for claims against corporations. See supra note 163 and accompanying text.
273 See supra notes 184–186 and accompanying text; see also supra notes 222–223 and accompanying text.
Hence, employing any one of the three interpretive canons should have led courts to decide that corporations are not protected by the waiver language in Article 14(b) because they cannot be considered “nationals” of Japan.

Even if the term “nationals” were deemed to encompass corporations, it is possible that not all types of corporations could be so encompassed. In particular, one could argue that MNCs, by their very nature, cannot be deemed to be “nationals” of any one state. The issue is relevant because many of the respondents in the Japanese forced labor litigation were MNCs or their subsidiaries and affiliates, such as Nippon Steel Corporation, Mitsubishi International Corporation, and Mitsui & Co. Ltd. The broader issue of corporate nationality has received much attention from commentators who have explored the nature and practice of MNCs, especially in light of the increasing globalization of economic actors. It is certainly now plausible to assert that an MNC, even though formally incorporated in one state, cannot be deemed to be a national of that state in the sense of its rights and obligations being exclusively defined by the laws

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274 See supra Part IVC.

275 It can be argued that because the Japanese government exercised significant control (or at least influence) over the corporations in Japan during World War II, Japanese corporations were in effect acting as part of Japan’s national war effort and as extensions of the Japanese government rather than as private entities. See Deutsch II, 324 F.3d at 712. The Ninth Circuit in Deutsch II appeared to agree with the position that the defendant corporations acted in the course of the “prosecution of the war,” stating that such enterprises “if not themselves our wartime enemies, were operating in enemy territory and presumably—no party disputes this—with the consent and for the benefit of our wartime enemy.” Id. An implication of this argument is that, while the term “nationals” can generally be viewed as exclusive of corporations, the term must include Japanese corporations in the context of World War II on the grounds that those corporations did not operate as private entities. However, this implication ought to be rejected. See id. Most nations during World War II exercised significant control over large-scale enterprises operating within their borders. Yet this did not prevent the drafters of post-war treaties from routinely regarding the term “nationals” as exclusive of corporations. See supra note 166 and accompanying text. Indeed, it did not prevent Japan herself from accepting that “nationals” did not include Japanese corporations in its post-war treaties, such as in the 1952 Treaty of Peace between the Republic of China and Japan. See supra note 165.

276 See Vernon, supra note 199, at 114 (noting that an MNC is a “cluster of corporations of diverse nationality”) (emphasis added).

277 See the defendants named in the cases cited herein, including in Japanese Forced Labor Litigation I, Japanese Forced Labor Litigation III, Taiheiyo I, Deutsch II, and Mitsubishi Materials.

of that state. The traditional view of a corporation as having a legal personality rooted in a particular jurisdiction has been transformed by the practice of MNCs, whose rights and obligations are defined by a confluence of different laws, including the laws of the numerous jurisdictions in which they operate, the laws and rules of international organizations, such as the OECD, and to a small but increasing extent, the evolving norms of international human rights.

It is thus arguable that a treaty provision that purports to waive liability for the actions of “nationals” of a state should, if the term “nationals” is deemed to include corporations and the treaty provision is otherwise valid, be applied with regard to substantive, rather than formal, nationality; and therefore should not apply to MNCs that are formally incorporated in that state, but whose operations are conducted outside of it and whose activities are subject to an intersection of various national and international laws. Such a narrower construction of the ambit of a treaty provision which purports to excuse violations of human rights norms by nationals of any given state(s) is particularly appropriate in view of the exponential development and influence of international human rights laws in the past few decades. And in our increasingly globalized world, the time is ripe for adopting a progressive, substantive approach to determining the question of nationality.

In approaching waiver clauses similar to Article 14(b) in contemporary peace treaties, judges ought to adopt, or at least be mindful of, this substantive view of nationality. This would mean that, even if such a contemporary waiver clause differed from the 1951 Treaty by expressly defining “nationals” to include companies or corporations, judges could, and probably should, deem that MNCs are not protected by that waiver clause, given that MNCs operate on an international scale and are subject to a global intersection of laws, making it difficult to regard them as nationals of any one state. Yet it should be

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279 See Vernon, supra note 199, at 114.
282 See Higgins, supra note 88, at 95–110 (providing one account of the range of international human rights standards).
acknowledged that this substantive approach would likely be inappropriate to apply to the actions of corporations that took place over fifty years ago. The actions of the respondents in the Japanese forced labor litigation occurred prior to the profusion of MNCs and of international organizations impacting the activities of MNCs.  

In any event, however, Article 14(b) of the 1951 Treaty did not expressly define the term “nationals” to include corporations and was drafted in an era when such express definitions were rare. In light of a historical examination of state practice which suggests that the term “nationals” in the 1951 Treaty was not intended to encompass any type of corporation, and in view of the interpretive approaches examined in Part IV of this Article which demand a narrow construction of the waiver contained in Article 14(b), Article 14(b) should be construed so as to permit claims against all corporations that employed forced labor.

Conclusion

Assuming that a court determines that a treaty provision does not bar the claims of a particular claimant seeking compensation for violations of his or her rights (for example, because the treaty provision is invalid, or because its scope does not preclude the plaintiff’s claim, or because the plaintiff has never been a national of a state party to the treaty in question), the plaintiff must determine as a practical matter how to pursue his or her claim. The options include a state-law cause of action such as Section 354.6, common law and equitable causes of action such as for unjust enrichment, and the causes of action provided in federal statutes, namely the ATCA and TVPA. As was amply demonstrated in the Japanese forced labor litigation, it is possible that none of these causes of action will eventually succeed (for example, if the state-law cause of action is deemed unconstitutional and the remaining causes of action are time-barred).

However, a plaintiff’s claim pursuant to any one of these causes of action is at the outset dependent on a court’s examination and con-

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283 See Vagts, supra note 278, at 746 (observing that “[f]or present purposes one can fairly treat the [multinational enterprise] as a recent creation, certainly post-World War II and largely post-1955”).

284 See supra notes 165–167 and accompanying text.


286 A plaintiff can only invoke the Torture Victim Protection Act, 28 U.S.C. § 1350 (2000), if she or he has suffered “torture.”

287 See supra notes 49, 51–52, 54 and accompanying text.
struction of the relevant treaty provision. In the Japanese forced labor litigation, courts willingly and thoroughly explored arguments invalidating the claimants’ causes of action (such as the federal foreign affairs power as it affected Section 354.6), yet neglected to comparably examine the validity and scope of the relevant treaty provision. The courts failed to consider compelling grounds in international and constitutional law for invalidating Article 14(b).\footnote{See supra Part IIA–B.} Admittedly, such a consideration is sometimes daunting for courts, given the judiciary’s desire and need to avoid confrontation with the executive and even for more resolute judges, the fact that policy considerations may argue in favor of upholding the relevant provision. However, judges are duty-bound to at least openly acknowledge and weigh such policy considerations—including those arguing against the executive’s position—and in particular, the need to safeguard rights. Where individual rights are implicated, judges may not always be able to invalidate the treaty provision in question due to policy considerations. But in the face of any ambiguity, they may yet protect such rights by adopting established interpretive approaches to more narrowly construe the scope of the treaty provision, thereby permitting the victim’s claim and signaling a judicial undertaking to shield such rights from future invasion.

With this approach, negotiators and drafters of future treaties would be forewarned that, although judges are highly unlikely to declare a treaty provision invalid, courts nevertheless demand maximum candor and clarity in its text.
REGIONALIZING LABOR POLICY THROUGH NAFTA: BEYOND PRESIDENT BUSH’S TEMPORARY WORKER PROPOSAL

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Abstract: The North American Free Trade Agreement (NAFTA) sought to create an expanded and secure market for the goods and services produced in its member territories. It represented huge improvements in the freedom of goods, services, and investments to move between member nations, but remained silent on the issue of freedom of movement of labor. The major objection to unrestricted movement of labor within NAFTA was the concern of permanent immigration from Mexico into, mainly, the United States. In early 2004, President George W. Bush introduced a proposal to allow, unilaterally, freer movement of temporary laborers into the United States. This Note argues that the President’s proposal is flawed because it fails to seek a multilateral agreement for the freedom of movement beyond that which flows into the United States, and especially ignores U.S. citizens seeking employment abroad. Rather than the United States acting unilaterally, this Note argues for a re-consideration of movement of labor within NAFTA.

Introduction

In the Winter of 1992, during the height of negotiations for the North American Free Trade Agreement (NAFTA), the United States Commissioner of the Immigration and Naturalization Service (INS) commented that “if immigration is not formally on the table, someone at the table will sooner or later realize as a practical matter that moving goods and services in international commerce also involves moving the people who trade in those goods and services.” Noemi Gal-Or, Labor Mobility Under NAFTA: Regulatory Policy Spearheading the Social Supplement to the International Trade Regime, 15 Ariz. J. Int’l & Comp. L. 365, 365 (1998).
capital and labor to where its marginal output would be the highest. Discussions of free movement of labor, however, inevitably are accompanied by concerns of permanent immigration and the resulting detrimental effects on the native labor force. Because of the high levels of illegal immigrants passing from Mexico into the United States, both the migration and immigration of workers have become increasingly contentious political issues in the United States.

In January 2004, the debate about immigration again came to the political forefront in the United States when President George W. Bush outlined his new proposal for a restructured temporary worker program. The plan, as proposed, would allow employers to hire willing foreign workers to fill jobs when no willing U.S. worker could be found, and would give those workers temporary legal status for three years. Depending on its ultimate scope, the program would restructure, if not replace, the current H-2 visas for non-immigrant unskilled workers. The President’s plan would open up U.S. immigration policy with respect to unskilled workers, as opposed to the current status of U.S. law with respect to restricted temporary entry of business person provisions under NAFTA. Upon the expiration of the three-year period, workers would be allowed to file for a renewal of their status, but the program would be required to have “an end” and would not

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6 Id. at 33–34.
7 See 8 U.S.C. § 1101(a)(15)(H)(ii) (2003). H-2 visas require that an employer has attempted to hire U.S. nationals by offering the prevailing wage and has failed before hiring the foreign workers, but it provides no legal status for those workers nor does it provide a central system to assist employers in the search for U.S. workers. Id. Additionally, there is a limit on the number of temporary workers allowed under the current law. 8 C.F.R. § 214.2(h)(8)(i)(C) (2003).
8 See Harry J. Joe, Immigration and Labor, in NAFTA AND BEYOND: A NEW FRAMEWORK FOR DOING BUSINESS IN THE AMERICAS, 421, 428–29 (Joseph J. Norton & Thomas L. Bloodworth eds., 1995). The four classes of business persons allowed temporary entry under NAFTA are business visitors, traders and investors, intra-company transferees, and professionals. Id. See generally Michael D. Patrick, Possible New Options for Skilled Foreign Professionals, 231 N.Y.L.J. 3 (2004) (implying that, though the main benefactors of the President’s plan will be unskilled workers, the plan also could lead to benefits for skilled professionals over the current law which sets a cap on the number of available visas).
provide any advantage to temporary workers with respect to pursuing U.S. citizenship. The President stressed that one of the expectations and goals of the program is for temporary workers to return permanently to their country of origin.

This Note explores the social, political, and economic justifications presented in favor of the President’s initiative. Specifically, this Note addresses how temporary workers fit within the theory of economic efficiency, NAFTA, and the long term consideration of immigration. While President Bush’s initiative is applicable to temporary workers from any nation, this Note focuses on the issue of immigration between the United States and Mexico. Part I discusses the treatment of capital and labor within NAFTA, the specifics of President Bush’s initiative, and presents statistics about immigration between the United States and Mexico. Part II examines the direct and indirect economic and social effects immigration has on native workers and seeks to explain the phenomenon that temporary worker programs tend to end in permanent dependence and immigration. Part III argues that, based on the President’s stated goals of the temporary worker program, the plan creates negative effects on foreign workers because of its limited time and scope. Further, it asserts that, rather than a unilateral change in immigration policy by the United States, the issue of movement of labor and immigration should be considered as a new NAFTA provision so as to complete the agreement’s treatment of free trade within the region.

I. LABOR TREATMENT IN NAFTA, THE BUSH INITIATIVE, AND IMMIGRATION INTO THE UNITED STATES

One of the prime motivating factors for the United States to enter into NAFTA was to help ensure an economically strong Mexico. However, the debate surrounding the ratification of the trade agreement went beyond the economic factors included in its language to include heated and highly public debates about labor and the environment. One such debate concerned the issue of Mexican immigrants and their effect on the U.S. job market. President Bush’s proposal again

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9 See Bush Announcement, supra note 5, at 33.
10 Id. at 34.
12 See Joe, supra note 8, at 450.
13 See id. (characterizing organized labor’s lobbying of Congress as intensive and extremely vocal).
brought Mexican immigration to the forefront, this time in the context of amending the United States’ immigration policy and law.\textsuperscript{14}

**A. NAFTA, a Trade Agreement Not a Social Contract**

This section explores how labor and immigration, despite the fact that they were not primary considerations in the NAFTA negotiations, were brought to the forefront of the NAFTA debate within the United States. The Preamble to NAFTA states, in part, that the member nations resolve to “create an expanded and secure market for the goods and services produced in their territories” and “protect, enhance and enforce basic workers’ rights.”\textsuperscript{15} NAFTA significantly enhanced the scope of trade in goods, services, and investment between its member nations, but it remained silent as to the free movement of labor, or, in other words, the rights of workers to seek employment in other member nations.\textsuperscript{16}

Under NAFTA, all goods that meet the required rules of origin standards will have their tariffs eliminated between the member nations by 2008 at the latest, allowing for the unrestricted trade of goods.\textsuperscript{17} NAFTA also provides common rules for investment between its members, liberalized restrictions on foreign investment, and a dispute resolution mechanism for investors and other governments.\textsuperscript{18} In addition, NAFTA was one of the first international treaties to include provisions on trade of services, and it established a set of rules and obligations that facilitate trade in services among the member nations.\textsuperscript{19} The provisions relating to services include Chapter 12, which applies to cross-border trade in services, and Chapter 16, which establishes the mechanisms for temporary entry of business persons into member states.\textsuperscript{20}

\textsuperscript{14} See Maureen Minehan, *Bush’s Temporary Worker Proposal Gives Employers Central Immigration Role*, 21 No. 5 EMP. ALERT 3 (2004) (quoting the executive director of the National Immigration Forum Frank Sharry who claimed the President’s announcement “re-started a long overdue discussion of immigration reform”).


\textsuperscript{17} See Appleton, supra note 16, at 25. In order to qualify, goods must originate in North America if they are wholly North American. See id. Goods containing non-regional materials qualify if those materials are sufficiently transformed in the NAFTA region. See id.

\textsuperscript{18} Id. at 79.

\textsuperscript{19} Id. at 91.

\textsuperscript{20} NAFTA, supra note 15, ch. 12, 16.
With respect to movement of labor, beyond the statement in the Preamble, no provision of NAFTA directly addresses labor issues.\(^{21}\) In fact, Chapter 16 emphasizes the fact that NAFTA only covers temporary entry of business-people into member nations, stating “this Chapter reflects . . . the need to ensure border security and to protect the domestic labor force and permanent employment in [the] respective territories.”\(^{22}\) Additionally, there is no authority or obligation on the part of any country to grant a citizen of any other country entry for the purpose of permanent residence.\(^{23}\) NAFTA specifically allows for member nations to maintain their individual immigration laws.\(^{24}\)

Movement of labor, and thus immigration, was not brought to the NAFTA negotiation table by the United States government; in fact, it was deliberately excluded.\(^{25}\) During negotiation and ratification of the treaty, debate over immigration occurred mostly in the public arena.\(^{26}\) Two major schools of thought emerged.\(^{27}\) Economists and business interests asserted that NAFTA would be economically beneficial for all nations involved.\(^{28}\) They stressed both the benefits to economic efficiency within the region and individual member economic growth, which would lead to the creation of jobs in all member nations, especially Mexico.\(^{29}\) Organized labor and others, including Ross Perot, claimed that NAFTA would encourage employers to flee to Mexico for lower wage rates, and therefore, cost U.S. workers their jobs.\(^{30}\) Additionally, the issues of Mexican labor conditions, environmental concerns, and illegal immigrants permeated and further fueled an already heated political debate.\(^{31}\)

Interestingly, it was not during the negotiations to formulate the provisions of NAFTA, but during the debates for ratification, that interest groups began to link immigration and migration issues with

\(^{21}\) Gal-Or, supra note 1, at 372.

\(^{22}\) NAFTA, supra note 15, ch. 16, art. 1601.

\(^{23}\) Joe, supra note 8, at 428.

\(^{24}\) NAFTA, supra note 15, art. 1607 (stating that, except as specifically provided in the agreement, no provision of NAFTA shall impose any obligation on a member nation regarding its immigration measures).

\(^{25}\) See Kevin R. Johnson, Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States, 27 U.C. Davis L. Rev. 937, 940 (1994); Gal-Or, supra note 1, at 373.

\(^{26}\) See Johnson, supra note 25, at 950–53.

\(^{27}\) See id. at 939.

\(^{28}\) See id.

\(^{29}\) See id. at 939, 951.

\(^{30}\) See id. at 939.

\(^{31}\) See Gal-Or, supra note 1, at 372–73.
ratification of the treaty. It was increasing pressure from interest groups that caused immigration to become a crucial factor during the domestic debate surrounding NAFTA.

The issues raised by the NAFTA negotiations also became a major focus in the 1992 presidential election. After the election, public debate continued even after the signing of NAFTA. The issues surrounding the threats of illegal immigration gained even more attention due to events such as the plight of the Haitian boat people and the passing of California Proposition 187 in 1994. As the Clinton Administration progressed, however, the public and governmental debates about the viability of free movement of labor between NAFTA member states faded and other issues took center stage.

B. New Debate on Immigration: President Bush’s Temporary Worker Plan

When announcing his immigration initiative, President Bush pointed out that immigration reform must begin by confronting “a basic fact of life and economics” with respect to labor—some jobs being created in the United States are not being filled by U.S. citizens.

On January 7, 2003, the President proposed a new and reformed temporary worker program to “match willing foreign workers with willing U.S. employers when no U.S. citizen can be found to fill the jobs.” Two of the reasons cited by the President for his revival of the debate surrounding immigration reform include, first, that the new program would increase national security because there would be better accounting of those who enter the country; and second, that the

32 See Johnson, supra note 25, at 941.
33 Gal-Or, supra note 1, at 373.
36 See id. Proposition 187 bars undocumented aliens from receiving social services. See id.
38 Bush Announcement, supra note 5, at 33–34.
39 Id. at 33.
program may aid in the long-term expansion of economic opportunity between NAFTA members, which in theory would decrease illegal immigration into the United States.\textsuperscript{40}

Under the President’s proposed plan, temporary foreign workers would be granted legal status in the United States for three years, dependent upon maintenance of their employment status, and, upon the expiration of their status, they have to apply for renewal or return to their home country permanently.\textsuperscript{41} The President stressed that the program would not change permanent immigration standards, retaining the requirement that workers pursue permanent legal status through traditional legal immigration procedures.\textsuperscript{42} However, while the President asserted that the plan is the best long-term way to reduce the pressures that create illegal immigration,\textsuperscript{43} participants in the temporary worker program would not receive an advantage in their applications for U.S. citizenship.\textsuperscript{44} The President was explicitly clear that he opposes amnesty and would not place undocumented workers on the “automatic path to citizenship,” regardless of whether they subsequently entered the temporary worker program.\textsuperscript{45} Furthermore, to give temporary workers an incentive to return home, the President said he would work with other countries to give temporary workers credit in their home country’s retirement system for their time worked in the United States.\textsuperscript{46} Finally, the President called for Congress to work with him to increase the annual number of green cards issued and to speed up the current citizenship process.\textsuperscript{47}

Consistent with the President’s policy on amnesty, unamended, the proposed temporary worker program would be open only to those illegal aliens within the United States who had jobs on the day of his January announcement.\textsuperscript{48} In other words, any illegal alien entering the United States, or unemployed on the date of the announcement, would be excluded from eligibility.\textsuperscript{49} Eligible undocumented aliens in the

\textsuperscript{40} Id. at 34.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} President Suspends Entry of Persons Engaged in or Benefiting from Corruption as President Fox Endorses Proposed Temporary Worker Program, 81 No. 3 Interpreter Releases 81, 81 (2004) [hereinafter Fox Endorsement].
\textsuperscript{44} Bush Announcement, supra note 5, at 34.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{49} See id.
United States would be required to pay a one-time registration fee as a condition of participation.\textsuperscript{50} Potential participants residing outside the United States before entering the program would not be required to pay a fee due to their implied compliance with U.S. immigration laws.\textsuperscript{51} Illegal immigrants entering the country after January 7, 2004 would be ineligible to enroll in the program from within the United States.\textsuperscript{52} All other provisions of the proposal would apply to every worker entering the program regardless of their original point of origin.\textsuperscript{53}

The development of the specific language of the proposed program has been left to Congress, which, as of November 2004, has yet to fully consider the issue.\textsuperscript{54} The closest legislation to the issue was Senate Bill S. 2010, proposed in January 2004 and sponsored by then Senate Minority Leader Thomas Daschle (D-SD) and Senator Chuck Hagel (R-NE), which proposed a more comprehensive approach to immigration reform, including reforms to the current foreign worker program.\textsuperscript{55} The main difference between the President’s plan and S. 2010 is the proposal for the creation of an earned adjustment process.\textsuperscript{56} Despite the lack of specific details and ultimate viability of the program,\textsuperscript{57} many immigration scholars felt that the President’s announcement was beneficial because it jump-started discussion and debate surrounding immigration reform.\textsuperscript{58} As the 2004 presidential campaign progressed, however, the issue again lost momentum and ultimately was not a prominent feature in the 2004 campaign.\textsuperscript{59}

\textsuperscript{50} See Bush Announcement, supra note 5, at 34.
\textsuperscript{51} See id.
\textsuperscript{52} See Bush-Fox News Conference, supra note 48.
\textsuperscript{53} See Bush Announcement, supra note 5, at 34.
\textsuperscript{55} See McMillion, supra note 54, at 68.
\textsuperscript{56} Patrick, supra note 8. An earned adjustment process allows qualifying workers automatically to become eligible to apply for adjustment of status to lawful permanent residents. Id.
\textsuperscript{59} See Immigration Reform, supra note 54.
C. Issues and Statistics Surrounding the Movement of Labor Between the United States and Mexico

Immigration accounts for almost forty percent of the United States’ population growth, and sixty percent of the 500 million aliens whom the Department of Homeland Security admits to the United States each year pass across the border between the United States and Mexico. At the same time, virtually all Mexican emigrants head for the United States. Beyond a claim of loss of U.S. jobs to foreigners, there are a number of other potential internal and external effects on the labor market and the economy that can be associated with freer movement of labor between the United States and Mexico. Immigration affects everything from wage rates and job availability to the demand for housing, education, and social services. Furthermore, immigration has an economic impact that goes beyond those with whom immigrants compete for jobs. Additionally, immigrants can directly affect politics at all levels, especially presidential elections.

Despite the problem of illegal immigration, social, economic, and political forces within the United States have been set to maintain the current immigration laws. Some scholars question if liberalization of the United States’ laws would improve the wages and conditions of migrant and immigrant workers. The maintenance of the status quo does not address the issue that most Mexican immigrants, legal and illegal, leave their home country due to social and economic forces and “go north for opportunity” with the hope of a better life. One of the goals under NAFTA was to stimulate the Mexican economy’s growth, a policy theorized, and also recently supported by President Bush, as a

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62 See Martin, supra note 4, at 419.
63 See Schuck, supra note 60, at 3–4.
64 Id. at 4.
65 See id.
66 Id. at 4 (noting that the 2000 elections were the first in many years in which immigration was not a major campaign issue).
67 See Cassise, supra note 35, at 1378.
69 See id. at 125, 140; Martin, supra note 4, at 419.
way to help stem Mexican migration and illegal immigration across the border. Proponents of NAFTA claimed the treaty represented the nation’s long-run solution to illegal immigration; however, the President’s proposal is evidence that more is needed to achieve that goal.

II. THE VARIED IMPACT OF IMMIGRATION

Though NAFTA does not explicitly address illegal immigration, the INS Commissioner, Doris M. Messinger, testified at Congressional hearings that, in all likelihood, NAFTA should result in the long-term reduction of illegal immigration into the United States. At the same time, President Bush’s proposal seeks to further the goals of increasing national security and reducing illegal immigration through the use and expansion of the temporary worker program. However, while temporary workers would provide economic benefits for employers and the U.S. economy, there are a number of negative externalities that may result from their legally residing and working in the United States. First, even with a reduction in numbers of illegal immigrants, the economic and social costs of immigrants on natives reaches beyond competition for jobs. Second, and perhaps more important, the experience of guest and temporary worker programs throughout the world has led to the saying, “[t]here is nothing more permanent than temporary workers.” This section explores some of the general economic and social costs immigrants have on the U.S. economy, and discusses the practical results which accompany a policy based on “temporary” workers.

A. Economic and Social Costs of Immigrant Labor on Native Workers

The most direct way immigrants affect the U.S. economy is through the labor market. Immigration restrictions allow domestic laborers to demand a higher price for their services because of the limited supply of laborers. Economists argue that this restriction

70 See Ostry, supra note 11, at 27; Bush Announcement, supra note 5, at 34.
71 See Johnson, supra note 25, at 941.
72 Joe, supra note 8, at 423 (citing 70 INTERPRETER RELEASES 1546, 1547 (1993)).
73 See Fox Endorsement, supra note 43, at 81.
74 See Chang, supra note 2, at 378–84.
75 See id.
76 Martin, supra note 4, at 437.
77 See Schuck, supra note 60, at 3–4. To what degree that effect is felt by individual workers remains a heated issue of debate between analysts. See id.
creates economic inefficiency.\textsuperscript{79} The argument is that protectionism of domestic laborers causes distortions in domestic production and consumption due to higher production costs, and ultimately U.S. consumers lose due to the resulting higher cost of goods and an inefficient market.\textsuperscript{80} On an international level, standard trade theory calls for the same analysis and, further, is centered on the assertion that free trade in goods, services, and labor is needed to maximize national and international economic welfare and efficiency.\textsuperscript{81}

One issue surrounding a change in the U.S. laws is whether the benefits from temporary labor, with respect to economic efficiency, outweigh the possible economic and social costs.\textsuperscript{82} The President’s plan implicitly assumes that the temporary workers would be substitutes for U.S. workers, suggesting they would demand and be offered the same wage rate.\textsuperscript{83} In contrast, economic theory on free movement of labor would call for an adjustment in wages to create the optimal and efficient distribution and use of foreign labor.\textsuperscript{84} This creates two possible outcomes.\textsuperscript{85} In the first, employers maintain their wage rates and treat the availability of temporary workers as perfect substitutes for U.S. workers without accounting for the fact that most foreign workers would accept a lower wage rate for the same work.\textsuperscript{86}

The second outcome theorizes that employers would adjust their wage rate so that they pay the lowest wage possible while still maintaining a full labor force.\textsuperscript{87} As a result, general wage rates would decrease, thereby causing U.S. workers to be unwilling to fill jobs they currently occupied, and allowing for more openings for “willing foreign workers.”\textsuperscript{88} Theoretically, the U.S. economy as a whole would “benefit from the honest labor of foreign workers” because the mar-

\textsuperscript{79} See id. at 379.
\textsuperscript{80} See id.
\textsuperscript{81} See id. at 379.
\textsuperscript{82} See id. at 378–84.
\textsuperscript{83} See Bush Announcement, supra note 5, at 33–34.
\textsuperscript{84} See Chang, supra note 2, at 373.
\textsuperscript{86} Cf. id. at 802 (finding that there remains an immigrant-native wage differential even when controlling data for education and potential labor market experience are considered).
\textsuperscript{87} See id. (finding that immigrants earned about thirty percent less than native workers at the end of the 1980s for the same jobs).
\textsuperscript{88} Fox Endorsement, supra note 43, at 81; see Minehan, supra note 14.
ket would be more efficient, however, the result would be more unemployed U.S. workers due to the fact that some would be replaced by foreigners demanding a lower wage rate.\textsuperscript{89}

The increase in labor mobility with temporary workers, while economically beneficial, creates a number of social problems for U.S. citizens.\textsuperscript{90} Directly, temporary workers create a loss of U.S. jobs and an increased dependence on foreign workers by U.S. producers.\textsuperscript{91} Immigrants, especially those with legal status, can gain access to, and therefore, increase the burden on, a number of government programs and public goods such as public schools, health care, and roads.\textsuperscript{92} Due to increased usage of a finite amount of services, all U.S. citizens are potentially subject to the effects of higher levels of immigrants, not just those competing with immigrants for jobs.\textsuperscript{93} Finally, while many immigrants pay taxes, the net fiscal burden of unskilled immigrants on the United States is, and would continue to be, negative because the consumption of public goods and government services is much greater than the taxes paid by the individuals.\textsuperscript{94} Indeed, a recent report by the Center for Immigration Studies found that the lifetime fiscal effect on the U.S. economy of the average low-skilled immigrant worker is a negative $55,200.\textsuperscript{95}

Additionally, Hispanics (particularly Mexican-Americans) make up an already large and rapidly increasing part of the electorate in the United States\textsuperscript{96}, and therefore, can have a profound effect on the political process.\textsuperscript{97} Because of the large bloc of Hispanic voters in some regions, it is difficult for elected officials to go on record as opposing immigration reform.\textsuperscript{98} The President’s proposal is an example of how immigrant communities can affect the campaigns and decisions of candidates and incumbents.\textsuperscript{99} This is highlighted by the fact that, even though President Bush talked about immigration reform since early in his first term, he mentioned it infrequently during his 2004

\textsuperscript{89} Fox Endorsement, supra note 43, at 81; Minehan, supra note 14.
\textsuperscript{90} See Chang, supra note 2, at 393–94.
\textsuperscript{91} See id.
\textsuperscript{92} Id. at 382–83.
\textsuperscript{93} See id. Consider, for example, the increased congestion on roads. See id. at 383.
\textsuperscript{94} See id. at 390–91.
\textsuperscript{95} O’Meara, supra note 57, at 31.
\textsuperscript{96} Papademetriou Testimony, supra note 58, at 4.
\textsuperscript{97} See Minehan, supra note 14, at 3.
\textsuperscript{98} Id.
\textsuperscript{99} See Austin T. Fragomen, Jr. & Steven C. Bell, President Unveils Immigration Reform Proposal, Immigration Business News and Comment, Feb. 1, 2004, at 2, at 2004 WL 102714 (citing critics who call the President’s plan merely part of his re-election strategy).
re-election campaign; indeed, even at those times when the issue was mentioned during the campaign, it was in Southwestern border states or before Hispanic audiences where it was believed it could give the President a political boost.  

The President’s proposed temporary worker program would do nothing to improve or alter the inherent social costs of immigrants on the U.S. economy. Despite the added tax revenue, the temporary workers would continue to equate to negative fiscal burdens, as opposed to possible long term fiscal gains from those immigrant families who remain in the United States for generations. The National Research Council found that the descendents of current immigrants in the United States are likely to have an overall net positive fiscal effect on the economy. With respect to temporary workers, there is no hope of the families of the immigrants reversing the negative fiscal effects because the workers are expected to return home permanently; therefore, there is no chance for recovering any of the net social and fiscal loss the economy suffers during their time in the United States.

B. Permanent Temporary Workers

The purpose and theory behind temporary worker programs such as the President’s is to add workers to the labor force without adding permanent residents to the population. Virtually all guest worker programs fail, though, when measured against this goal, because employers become dependent on foreign workers, and many workers find ways to settle permanently in the host country. The President’s plan would call for the registration of the eight to twelve million illegal aliens currently residing in the United States, about three-fifths of whom are Mexicans. Many of these illegal immigrants

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102 See id. at 467.


104 See id. at 388–90; Bush Announcement, supra note 5, at 34.

105 Martin, supra note 4, at 436.

106 Id.

107 O’Meara, supra note 57, at 30; Papademetriou Testimony, supra note 58, at 2.
remain in the country because of the dangers involved with a possible future return if they attempt to leave due to enhanced border protection.\textsuperscript{108} Migration of people into the United States may be more permanent than the legal flow of trade, and, because of enforcement problems, those immigrants often remain in the country and have a lasting impact on the nation as discussed above.\textsuperscript{109} Additionally, the phenomenon is due in part to the host employers’ increasing dependence on both foreign workers and foreign labor markets.\textsuperscript{110}

President Bush described the situation faced by many immigrants, especially illegal immigrant workers in the United States, as “wrong” and claimed that the changes to immigration law he proposed must be made to show the compassion and the heart of the American people, consistent with the ideals of common sense and fairness with respect to immigrant workers.\textsuperscript{111} In addition to emphasizing the compassion of the American people, the President voiced his disapproval of an amnesty process which would guarantee those same workers the full protection and access to the laws within the U.S. labor market, insisting that amnesty instead encourages violation of U.S. laws.\textsuperscript{112} At the same time, allowing the use of temporary immigrant laborers creates a dependence on those workers by U.S. employers, but fails to detail what types of protections must be guaranteed to such workers and how those protections will be enforced.\textsuperscript{113} In essence, the program can be seen to serve the needs of large corporations while creating a “new kind of second-tier worker.”\textsuperscript{114}

The issue many undocumented aliens or foreign citizens may have to deal with, when evaluating the temporary worker programs, is the conflict between enrolling in a program which would ultimately force them to leave the country when, if they did not enroll, they could continue to work illegally and indefinitely.\textsuperscript{115} Many illegal aliens currently residing and working in the United States have already de-

\textsuperscript{108} Martin, supra note 4, at 422–23; Papademetriou Testimony, supra note 58, at 6.

\textsuperscript{109} Johnson, supra note 25, at 968.

\textsuperscript{110} See Martin, supra note 4, at 436–37.


\textsuperscript{112} Bush Remarks, supra note 111.

\textsuperscript{113} See id.

\textsuperscript{114} Bush Announcement, supra note 5, at 35 (quoting John J. Sweeney, President of the AFL-CIO).

\textsuperscript{115} See id. (quoting co-director of the Migration Policy Institute Demetrios Papademetriou in an interview with the Washington Post).
veloped deep social and economic roots in their communities, and a program that allows only temporary status is not likely to provide sufficient inducement for them to come forward and register. Additionally, without strict supervision of the program, those workers entering from abroad may be unwilling to return voluntarily to their home countries, and instead may choose to use their temporary worker status as a means toward establishing themselves permanently in the United States.

III. The Need to Approach Immigration Reforms Through NAFTA

During the ratification process, the debate about immigration under NAFTA was based primarily on the issue of fear of migration of jobs to Mexico and illegal immigration from Mexico. The President’s plan allows for employers to fill jobs that U.S. citizens are unwilling to take by opening the border to temporary workers at a time when there are eight to twelve million unemployed citizens, as well as eight to twelve million illegal aliens in the United States. It seems plausible that the reason that many available jobs are not being filled does not have to do with a lack of unemployed U.S. citizens, but rather with the conditions and circumstances of employment, and the amount of money the employer is willing to pay. The unilateral amendment of immigration laws by the United States to allow for temporary foreign workers, especially from Mexico, allows for temporary workers to have a type of dual citizenship, while no rights or benefits would be reciprocated to U.S. workers in foreign countries.

This section argues that the current debate should shift to the core issue of negotiating NAFTA provisions governing the movement of all types of labor, not just professionals, between the United States, Canada, and Mexico, rather than the inherent flaws in a unilateral law and policy change by the United States.

116 See Papademetriou Testimony, supra note 58, at 5.
117 See id. at 6; O’Meara, supra note 57, at 30.
118 Johnson, supra note 25, at 950–53.
119 See O’Meara, supra note 57, at 30.
120 See id. at 31 (quoting Representative Tom Tancredo (R-CO)).
121 See id. at 32 (quoting Dan Stein, Director of the Federation for American Immigration Reform); Papademetriou Testimony, supra note 58, at 9.
A. Unilateral Change Without Direct Domestic Benefits

The President’s plan, while supported and endorsed by President Vicente Fox of Mexico, is a one-sided and unilateral change to the United States’ immigration laws. The majority of the direct benefits of this change will not be felt by U.S. citizens; instead, they will go to the hundreds of thousands of illegal and potential immigrants who would become part of the program. The President has claimed that the change would help increase national security, as well as create a speculative economic boost. In overall fiscal terms, there may be no measurable benefit to the United States, but merely the assertion that the United States is safer because of an increase in border control and greater monitoring of foreigners entering the country.

The need for a multilateral, as opposed to unilateral, change to immigration laws within North America can be explained and emphasized through both an economic and social analysis of President Bush’s plan. However, because of the advanced nature of the economies of the United States and Canada, when compared with the developing economy of Mexico, completely unrestricted movement of labor between members of NAFTA is not currently feasible. A multilateral plan which reduces the restrictions on the movement of labor would directly increase economic efficiency and positively affect each individual nation. At the same time, restructuring of immigration and labor laws to allow for unlimited temporary labor on a unilateral level maintains, if not heightens, economic inefficiency and social problems created by legal and illegal immigration.

122 See O’Meara, supra note 57, at 33 (quoting Glen Spencer, head of American Boarder Patrol, who characterizes the President’s proposal as a kind of one-way merger).
123 See id.
125 See O’Meara, supra note 57, at 32, 33.
126 See Bush Announcement, supra note 5, at 33–34; Minehan, supra note 14, at 3.
127 See Johnson, supra note 25, at 952 (asserting that Mexico is a developing nation, while the United States and Canada are not, and this causes the focus of the debate about immigration to center on the United States’ neighbor to the south); O’Meara, supra note 57, at 32 (quoting Dan Stein, Director of the Federation for American Immigration Reform, asserting that there cannot be a completely free hemispheric labor market unless all countries are at economic parity and have parity in their social-benefit systems).
128 See Chang, supra note 2, at 373.
129 See O’Meara, supra note 57, at 32 (quoting Dan Stein, Director of the Federation for American Immigration Reform, who claims that the President’s proposal is like surrendering to a situation that leaves Americans to absorb all the costs and impacts).
The President’s temporary worker program, in theory, would entice the registration of illegal immigrants through a promise of temporary legal status.130 Upon registration, the immigrants would pay a fee and register their names and addresses, so that after their legal status expires the government can identify them and return them to their home country.131 The President’s plan asks for illegal immigrants to register themselves with the knowledge that, three years from that date, the INS would notify them that their legal status has expired and they must leave the country, but, if the immigrants did nothing, they could maintain their status quo indefinitely.132 The plan assumes that illegal immigrants would weigh the advantage of the ability to travel between the United States and their home country with the three year expiration date on their residence in the United States, and find obtaining legal status worth restricting their time in the country.133 As a further deterrent, many immigrants may fear that registration could be used against them in other detrimental ways.134

Economically, the United States would be instituting an implicit time limit on existing sources of labor within its economy, not just attracting temporary labor.135 Those foreign workers who would enter the United States through the temporary worker program would also face the three year deadline, but the expiration of their status could have less of a direct economic effect in reduction of current labor levels because of the circularity of the workers.136

For each temporary laborer sent home, there would be an implicit economic loss in human capital.137 The President cites as support for his proposal the fact that, after their time in the United States, workers would return to their home countries with additional skills and training which would aid their home economy.138 Such skills and training would be learned at the expense of, and through training by, U.S. companies.139 While U.S. companies would be able to get workers through the program, they would also lose those workers in

130 See Bush Announcement, supra note 5, at 34; O’Meara, supra note 57, at 31.
131 See O’Meara, supra note 57, at 31.
132 See Bush Announcement, supra note 5, at 35 (quoting Co-Director of the Migration Policy Institute, Demetrios Papademetriou); O’Meara, supra note 57, at 31.
133 See O’Meara, supra note 57, at 31.
134 See Papademetriou Testimony, supra note 58, at 5.
135 See Press Conference, supra note 124.
136 See Papademetriou Testimony, supra note 58, at 3.
137 See Patrick, supra note 8.
138 See Press Conference, supra note 124.
139 See Patrick, supra note 8.
whom they had invested time, money, and training. By asking U.S. companies to comply with a three year program, the President would implicitly be limiting the amount of training and on-the-job education that temporary workers would be given, and with which they would return home. This resulting limit on training undermines the assertion that returning workers would have a great impact on their home economy. Additionally, if labor laws were not vigorously enforced, the finite term of possible employment would expose temporary workers to negative, and possibly illegal, treatment by employers. There may be companies which would seek to exploit temporary workers by maintaining the lowest possible wage rates, restricting promotions, and instituting programs which use the fixed time frame as a major factor against temporary workers. Economically, companies face much higher costs if there is turnover in more advanced positions filled by temporary workers because of higher levels of training and investment in human capital. It is very possible that, under the Bush plan, temporary workers would be subject to implicit and structural employment discrimination because of their legally defined period of employment. Furthermore, under the plan, a temporary worker must hold and maintain employment to retain legal status, and some employers may

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140 See id.
141 See id.
142 See id.
143 See Press Conference, supra note 124.
144 See Bush Announcement, supra note 5, at 35 (referencing Jared Bernstein of the Economic Policy Institute as supporting the need for the President’s proposal to enable temporary workers to be protected by labor laws).
146 See Patrick, supra note 8.
147 See Bush Announcement, supra note 5, at 35 (quoting AFL-CIO President John J. Sweeney as stating the President’s proposal creates a new type of second-tier worker, implying that temporary workers would be treated differently than American workers).
use this unstable legal status to exploit workers. While probably illegal, it is not impossible to imagine scenarios where temporary workers might seek to exercise their rights by seeking to join unions, requesting raises, or pursuing other benefits, and an employer would threaten termination of employment, and thus legal status, to stifle such actions. Overall, the temporary worker program potentially would leave foreign workers in an extremely weak bargaining position.

B. Recent Events and Multilateral Negotiation

In March 2004, President Bush acknowledged that his proposal faced a tough time in Congress. Over two months after the announcement of his proposal, the Senate Foreign Relations Committee held a hearing on the issue of United States-Mexico relations, but no language had been drafted regarding the President’s proposal. After the hearings, the Republican-controlled Congress did nothing further to move on the President’s proposal in 2004. Despite the lack of progress for the President’s plan, the debate about immigration reform came to the political forefront that spring. The meeting between President Bush and President Fox in early March 2004 emphasized the Bush Administration’s focus on protecting the nation from terrorism through stemming the flow of illegal immigrants. During the second meeting of the two leaders in November 2004, President Bush renewed his support for his plan and changes to U.S. immigration law, but did not pledge to push for the enactment of his pro-

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148 See Minehan, supra note 14 (quoting AFL-CIO President John Sweeney asserting that the Bush plan deepens the potential for abuse and exploitation of temporary workers).

149 See Chang, supra note 101, at 470–71; Bush Announcement, supra note 5, at 34.


151 See Press Conference, supra note 124 (responding to a question of timing of his proposal, President Bush stated that he certainly hoped Congress would take the issue, but nothing was certain because 2004 was an election year); Ron Hutcheson, Bush Promises to Ease Borders; Proposal for Illegal Mexican Workers Not Favored in Congress, SUN HERALD (Biloxi, MS), Mar. 7, 2004, at 1, available at 2004 WL 70754435.


153 See Immigration Reform, supra note 54.

154 See, e.g., Hutcheson, supra note 151 (quoting a statement issued by Senator John Kerry, Democratic presidential candidate, saying “Latinos can tell it’s an election year because George W. Bush is finally paying attention to them.”).

155 See Press Conference, supra note 124.
posal. The meetings between the two leaders could have been ideal moments to re-open discussions about regional, instead of merely unilateral, immigration and/or labor agreements between, not just the United States and Mexico, but all of the members of NAFTA.

Canadian support and approval would be necessary to add the final aspect of free trade (movement of labor) to the NAFTA agreement. Realistically, obtaining Canadian support for a multilateral plan likely would not be a major hurdle to a region-wide agreement. The immigration standards between the United States and Canada maintain a level of freedom which would not need major amendments in order to facilitate negotiations to add labor to NAFTA. Canada’s interest in expanded movement of labor is the attraction of human capital and talent into their economy, a goal which would be furthered through a region-wide agreement. From Canada’s perspective, NAFTA began a period of increased continental integration which could, in the future, include freer (but not unrestricted) movement of, not only goods, capital, and ideas, but also people.

C. Negotiation Through NAFTA

The proposed temporary worker program essentially would have the effect of opening the U.S. job market to any foreign worker willing to fill a job at a wage that a native worker would be unwilling to

156 See Immigration Reform, supra note 54.
157 See Press Conference, supra note 124.
159 See Gal-Or, supra note 1, at 379 (discussing the amendments made to Canada’s immigration law in order to implement NAFTA while retaining a much less restrictive temporary entry regime for Canadians entering the United States). Amendments to immigration laws between Canada and Mexico and Canada and the United States are beyond the scope of this Note; however, illegal immigration between Canada and Mexico has always been a much smaller problem than that between the United States and Mexico. See e.g. Morton Weinfeld, North American Integration and the Issue of Immigration: Canadian Perspectives, in NORTH AMERICA WITHOUT BORDERS? INTEGRATING CANADA, THE UNITED STATES, AND MEXICO 153, 158–60 (Stephen J. Randall ed., 1992) (citing the number of Hispanic immigrants into Canada in 1987 as 5,513 people, when in the same year the U.S. Census Bureau reported the immigration of 11.8 million Mexicans into the United States).
160 See Gal-Or, supra note 1, at 379.
162 Weinfeld, supra note 159, at 154.
accept. The Bush Administration has emphasized that a principal target of the program is Mexico and illegal Mexican immigrants. The temporary worker program would provide an unlimited amount of Mexicans with the legal right to work and live in the United States, without any reciprocal rights for U.S. citizens within Mexico. Hence, the overall effect is a unilateral opening of the United States’ borders for the primary benefit of another NAFTA member nation, without provisions allowing for the protections that could be gained through an international agreement.

If President Bush’s main focus is to control and deter illegal immigration from Mexico through an amendment to immigration policy, there is no reason to open the United States’ borders to all countries. When NAFTA was negotiated, labor was left off of the bargaining table mainly because of the United States’ fear of Mexican immigrants. As it currently stands, NAFTA reinforces the immigration status quo between the United States and Mexico while economic and other pressures favor change. In March and November 2004, Presidents Bush and Fox met to discuss the temporary worker program, and both were supportive of advancing the policy of movement of labor between the United States and Mexico, adding to the pressures favoring change. With the primary obstacle to negotiating labor within the original NAFTA debates (namely, U.S. opposition to Mexican workers) now open to negotiation and discussion, the appropriate forum for those negotiations is within the framework of NAFTA. By negotiating within NAFTA, the member nations would be able to ensure that any amendments to labor and immigration law and policies would fully “protect, enhance, and enforce workers’ rights” in all member nations, and therefore, further the standards established in the original negotiations.

163 See O’Meara, supra note 57, at 32 (quoting Dan Stein).
164 See O’Meara, supra note 57, at 32 (quoting Dan Stein and Rep. Tom Tancredo).
165 See id.; Papademetriou Testimony, supra note 58, at 10.
166 See Noriega Testimony, supra note 145, at 7.
167 See Gal-Or, supra note 1, at 366 (noting that, because of the extremely volatile immigration situation in U.S.-Mexican relations, the Parties to NAFTA opted to by-pass it to avoid jeopardizing the real “directly trade related issues” at stake).
168 Johnson, supra note 68, at 126; Cassise, supra note 35, at 1378.
169 See Immigration Reform, supra note 54; Press Conference, supra note 124.
170 See Papademetriou Testimony, supra note 58, at 9 (testifying that an issue as complex as immigration cannot be managed as well unilaterally as it can with the cooperation of the United States’ neighboring countries).
171 See NAFTA, supra note 15, pmbl.; Papademetriou Testimony, supra note 58, at 10.
An amendment to NAFTA would not have to establish a uniform approach to standards for permanent legal status for immigrants within the three member nations, but it should set out a minimum accepted level of treatment for applicants from within NAFTA. Without the possibility of permanent legal status, even a multinational worker movement policy would be susceptible to those who seek to avoid control by moving through illegal channels. However, each country within NAFTA faces different immigration issues from the rest of the world and is, and must continue to be, afforded the opportunity and ability to set its own immigration policy and laws.

NAFTA’s Preamble establishes the standard for workers’ rights, but currently that promise is not supported in the actual language of the treaty. Freer movement of labor across borders is an underlying economic necessity to further enhance and maximize the efficiency of member nations’ economies. However, completely free movement of labor between the member nations, such as is the case in the European Union, is not feasible because of the economic, social, and political differences of Mexico compared to the other two NAFTA member countries. A unilateral legal change by the United States to allow for Mexican temporary workers would do little, if nothing, to improve that economic differential. A multilateral agreement to allow for controlled, but expanded, movement of workers between member nations would allow for economic growth and higher levels


174 See O’Meara, supra note 57, at 31.


176 See NAFTA, supra note 15, ch. 16, art. 1607.

177 See Chang, supra note 2, at 373.

178 See O’Meara, supra note 57, at 32.

of economic efficiency in each country.\footnote{See Chang, supra note 2, at 373.} Lower skilled laborers from Mexico could fill jobs in the United States and/or Canada, while higher skilled and trained workers could enter Mexico and, theoretically, work to improve and strengthen the Mexican job market and therefore the Mexican economy.\footnote{See id. (indicating that market forces would direct labor to the market where its marginal product would be the highest).}

During the original debates over NAFTA, the need for freer movement of foreign investment, capital, and services between members was agreed upon, but the final economic factor (labor) was left unaccounted for in the text.\footnote{See Spracker & Brown, supra note 176, at 351.} By negotiating to add the final economic factor to the equation, the United States’ goals of developing and furthering the economic stability of Mexico and increasing national security would be more complete.\footnote{See Ostry, supra note 11, at 27.} Moreover, amending NAFTA to include a provision on immigration and labor would not need to undermine each individual country’s immigration laws and policies with respect to outside nations.\footnote{See NAFTA, supra note 15, ch. 16, app. 1603.} Chapter 16 of NAFTA currently provides for freer movement of business persons between the member nations, while still allowing each individual nation to set its immigration standards for business persons from abroad; the same type of provision could be negotiated for low and un-skilled laborers.\footnote{See Papademetriou Testimony, supra note 58, at 10.} Furthermore, if there was a region-wide agreement on border enforcement and policy, the security of each member nation would increase substantially more than would occur with a unilateral increase in protection, simply because of the heightened degree of regional cooperation and coordination in immigration and anti-terrorist practices.\footnote{O’Meara, supra note 57, at 32; Noriega Testimony, supra note 145, at 7.}

A regional labor movement policy would also eliminate the “opening of the floodgates” feel of a nationality-neutral, unilateral temporary worker program.\footnote{See O’Meara, supra note 57, at 32.} To address the primary issue of illegal Mexican immigrants, the President’s plan would unnecessarily open the United States’ borders to temporary workers from all nations.\footnote{See O’Meara, supra note 57, at 32.}
In contrast, creating a movement of labor provision in NAFTA would address the specific issue of Mexican workers, while allowing for the member nations to maintain domestic immigration laws to meet the needs and policies relating to immigrants from non-member nations. A labor and/or immigration provision in NAFTA would finally bring the last economic factor of production entirely within the provisions of the treaty, as well as further the goals of national security and border control.

Conclusion

NAFTA was a groundbreaking agreement with respect to the cross-border trade in services. An amendment to NAFTA dealing with controlled regional movement of labor could be equally groundbreaking, allowing for more efficient uses of labor while not requiring a comprehensive integration of economies and social policies. The benefits of working on a regional level, as opposed to unilateral action by the United States, would be felt most directly by U.S. workers. In order to create a higher level of economic efficiency without destroying the U.S. labor market, the agreement would need to include provisions to restructure the ability of workers to move between all member nations without removing all restrictions. With a regional policy and agreement, the U.S. economy would be less exposed to potential economic losses caused by immigrants than it would with unilateral action. The skills and training of immigrant workers would not suffer limitations due to a finite expiration date, and at the same time foreign workers would be less likely to encounter exploitation and discriminatory treatment in the workplace. Additionally, legal immigrant laborers would add to the tax base of the host country, resulting in increased tax revenue. Finally, national security would increase because of decreased need for enforcement coupled with increased multilateral efforts to control illegal border crossings.

The issues that surrounded the original NAFTA debates about labor and economic standards within Mexico would undoubtedly arise during debates over a regional labor movement policy. It is probable that the admittance of U.S. workers to the Mexican labor

189 See Papademetriou Testimony, supra note 58, at 9, 10.
190 The four basic pillars of a comprehensive free trade regime, as defined by the European Union, are the free movement of goods, services, capital, and persons. See Chang, supra note 2, at 372.
191 See id. at 372–73; Bush Announcement, supra note 5, at 34.
force, especially in management positions, would have a much more
direct and immediate impact on Mexican labor, environmental poli-
cies, and the economy, than the current indirect effect of improve-
ment of policies with the gradual improvement of the Mexican econ-
omy. A direct negotiation between member countries for regional
immigration and labor provisions would likely lead to faster and bet-
ter results than would be possible through a unilateral action by any
member. The goals of improving national security for each member
nation and enhancing regional economic stability are more likely to
be implemented successfully if there is regional cooperation within
NAFTA.
THE FOREIGN CORRUPT PRACTICES ACT:
IT’S TIME TO CUT BACK THE GREASE AND
ADD SOME GUIDANCE

REBECCA KOCH*

Abstract: Congress enacted the Foreign Corrupt Practices Act to combat an epidemic of illicit payments by U.S. businesses and individuals to foreign officials. The FCPA prohibits any bribe to a foreign official to influence any official act, induce unlawful action, or obtain or retain business. The FCPA, however, carves out an exception for facilitating grease payments made to foreign officials to expedite or secure performance of routine government actions. This exception allows for modest payments to low-ranking officials to expedite non-discretionary clerical activities. The FCPA fails to provide a monetary threshold for what constitutes a permissible grease payment. This Note explains that the carve-out for grease payments impedes the Congressional goal of stamping out corruption. To alleviate the problems associated with grease payments, this Note advocates for Congressional repeal, or amendment of, the statute; DOJ promulgation of guidelines defining permissible grease payments; corporate activism; and institutional reform.

I. Introduction

Congress enacted the Foreign Corrupt Practices Act (FCPA) in an unprecedented attempt to combat the epidemic of illicit payments by U.S. businesses and individuals to foreign government officials.¹ Despite the FCPA’s enactment, transnational corruption remains a potent and debilitating force affecting U.S. foreign policy, the United States’ international economic interests, and the political and economic interests of developing nations.² This pervasive trend erodes public confidence in the business community and tarnishes the image

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379
of the U.S. government abroad. Against this erosion, the FCPA falls short. The current provisions of the FCPA are weak and ineffectual; specifically, the exception for “grease” or “facilitating” payments made to foreign officials to expedite or secure the performance of routine government actions. These grease payments currently comprise a gray area of corruption, blurring the distinction between legal and illegal payments to government officials and opening the flood gates for abuse. Although the FCPA does not prohibit grease payments, such payments may still be considered bribes, carrying with them many potential deleterious effects. Unlike the United States, the international community is progressing toward criminalization of all payments to foreign officials.

As the basis underlying Congress’ decision to allow grease payments continues to dissolve, Congress and the Department of Justice (DOJ) could rein in the ill effects of grease payments. First, congressional repeal of the statutory exception would provide a quick solution to the troubles associated with grease payments. Another potential avenue for redress is for Congress to amend the statute to provide for a monetary threshold, above which a payment will not constitute a

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4 See Cruver, supra note 2, at 20 (indicating that grease payments are not prohibited by the FCPA); Perkel, supra note 2, at 686 (stating that corruption is still pervasive despite the FCPA provisions).


6 See id. at 477.


8 See generally The Foreign Trade Practices Act, Hearings before the Subcomm. on Int’l Econ. Policy and Trade of the House Comm. on Foreign Affairs, 98th Cong. 217 (1983) (prepared statement of Mark Feldman, Attorney, Donovan, Leisure, Newton & Irvine) (stating that it was customary practice to give grease payments to underpaid, low-ranking civil servants) [hereinafter Foreign Trade Hearings]; H.R. Rep. No. 95–640, at 8 (1977) (stating that it would not be feasible for the United States to attempt to eradicate grease payments unilaterally); M. McCary, Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective, 35 Tex. Int’l L.J. 289, 314 (stating that an international consensus has emerged that grease payments constitute bribery); Wallace-Bruce, supra note 7, at 350, 357–59 (explaining that an international effort is evolving to minimize, if not eliminate, corruption and that the positive effects of corruption, such as supplementing the incomes of underpaid, low-level government officials, are outweighed by the negative effects).
permissible grease payment. Congress could also establish a two-prong test for permissible grease payments, requiring: (1) the payer to make the payment for the purpose of securing or expediting a routine government action; and (2) that the payment fall beneath a certain percentage of the country’s per capita income. Finally, to further prevent abuse of the FCPA and enlighten businesses about grease payments, the DOJ should promulgate guidelines to elucidate what constitutes a permissible grease payment.

Section II of this Note provides a brief history of the FCPA and a summary of the anti-bribery provisions. This section also addresses the international response to transnational corruption that ensued from the enactment of the FCPA. Section III sets forth the arguments against the FCPA and the flaws inherent in the grease payments exception. Section IV addresses various methods to alleviate the troubles associated with grease payments, including the possible repeal of the grease payment exception and the inclusion of a dollar limit for grease payments into the FCPA. This section also advocates for the DOJ to create guidelines to clarify what constitutes a grease payment. In consideration of the inherent limitations of legislative solutions in this arena, this section also addresses extra-legal solutions to the problem of transnational corruption.

II. BACKGROUND AND HISTORY

A. ENACTMENT OF THE FOREIGN CORRUPT PRACTICES ACT IN THE UNITED STATES

Business reliance upon bribery as a method of obtaining favorable, foreign business contracts has evolved into an international business

9 See Business Accounting and Foreign Trade Simplification Act: Joint Hearings Before the Subcomm. on Sec. and the Subcomm. on Int’l Fin. and Monetary Policy of the Senate Comm. on Banking, Hous., and Urban Affairs, 97th Cong. 438 (1977) (prepared statement of Wallace L. Timmeny, Kutak, Rock & Huie) (suggesting that a better approach to grease payments would be to establish a dollar limit) [hereinafter Business Accounting Hearings].

10 See Foreign Trade Hearings, supra note 8, at 285 (testimony of Steven J. Brogan, Associate, Jones, Day, Reavis & Pogue) (suggesting that the legality of the payment should turn on its purpose); Unlawful Corporate Payment Act of 1977: Hearings Before the Subcomm. on Consumer Protection and Fin. of the House Comm. on Interstate and Foreign Commerce, 95th Cong. 44 (1977) (comment of Rep. Krueger, Member, Hous. Comm. on Interstate and Foreign Commerce) (suggesting that the allowance for grease payments could vary with per capita income) [hereinafter Unlawful Corporate Payment Hearings].

Illegal or improper payments by U.S. businesses to foreign officials are certainly not a recent development. Prior to 1977, most nations failed to criminalize the extraterritorial payment of bribes by domestic companies. In the United States, the Securities Exchange Commission (SEC) brought its first action against a corporation for multinational bribery in SEC v. United Brands. In United Brands, the corporation funneled $2.5 million in bribes to the President of Honduras in exchange for a reduced local tax on an exported product. Fueled by the United Brands’ scandal and allegations that corporate giants (particularly Exxon, Gulf, Mobil, and Lockheed) made payments to presidents, prime ministers, and royalty of major trading partners, the SEC created a voluntary disclosure program. The SEC’s program resulted in a published report that revealed over 400 U.S. businesses had made questionable payments to foreign officials. Lockheed alone admitted to spending more than $22 million in bribes to foreign officials. In 1977, after months of discussions with the SEC, Congress unanimously enacted the FCPA as part of the 1943 Securities Exchange Act. “The Senate Committee in which the legislation originated described the Act as a ‘strong antibribery law’ and recommended its enactment to ‘bring corrupt practices to a halt and to restore public confidence in the integrity of the American business system.’”

The FCPA criminalized bribery of foreign officials by U.S. businesses and individuals conducting business abroad. U.S. businesses consequently suffered a competitive disadvantage to foreign busi-

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15 Levy, supra note 12, at 74.
16 Id.
19 Heifetz, supra note 13, at 209.
20 Duncan, supra note 18, at 11 (explaining that Congress unanimously enacted the FCPA); Perkel, supra note 2, at 683 (indicating that Congress enacted the FCPA as part of the 1943 Securities Exchange Act).
22 Perkel, supra note 2, at 683.
nesses that were uninhibited by laws proscribing bribery in international markets. As a result of corporate protest, the FCPA was amended in 1988, and again in 1998. In 1988, to promote a level playing-field and clarify ambiguities in the 1977 FCPA, Congress amended the FCPA under the Omnibus Trade and Competitiveness Act, adding two affirmative defenses and instructing the executive branch to urge the United States’ trading partners to pass anti-corruption laws. In 1998, Congress amended the FCPA to implement the provisions of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention). The 1998 amendments expanded the breadth of potential FCPA violations by including some foreign nationals within the scope of persons covered by the act.


The FCPA’s anti-bribery provisions, located in 15 U.S.C. §§ 78dd-1 to 78dd-3, prohibit any bribe to a foreign official to “influence any official act, induce any unlawful action, induce any action that would assist in obtaining or retaining business, or secure any improper advantage.” These provisions prohibit individuals or businesses from offering, paying, promising, or authorizing to pay, either directly or indirectly, money or anything of value to any foreign official. The FCPA provides no distinction between grand and petty bribery. However, relatively large scale bribes (tens of thousands to millions of dollars) comprise the majority of prosecutions.

The 1998 amendments to the FCPA eliminated the territorial nexus requirement between the illicit act and the United States. Consequently, the provisions apply to “any person” who commits bribery on

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23 Id. at 683–84.
24 Id. at 684.
25 See Salbu, supra note 14, at 243 (indicating that Congress amended the FCPA in 1988 under the Omnibus Trade and Competitiveness Act); Perkel, supra note 2, at 684 (explaining that Congress amended the FCPA to promote a level playing field and clarify ambiguities in the 1977 FCPA).
26 Eisenberg, supra note 1, at 596.
27 Perkel, supra note 2, at 685.
29 Eisenberg, supra note 1, at 601.
31 Id.
32 Perkel, supra note 2, at 695.
U.S. territory regardless of whether the accused is a resident or conducts business in the United States.\textsuperscript{33} Moreover, individual corporate employees can be prosecuted under the FCPA even if their employer-corporation is not found guilty of an FCPA violation.\textsuperscript{34} The FCPA also prohibits payments to third parties, “while knowing” that the third party will use any or all of the payment as a bribe, or for any purpose inconsistent with the FCPA.\textsuperscript{35} Neither foreign officials who receive bribes from U.S. companies, nor foreign officials who conspire to violate the FCPA, can be prosecuted under the FCPA for such a violation.\textsuperscript{36}

Additionally, the 1988 amendments provided U.S. businesses and individuals charged with violating the anti-bribery provisions with two affirmative defenses, thereby eliminating liability for payments that are legal in the recipient country or that are considered “reasonable and bona fide expenditures.”\textsuperscript{37} The first affirmative defense allows “payment, gift, offer or promise of anything of value” to a foreign official or political party if the country’s written laws permit such an offering.\textsuperscript{38} To successfully use this defense, the DOJ recommends that a U.S. business seek legal advice from both local counsel and through the DOJ review procedure process.\textsuperscript{39} The second affirmative defense addresses payments, gifts, offers, or promises of anything of value that constitute a “reasonable and bona fide expenditure.”\textsuperscript{40} A defendant may only assert this defense if he or she can show that the bona fide expenditures lack a corrupt purpose.\textsuperscript{41} Moreover, the expenditure must be “directly related” either to the promotion, demonstration, or explanation of products and services, or to the execution or performance of a contract with a foreign government or agency.\textsuperscript{42}

Convicted violators of the FCPA’s anti-bribery provisions can face severe punishment under the act.\textsuperscript{43} A corporation or an individual

\begin{footnotes}
\item[33] See id. at 692.
\item[34] Id. at 692–93.
\item[35] Eisenberg, supra note 1, at 604.
\item[36] Perkel, supra note 2, at 693.
\item[37] Eisenberg, supra note 1, at 605-06.
\item[38] Perkel, supra note 2, at 697 (quoting 15 U.S.C. §§ 78dd-1(c)(1) (2000)).
\item[39] Id.
\item[40] Eisenberg, supra note 1, at 605–06 (quoting 15 U.S.C. §§ 78dd-1(c)(2) (2000)).
\item[41] Perkel, supra note 2, at 698.
\item[42] Id. at 698 (quoting 15 U.S.C. §§ 78dd-1(c)(2) (2000)).
\item[43] See Corr & Lawler, supra note 17, at 1263. A violation of the anti-bribery provisions of the FCPA requires proof of the following:
\end{footnotes}
acting on his own behalf may face fines up to $2 million per violation.\(^4\) The FCPA provides that an individual acting for a corporation can receive fines up to $100,000 and imprisonment for a maximum of five years for each violation.\(^5\) In addition to criminal punishment, the FCPA provides for civil penalties of up to $10,000 for violations of the anti-bribery provisions by either a corporation or an individual.\(^6\)

Contrary to its objective of stamping out multinational bribery, the FCPA does not prohibit all payments to foreign officials.\(^7\) An exception to the FCPA permits payments to public officials for “routine governmental actions.”\(^8\) Congress added the “routine government action” language to the FCPA in the 1988 amendments to clarify the provision in the original version that permitted payments to foreign officials who performed “ministerial” or “clerical” duties.\(^9\) This statutory exception permits U.S. businesses to make “modest” payments to low-ranking officials to speed up or secure the performance of clerical activities that do not involve the exercise of discretion.\(^10\) The FCPA’s exception for grease payments does not extend to payments to for-

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(i) a U.S. “issuer, “domestic concern,” or “any person,” including the officers, directors, employees, agents or shareholders acting on behalf of the issuer, domestic concern, or person (ii) makes use of the mails, or any means or instrumentality of interstate commerce (iii) in furtherance of an offer, payment, promise to pay, or authorization to pay anything of value (iv) to any foreign official, any foreign political party or official thereof, or any candidate for foreign political office, or other person knowing, that the payment to that other person would be passed on to a foreign official, foreign political party or official thereof, or candidate for foreign political office (v) inside the territory of the United States or, for any United States personality, outside the United States (vi) to corruptly (vii) in furtherance of an offer, payment, promise to pay, or authorization to pay anything of value (viii) to any


\(^{44}\) Corr & Lawler, *supra* note 17, at 1263.

\(^{45}\) Id.

\(^{46}\) Id. at 1264.

\(^{47}\) See Eisenberg, *supra* note 1, at 604.


\(^{49}\) Cruver, *supra* note 2, at 20 (stating that the 1988 amendments changed the focus of grease payments from the status of the recipient to the purpose or nature of the payment); see Steven R. Salbu, *Transnational Bribery: The Big Questions*, 21 NW. J. INT’L L. & BUS. 435, 449–50 (2001) (stating that Congress amended the FCPA to allow grease payments for routine government acts, instead of allowing such payments to foreign officials with ministerial or clerical functions).

eign officials that are used to encourage those officials to generate new business or continue business with a particular party. Routine government actions consist of non-discretionary acts that a foreign official ordinarily performs during daily business. The FCPA describes such routine acts as: obtaining permits, licenses, or documents that are needed to do business in a foreign country; processing governmental papers, such as visas and work orders; scheduling inspections; providing police protection; picking-up or delivering mail; providing phone, power, and water service; and loading, unloading, or protecting perishable products or commodities. The FCPA provides no dollar limit on the amount of permissible grease payments. No court has yet to interpret this exception to the FCPA.

C. International Developments

In the time since 1977, nations have begun to view bribery and corrupt practices as a “scourge” and “impediment” to international business, economic and political development, and stability. The increased recognition of corruption and its negative effects is evidenced by the proliferation of numerous international initiatives against bribery and corruption. For example, Transparency International, the European Union, the Council of Europe, the European Bank for Reconstruction and Development, the International Monetary Fund, the Inter-American Development Bank, and the Asian Development Bank all have instituted anti-corruption measures and programs.

The most significant recent development in international corruption law is the OECD Convention, adopted in November 1997 by the Organization for Economic Cooperation and Development. The stimulus for the OECD Convention stemmed from the 1988 amendments to the FCPA that directed the executive branch to pursue in-

51 Perkel, supra note 2, at 696.
52 Id. at 696–97.
53 Id. at 697.
54 Cruver, supra note 2, at 20.
55 Perkel, supra note 2, at 697; Salbu, supra note 49, at 451.
57 See id.
58 Id. at 357.
59 John W. Brooks, Fighting International Corruption, 20 No. 6 GPSolo 42, 42 (2003) (calling the adoption of the OECD Convention the most significant development in international law); Heifetz, supra note 13, at 210 (indicating that the adoption of the OECD Convention occurred in November 1997).
ternational anti-bribery measures within the OECD. In 1989, the U.S. representatives to the OECD put forth efforts to initiate a multilateral agreement against bribery. As a result of international pressures, the majority of the OECD member states agreed to comply with the non-binding package of recommendations contained in the OECD Recommendations on Bribery in International Business Transactions. In May 1997, the OECD Committee reconvened to evaluate the measures implemented by member countries pursuant to the recommendations. Throughout the course of this meeting, the U.S. delegation strongly encouraged other members to adopt a binding anti-bribery agreement that ultimately led to the adoption of the OECD Convention.

The Preamble to the OECD Convention provides that “bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions.” Signatories of the OECD Convention assumed obligations to implement its provisions through the passage of domestic legislation by December 31, 1999. The ensuing enactment of domestic anti-bribery laws demonstrated some level of international support for the idea that bribery of foreign public officials is unacceptable.

The OECD Convention requires its parties to promulgate laws that criminalize the bribery of foreign officials. The Convention defines the act of bribery as:

[T]o offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or

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60 Heifetz, supra note 13, at 213.
61 Id.
62 Id.
63 Id.
64 See Id.
66 Heifetz, supra note 13, at 210.
67 Id.
68 Id. at 214.
retain business or other improper advantage in the conduct of international business.  

It defines foreign public official as “any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprises; and any official or agent of a public international organization.”\(^{69}\) The Convention further requires that parties criminalize complicity with, the attempt to, as well as the conspiracy to, commit such bribery.\(^{70}\) Many scholars have criticized the OECD Convention for its failure to prohibit bribery of political parties and candidates, as well as the tax deductibility of illicit payments.\(^{71}\)

The United Nations directed its attention to the issue of bribery in 1996, as evidenced by the General Assembly’s adoption of two declarations: The Declaration Against Corruption and Bribery in International Commercial Transactions and The Declaration of the International Code of Conduct for Public Officials.\(^{72}\) The first declaration attempted to criminalize foreign bribery and abolish tax deductibility for bribery of foreign officials as a legitimate business expense.\(^{73}\) In 1998, the General Assembly adopted the second declaration, urging the criminalization of the bribery of foreign officials and the development of programs to combat bribery and corruption.\(^{74}\) In December 2000, a number of United Nations member states signed the United Nations Convention Against Transnational Organized Crime, calling for the criminalization of both national and international corruption.\(^{75}\) In 1996, the Organization of American States adopted the Inter-American Convention Against Corruption (“Inter-American Convention”), seeking to eradicate bribery and corruption in member countries.\(^{76}\) Although bearing similarities to the FCPA and OECD Convention, the Inter-American Convention goes even further to combat bribery and corruption.\(^{77}\) For instance, it addresses the demand side of

\(^{69}\) OECD Convention, supra note 65, art. 1 § 1.

\(^{70}\) Id. art. 1 § 4(a).

\(^{71}\) See id. art 1 § 2.

\(^{72}\) Perkel, supra note 2, at 704.

\(^{73}\) Weinstein, supra note 56, at 355.

\(^{74}\) Id. at 355–56.

\(^{75}\) Id. at 356.

\(^{76}\) Brooks, supra note 59, at 43.

\(^{77}\) Id. at 42.

\(^{78}\) Id.
bribery by prohibiting the solicitation of improper payments by government officials. To comply with the Inter-American Convention’s requirements, signatories must criminalize both demand and supply side corruption, the bribe-seeking acts or omissions by governmental officials, as well as the payments themselves. Unless particular circumstances warrant application of an exception, the Inter-American Convention further requires that each member state proscribe “illicit enrichment,” defined as an “unexplainable significant increase in wealth.” Regrettably, the Inter-American Convention lacks a valid enforcement mechanism.

III. Discussion

A. Problems with the Grease Payment Exception

1. The Statutory Language is Ambiguous

Numerous ailments currently plague the FCPA’s exception for grease payments, thereby impeding its goal of eliminating illegal payments to foreign officials. A close examination of the statutory text reveals problems with its construction, that, in turn, hinder enforcement of the FCPA and provide insufficient guidance to U.S. businesses. One source of trouble with the grease payment exception arises from the indeterminacy of the statutory language. Specifically, enforcement difficulties with the provision arise from the possible multiple interpretations of “routine.” A U.S. business can interpret “routine” in several different ways: a business could interpret it to simply mean “frequently,” or the business could interpret it to mean “ordinary” or “commonplace.” Whether a payment to a foreign official is permissible under the exception may depend on the particular inter-

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79 Id.
80 Id.
81 Brooks, supra note 59, at 42–43.
82 Id. at 43.
83 See generally, e.g., Salbu, supra note 14, at 266 (stating three problems with the FCPA’s provision for grease payments).
84 See id. (explaining that the FCPA forces businesses to analogize to the statute when situations arise that are not specially enumerated in the statute, which is something businesses are ill-equipped to perform).
85 Id.
87 Id. at 451.
pretation of “routine” taken. Moreover, a foreign official demanding a payment to speed up a decision honestly may be seeking payment for quick service, or may be using euphemistic language to cloak what is really a bribe for preferential treatment in contract procurement. The various interpretations of the meaning of “routine” thus can leave a business in the lurch as to how to lawfully proceed.

The FCPA’s definition for “routine” government action sets forth some examples of permissible grease payments to government officials and indicates that it will also permit “actions of a similar nature.” The statute, however, provides sparse guidance when questionable situations arise that are not specifically enumerated in the statute, leaving businesses and individuals analogizing between what is specifically permitted in the provision and what they intend to do. The statutory language also treats some “ethically justifiable, or even desirable” payments as clearly illegal or fails to properly identify the payment. To illustrate this proposition, it is possible to imagine a government official, during the course of a civil war where a government was blocking food deliveries, agreeing to allow such deliveries for personal kickbacks. In this situation, such a bribe would clearly be socially desirable but prohibited due to the statutory language.

The FCPA’s exception for payments for routine, non-discretionary government actions is further troublesome since circumstances often arise where it is not clear what constitutes a non-discretionary, facilitating payment. For example, suppose a foreign government official offered to expedite the processing of a company’s lawfully-owed Value-Added Tax refunds in exchange for a percentage of each refund. The

88 See id. (illustrating three different interpretations of “routine,” and analyzing the results under the statute).
89 Salbu, supra note 14, at 266.
90 See Salbu, supra note 49, at 451. It should be noted that if a U.S. citizen or business is contemplating conduct that raises issues of legality under the anti-bribery provisions, the FCPA permits the citizen or entity to request an opinion from the DOJ as to whether the conduct would be lawful under the DOJ’s present enforcement policies. Corr & Lawler, supra note 17, at 1264. The DOJ is required to make a decision within thirty days of receiving the request. Id. If the DOJ states that the prospective conduct would not constitute a violation of the anti-bribery provisions, that creates a rebuttable presumption that the conduct is lawful. Id.
92 Salbu, supra note 49, at 452.
93 See id. at 451.
94 See id.
95 See id.
96 See Zarin supra note 50, at 5–3.
97 Id.
company intended the payment to the official only to expedite the processing of the company’s lawful claim to what the government owed it. Although the payment facially appears to satisfy the requirements of the grease payment provision, a DOJ official declared that the DOJ likely would not consider this payment to be a grease payment. The DOJ official reasoned that the foreign government official was exercising discretion in this situation when determining whose refunds to process first. To some extent, such discretionary action is inherent in expediting the processing of any government papers. The exception for grease payments thus leaves U.S. businesses to grapple with determining what constitutes a payment for discretionary government actions.

In addition to deciphering the discretionary government action puzzle, U.S. businesses also must successfully deduce what constitutes a payment to “obtain” or “retain” business. The difficulties associated with distinguishing between grease payments and payments made to obtain or retain business pose serious enforcement problems, as well as substantial problems for U.S. businesses attempting to conduct business abroad. In United States v. Kay, the Court of Appeals for the Fifth Circuit concluded that the FCPA failed to sufficiently illustrate when a payment to a foreign official was in fact a payment intended to obtain or retain business. In United States v.

98 Id. at 5–4.
99 Id.
100 Id.
101 Zarin, supra note 50, at 5–3.
102 See id. at 5–3 to 5–4 (providing an example of a facially legal payment but declared as one that would “attract the [DOJ’s] attention” and likely be deemed unlawful).
104 See id (indicating the need for uniformity in interpreting the FCPA). The DOJ official at the FCPA conference concluded that the payment to the government official to expedite the processing of the business’s refund would violate the FPCA since it involved a payment to a foreign official for the retention of business. Zarin, supra note 50, at 5–3 to 4.
105 See United States v. Kay, 359 F.3d 738, 744–45 (5th Cir. 2004). In 2001, a grand jury indicted two American Rice, Inc. executives for bribing Haitian officials to accept false bills of lading, which ultimately decreased the import duties owed. Russell Gold, U.S. Court Ruling Bolsters Statute Against Bribery, WALL ST. J., Feb. 9, 2004, available at http://online.wsj.com/article_print/0,,SB107627922252323843,00.html. The U.S. Court of Appeals for the Fifth Circuit held that bribes paid to foreign tax officials to secure illegally reduced customs and tax liability constitute a type of payment that can fall within the coverage of the FCPA. Kay, 359 F.3d at 756. In reaching this conclusion, the court reasoned from the FCPA’s legislative history to determine that Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person. Id. at 755–56.
Vitusa Corporation, the DOJ prosecuted the Vitusa Corporation for FCPA violations resulting from payments or promises of payments of approximately $50,000 to a foreign official to secure payment of a debt owed by the government of the Dominican Republic.\textsuperscript{106} Even though the debt was undisputed and the money was intended to expedite and secure payment, the DOJ treated the payment as an unlawful payment to induce an official to use his influence to obtain or retain business.\textsuperscript{107}

2. A Grease Payment is Still a Bribe

Whether a payment to a government official is to expedite a routine government action or to obtain a contract for construction of a hospital, the payment constitutes a bribe with several potential deleterious effects.\textsuperscript{108} Even small grease payments can have significant impacts.\textsuperscript{109} For example, modest bribes paid to building inspectors may result in tragedy if an inspector approves a building despite code violations.\textsuperscript{110} Under some circumstances, a small payment to a public official to expedite a routine government action is as corrosive and morally deficient as a large payment to a public official to obtain or continue business.\textsuperscript{111} According to the “broken windows hypothesis,” legislation ought to target grease payments as aggressively as higher-level corruption due to its potentially infectious nature.\textsuperscript{112} This theory suggests that the ability of lower-level officials to accept bribes encourages higher-level officials to take bribes of a more substantial amount and with greater detriment to the public.\textsuperscript{113} Additionally, cor-

\textsuperscript{106} Zarin, \textit{supra} note 50, at 5–4. The government of the Dominican Republic failed to pay its bill in full to Vitusa Corporation for deliveries of powdered milk. Corr & Lawler, \textit{supra} note 17, at 1278. When the Dominican Republic government submitted a payment on the milk contract, Vitusa arranged for a portion of these funds to be channeled to the Dominican government official. \textit{Id}.

\textsuperscript{107} Zarin, \textit{supra} note 50, at 5–4. “The collection of money is part of obtaining or retaining business, and a payment in furtherance of that goal is not a facilitating payment.” \textit{Id}. at 5–5. However, it has been argued that the Vitusa Corporation payment was not a payment in furtherance of obtaining or retaining business, and thus, the Justice Department ought to have treated it as a facilitation payment. Arthur F. Mathews, \textit{Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlements}, 18 Nw. J. Int’l L. & Bus. 303, 316 (1998).

\textsuperscript{108} See Dunfee & Hess, \textit{supra} note 5, at 477.

\textsuperscript{109} See Salbu, \textit{supra} note 30, at 664.

\textsuperscript{110} See \textit{id}.

\textsuperscript{111} See Dunfee & Hess, \textit{supra} note 5, at 477 (explaining the negative effects of grease payments as set forth in the Broken Windows hypothesis)

\textsuperscript{112} See \textit{id}.

\textsuperscript{113} See \textit{id}.
ruption may spread to higher levels of government as the bribe-accepting lower-level officials ascend within the hierarchy of government positions.\textsuperscript{114}

3. The International Community’s Tolerance for Grease Payments Is Fading

The FCPA’s treatment of facilitating payments as lawful is inconsistent with the local laws of many foreign countries and international conventions that have come into effect since the FCPA’s enactment.\textsuperscript{115} The local laws of most foreign countries treat these facilitating payments as illegal.\textsuperscript{116} Congress originally excluded such payments from the FCPA’s prohibitions in recognition that such payments were common and even legal in many countries.\textsuperscript{117} Such payments may still be common, but they are no longer legal in many countries.\textsuperscript{118} The FCPA in effect allows U.S. businesses to make payments to government officials that may violate the laws of the recipient country, thereby contributing to low-level corruption.\textsuperscript{119} The FCPA’s exception for facilitating payments brought much international criticism of the FCPA during the implementation of the OECD Convention.\textsuperscript{120} This criticism evidently was taken to heart as there is no exception for grease payments in the OECD Convention.\textsuperscript{121} The Commentaries on The OECD Convention (OECD Commentaries), however, provide that “small facilitation payments” do not constitute payments made to “obtain or retain business or other improper advantage” and are consequently not an offense.\textsuperscript{122} The Commentaries further add that “criminalization by

\textsuperscript{114} Id.
\textsuperscript{115} See Marian Nash, \textit{Contemporary Practice of the United States Relating to International Law}, 92 Am. J. Int’l L. 491, 493–94 (1998) (providing an example of an international convention that does not allow for grease payments); Zarin, \textit{supra} note 50, at 5–5 (suggesting that the FCPA’s allowance for grease payments is inconsistent with the local laws of many nations).
\textsuperscript{116} Zarin, \textit{supra} note 50, at 5–5.
\textsuperscript{117} Id. Roger M. Witten, \textit{Complying with the Foreign Corrupt Practices Act} § 2.09, at 2–11 (1997).
\textsuperscript{118} See Zarin, \textit{supra} note 50, at 5–5
\textsuperscript{119} Low et al., \textit{supra} note 103, at 269.
\textsuperscript{121} Witten, \textit{supra} note 117, § 2.09, at 2–12 n.76.
\textsuperscript{122} OECD Convention, \textit{supra} note 65, comment., art. 1, para. 9.
other countries does not seem a practical or effective complementary action.”

In contrast to both the FCPA and the OECD Commentaries, the Inter-American Convention does not create an exception for facilitating payments to government officials. Article VIII of the Inter-American Convention criminalizes all payments made “in connection with any economic or commercial transaction, including facilitating payments.” Additionally, the United Nations Convention against Corruption criminalizes the “direct or indirect promising, offering or giving, of an undue advantage to the official such that he will act or refrain from acting in the exercise of his official duties.” A literal interpretation of this language would include the criminalization of facilitating payments to government officials. It is plausible that the international community has expressed a consensus that facilitating payments constitute bribery, and thus, the FCPA places the United States in opposition to norms expressed by the international community.

IV. Analysis

A. Repeal of the FCPA’s Exception for Grease Payments

Repeal of the FCPA’s exception for grease payments quickly resolves the deficiencies in the statutory language, the potential adverse consequences of such payments, and aligns the United States with the international norms concerning bribery as expressed by the international community. Repeal of the grease payment exception is also appropriate considering the erosion of the foundation underlying Congress’ original decision to permit grease payments. When draft-

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123 Id.
124 Nash, supra note 115, at 493.
127 See id.
128 See McCary, supra note 8, at 314.
129 See Salbu, supra note 14, at 266 (explaining several deficiencies with the statutory language that make the grease payment provision unclear); McCary, supra note 8, at 314 (noting that that an international consensus has emerged that grease payments are bribery); Wallace-Bruce, supra note 7, at 350 (explaining that the international community is progressing toward the elimination of corruption).
130 See Foreign Trade Hearings, supra note 8, at 217 (stating that it was customary practice to give grease payments to underpaid, low-ranking civil servants); H.R. Rep. No. 95–640, at
ing the legislation that would lead to the FCPA, Congress propounded several reasons for its ambivalence toward grease payments.\textsuperscript{131} First, in sharp contrast to the United States, numerous countries treated grease payments as socially permissible.\textsuperscript{132} Second, a unilateral attempt by the United States to eradicate all such payments was not considered to be feasible, and U.S. businesses would be crippled by a competitive disadvantage abroad if such payments were prohibited.\textsuperscript{133} Finally, it was reasoned that many civil servants in developing countries earned inadequate wages and customary practice required U.S. businesses to provide them with gratuities.\textsuperscript{134} Even if these reasons were still valid, however, Congress’ decision to allow grease payments would be subject to criticism because corruption’s negative impact outweighs any positive effect it might have.\textsuperscript{135}

As the international community progresses toward the criminalization of all payments to foreign officials, Congress can no longer ground its treatment of grease payments in the assertion that foreign countries perceive such payments as culturally acceptable.\textsuperscript{136} The criminalization of facilitating payments abroad prompted international criticism of the FCPA during the OECD Convention implementation process.\textsuperscript{137} By continuing to permit grease payments, Congress may be sanctioning the continued violation of local anti-corruption laws of foreign countries and the emerging international conventions that criminalize grease payments.\textsuperscript{138} Moreover, given the emerging norms of the international community, the United States would no longer have to police

\textsuperscript{8} (stating that it would not be feasible for the United States to attempt to eradicate grease payments unilaterally).

\textsuperscript{131} \textit{See Foreign Trade Hearings, supra} note 8, at 217; H.R. rep. No. 95–640, \textit{supra} note 8, at 8.

\textsuperscript{132} \textit{Witten, supra} note 117, § 2.09, at 2-11.

\textsuperscript{133} \textit{See Foreign Trade Hearings, supra} note 8, at 217.

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{See Wallace-Bruce, supra} note 7, at 352, 357–59 (explaining that corruption’s negative consequences outweigh any positive effects it might have).

\textsuperscript{136} \textit{See McCary, supra} note 8, at 314; \textit{Wallace-Bruce, supra} note 7, at 350, 352 (showing that an international effort to extinguish corruption has emerged and that law enforcement, rather than culture, is to blame for the non-enforcement of anti-corruption laws).

\textsuperscript{137} \textit{See Moyer, supra} note 120, § III(C)(4).

\textsuperscript{138} \textit{See Heifetz, supra} note 13, at 210 (stating that the rise of domestic anti-bribery laws demonstrates international intolerance of bribery of foreign government officials); Nash, \textit{supra} note 115, at 493 (stating that the FCPA appears noncompliant with Article VIII of the Inter-American Convention).
grease payments unilaterally if Congress decided to criminalize such payments.\textsuperscript{139}

Instead of the intended altruistic effect contemplated by Congress, grease payments can also adversely affect the host country.\textsuperscript{140} Grease payments can interfere with the proper administration of government and result in social unrest.\textsuperscript{141} In an effort to pocket more grease payments, government officials, who issue licenses or permits, may deliberately delay operations.\textsuperscript{142} Furthermore, grease payments can create a perception that governments select only certain individuals for those strategic jobs that provide opportunities to accept bribes, leading to feelings of inequity, resentment, and potentially a national uprising.\textsuperscript{143}

B. Amendment of the Statute to Include a Monetary Threshold

Although elimination of the grease payments exception would ameliorate its deleterious effects, Congress and U.S. businesses will surely resist, asserting: (1) such a ban imposes enforcement difficulties; and (2) prosecution for small grease payments is undesirable.\textsuperscript{144} The opposition will likely further contend that legislation targeting petty facilitation payments is ineffective and subject to charges of moral imperialism.\textsuperscript{145} If such resistance impedes Congressional repeal of the exception for grease payments, an alternate solution still

\begin{itemize}
  \item \textsuperscript{139} See Wallace-Bruce, supra note 7, at 350 (noting that an international consensus against corruption is emerging).
  \item \textsuperscript{140} See id. at 357–59 (setting forth six reasons why grease payments are more harmful then helpful).
  \item \textsuperscript{141} See id. at 358.
  \item \textsuperscript{142} Id.
  \item \textsuperscript{143} See id. at 358–59.
  \item \textsuperscript{144} See Salbu, supra note 14, at 266 (explaining several deficiencies with the statutory language that make the grease payment provision unclear); Salbu, supra note 30, at 688 (stating that prosecution for petty bribery is undesirable); McCary, supra note 8, at 314 (noting that that an international consensus has emerged that grease payments are bribery); Wallace-Bruce, supra note 7, at 371 (stating that payment for routine government actions is entrenched in many developing countries and a business can be harmed by refusing to make a grease payment).
  \item \textsuperscript{145} See Salbu, supra note 30, at 688. The risk of moral imperialism is greater with petty bribery than grand bribery because it is less controversial to treat a large payment, for example a $9.9 million kickback, as corrupt, than a small payment of a few hundred dollars. See id. at 682–83. Grand bribery is less likely to serve any of the potentially legitimate social functions that justify smaller payments. Id.
\end{itemize}
exists to rein in the difficulties and abuses associated with grease payments: a dollar limit or ceiling on permissible payments.\textsuperscript{146}

Although Congress intended to permit small payments for routine government actions, the FCPA fails to provide any monetary ceiling on permissible payments.\textsuperscript{147} Qualifying payments permitted under the grease payments exception, in theory, ought to constitute “modest” sums of money to low-ranking officials.\textsuperscript{148} In practice, the absence of a monetary limit has resulted in bribes ranging from a few dollars to customs officials to bribes as large as tens of thousands of dollars.\textsuperscript{149} The potential for negative effects increases with the size of the illicit payment.\textsuperscript{150} The incidence rate of economic, political, and social harm is higher with a bribe of thousands of dollars than with a smaller bribe of a few hundred dollars.\textsuperscript{151}

The amplified risks associated with larger bribes suggest the need for Congressional amendment of the FCPA to limit the dollar amount of grease payments.\textsuperscript{152} The FCPA’s legislative history reveals both comments by Congressmen and witness testimony advocating for the inclusion of a dollar limit for permissible grease payments.\textsuperscript{153} For example, Wallace Timmeny testified before various House Congressional subcommittees that the FCPA should contain a monetary limit on grease payments.\textsuperscript{154} Additionally, Congressman Krueger of the House Committee on Interstate and Foreign Commerce stated that a lawful grease payment should not exceed a set percentage of the re-

\begin{footnotesize}
\begin{enumerate}
\item See Business Accounting Hearings, supra note 9, at 438 (suggesting a better approach to grease payments would be to establish a dollar limit).
\item See Cruver, supra note 2, at 20 (stating that Congress did not want to prohibit small payments under the FCPA); Witten, supra note 117, § 2.09, at 2-12 (noting that the FCPA has no per se limit on the size of the grease payment).
\item See Zarin, supra note 50, at 5–1.
\item Timothy Ashby, Steering Clear of the Foreign Corrupt Practices Act, 45 Orange County Law. 10, 11 (2003).
\item Salbu, supra note 30, at 663.
\item Id at 663–64.
\item See Business Accounting Hearings, supra note 9, at 438 (suggesting a better approach to grease payments would be to establish a dollar limit); Unlawful Corporate Payment Hearings, supra note 10, at 43 (suggesting that grease payments should be illegal if over a set amount); Salbu, supra note 30, at 663–64 (stating that larger bribes have a greater likelihood of causing economic, political, and social harm).
\item See Business Accounting Hearings, supra note 9, at 442–43 (suggesting that a permissible grease payment would fall beneath a certain monetary threshold and in fact be a payment to expedite the movement of goods or personnel); Unlawful Corporate Payment Hearings, supra note 10, at 44 (suggesting that grease payments should be limited to a set percentage of the recipient country’s per capita income).
\item See Business Accounting Hearings, supra note 9, at 442–43.
\end{enumerate}
\end{footnotesize}
recipient country’s per capita income. He reasoned that basing the grease payment threshold upon the host country’s per capita income would create an equitable or uniform approach to grease payments.

The FCPA’s legislative history further suggests that the inclusion of a dollar limit for grease payments never materialized largely because Congress did not want to set a minimum price for conducting business abroad and felt that the legality of a grease payment should focus upon the payment’s nature and purpose. During pre-FCPA hearings, Congressman Krueger suggested limiting grease payments to some percentage of per capita income in the recipient country, or $8,700, because “when a Congressman earns more than that in private income it is illegal, but if he earns less, it is legal.” Congressman Eckhardt rejected this idea, insisting that the focus of any legislation must be on what constitutes a legal grease payment versus a payment to corruptly influence a foreign official. Eckhardt added, “I am a little bit skeptical about trying to draw minimum amounts because I can conceive of situations which involve $100 that would be clearly corrupt, whereas a situation which may involve as much as $500 may not be.” Prior to the 1988 amendments, a witness before the Subcommittee on International Economic Policy and Trade of the House Committee on Foreign Affairs also suggested a minimum threshold for a bribe to be considered something other than a grease payment at the amount of $5,000. Subsequently, Congressman Berman solicited reactions to this idea. Another witness testified that the focus must be on the purpose of the payment and that the insertion of a dollar cap would set a minimum price for conducting business abroad. During another subcommittee hearing, a witness also suggested establishing a dollar limit on grease payments in addition to the requirement that the payment be for a routine government ac-

155 See Unlawful Corporate Payment Hearings, supra note 10, at 44.
156 See id. (indicating that tagging grease payments to per capita income would create cost equity).
157 See Foreign Trade Hearings, supra note 8, at 285 (suggesting that providing a dollar limit for grease payments would create a floor cost for conducting business abroad); Business Accounting Hearings, supra note 9, at 438 (indicating that what constitutes acceptable grease payments should focus on the nature of the payment).
158 Unlawful Corporate Payments, supra note 10, at 43, 44.
159 See id. at 52.
160 Id.
161 Foreign Trade Hearings, supra note 8, at 227.
162 Id. at 285.
163 Id..
The inclusion of a dollar limit for grease payments does not conflict with the concerns expressed by Congress about creating a floor cost for conducting business abroad when it is part of the following two-prong test. Under this proposed analysis, the FCPA would still require that the nature or purpose of the payment be to expedite or secure a routine government action. The test described, however, would additionally require that the payment fall beneath a set percentage of the country’s per capita income. The continued focus on the nature or purpose of the payment ensures that, even if a payment falls within the monetary limit, it will not be permissible unless it is actually a payment to secure or expedite a routine government action.

C. The Role of the DOJ

The DOJ also has an essential role in clarifying and preventing the abuse of the FCPA. A U.S. business confronted with a proposed transaction involving questionable grease payments can turn to the DOJ for assistance. To elucidate its enforcement priorities with respect to the FCPA’s bribery provisions, the DOJ released a statement in November 1979 that identified factors likely to increase prosecution and investigation, including the size of the payment, the size of the transaction, and the past conduct of the involved persons. Although the size of the payment or transaction is an escalating factor, the statement fails to provide any further clarification to facilitate decision-making by U.S. businesses. If a business still requires further guidance, it can request an opinion procedure from the DOJ that provides a

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164 Business Accounting Hearings, supra note 9, at 442–43.
165 Id. at 443.
166 See id. at 442–43 (stating that grease payments should include a dollar amount, and must also clearly be payments to expedite the movement of goods or personnel).
168 See Unlawful Corporate Payments Hearings, supra note 10, at 44.
169 See Business Accounting Hearings, supra note 9, at 442–43.
170 See Longobardi, supra note 11, at 462 (suggesting that the DOJ acknowledged its role in providing guidance to the application of the FCPA’s provisions by issuing guidelines).
171 See Cruver, supra note 2, at 62.
172 Id. at 61.
173 See generally id. (providing a limited list of factors that increase the likelihood of DOJ investigation or prosecution).
statement of whether the business’s proposed transaction violates the FCPA and whether the DOJ would bring any enforcement action.\textsuperscript{174} In fact, if a posed transaction does not fit within one of the prescribed categories for routine governmental action, an opinion procedure should be sought.\textsuperscript{175} However, due to ambiguities in the review procedure and drawbacks associated with its use, businesses infrequently rely upon this source.\textsuperscript{176} The insufficient assistance provided by these two avenues, and the scarcity of enforcement actions against violators of the FCPA, adds to the darkness in which businesses must function.\textsuperscript{177}

Given the problems associated with the review procedure and the scant body of available case law, the DOJ’s promulgation of guidelines could provide U.S. businesses with a useful definition of what constitutes a grease payment.\textsuperscript{178} During the wave of opposition and proposed amendments that followed enactment of the FCPA, the DOJ expressed a steadfast unwillingness to issue FCPA guidelines.\textsuperscript{179} The DOJ asserted that guidelines would be impractical and unduly burdensome for the DOJ with little or no benefit to U.S. businesses.\textsuperscript{180}

The DOJ contended that it could not issue guidelines that would enable U.S. businesses to tailor their transactions to accord with the FCPA.\textsuperscript{181} Specifically, the DOJ contended that illustration of only a few hypothetical transactions as legally permissible would result in businesses restricting operations to bring them within the confines of the given examples.\textsuperscript{182} On the other hand, if the DOJ attempted to list every possible business permutation companies may employ, businesses would be forced to hunt through the voluminous list in search of a fact pattern similar to its intended transaction.\textsuperscript{183} Either approach

\textsuperscript{174} Id. at 62. To request a review of a proposed transaction, a party must provide detailed information relevant and material to the proposed conduct, as well as any other information that the DOJ requires. Longobardi, supra note 11, at 462.
\textsuperscript{175} See Cruver, supra note 2, at 20–21.
\textsuperscript{176} Id. at 62.
\textsuperscript{177} See Longobardi, supra note 11, at 470 (explaining that the DOJ has conducted only eighteen reviews of proposed business transactions and all were positive).
\textsuperscript{178} See Cruver, supra note 2, at 61–62 (discussing problems with the review procedures); Longobardi, supra note 11, at 473–74 (noting that a widespread belief existed that the ambiguities in the FCPA necessitated DOJ guidelines); Perkel, supra note 2, at 697 (stating that no court has interpreted the grease payment provisions); Salbu, supra note 14, at 266 (explaining several deficiencies with the statutory language that make the grease payment provision unclear).
\textsuperscript{179} Longobardi, supra note 11, at 474.
\textsuperscript{180} See id. at 474–75.
\textsuperscript{181} See id. at 475
\textsuperscript{182} Id.
\textsuperscript{183} Id.
would restrict business dealings and potentially disadvantage U.S. businesses in foreign markets.\(^{184}\)

In light of the troubles associated with providing hypothetical business transactions, the DOJ could simply issue guidelines that indicate what constitutes a grease payment.\(^{185}\) A possible set of guidelines could mandate that “the payor’s purpose must be to secure or expedite a routine government action and the payment cannot exceed a specific dollar threshold based upon a percentage of the recipient country’s per capita income.”\(^{186}\)

**D. The Role of Business in the United States Beyond Profit-making**

The effect of any actions by Congress or the DOJ in attacking bribery will be diminished without the active and responsible participation of corporations.\(^{187}\) Firms may seek to provide their employees with clear guidance on what constitutes a permissible grease payment through their codes of conduct.\(^{188}\) One business code provides: “[E]ven though such payments may possibly be expected in accordance with area customs and legal interpretations, and would confer no improper business advantage on the company, every effort should be made to avoid them.”\(^{189}\)

**E. Extra-legal Solutions to Weed out the Roots of Corruption**

Vigorous enforcement of a revised and ideally lucid FCPA may still, however, be inefficacious in cracking down on illegal bribes to foreign officials.\(^{190}\) States can attack transnational corruption with both legislation and institutional change.\(^{191}\) Legislative solutions, such as the FCPA, seek to control undesirable behavior primarily by imposing

\(^{184}\) Longobardi, supra note 11, at 475

\(^{185}\) See id.

\(^{186}\) See Business Accounting Hearings, supra note 9, at 442–43 (stating that grease payments should include a dollar amount and must clearly be payments to expedite the movement of goods or personnel); Unlawful Corporate Payment Hearings, supra note 10, at 44 (stating that the level of permissible grease payments should vary with a country’s per capita income).

\(^{187}\) See Dunfee & Hess, supra note 5, at 477 (arguing that corporations should provide employees with guidance on grease payments through codes of conduct);

\(^{188}\) Id.

\(^{189}\) Id. (quoting Fritz Heimann, The Synergy Between Corporate and Government Reforms in Fighting Bribery 30 (Francois Vincet et al. eds., 1999)).

\(^{190}\) See Salbu, supra note 30, at 659 (stating that legislative reform may not ultimately address the problems that inure to grease payments).

\(^{191}\) Id.
criminal fines or other penalties. Such legislative endeavors, however, may inadequately address corruption as long as corruption is rooted in political, social, or economic institutions such as patronage, low government wages, poverty, and poor economic conditions. Eradication of corruption may continue to evade legislative solutions because such solutions dictate conduct rather than attempting to resolve the underlying causes of corruption. Thus, institutional reform may be more successful in combatting corruption than the legislative process.

By attacking corruption at its roots, institutional reform may be a more effective method to weed out corruption. To illustrate, if poverty fosters an environment conducive to corruption, then a war against poverty would also be a war against corruption. Nations can encounter significant challenges, however, when attempting institutional change due to the cyclical nature of some causes of corruption. For example, corruption often funnels a nation’s resources away from its people and into the wallets of the corrupt elite, thereby exacerbating poverty. Thus, institutionalized corruption creates a vicious cycle where poverty causes bribery, which exacerbates existing structural problems that result in increased poverty, which, in turn, leads to more bribery. To break the cycle and reduce corruption, legislative mechanisms should modify these institutions and social structures that support or encourage bribery.

Conclusion

To advocate amendment of the FCPA in 1983, U.S. Trade Representative William Brock indicated that “we have a responsibility to paint a bright line for our firms to follow so that they know exactly what Congress intended that they can and cannot do.” Congress has failed to paint this bright line with regard to the grease payment

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192 See id.
193 Id.
194 Id.
195 Salbu, supra note 30, at 659–62.
196 Id. at 660.
197 Id.
198 Id.
199 Id.
200 Salbu, supra note 30, 660–61.
201 Id. at 661.
202 Foreign Trade Hearings, supra note 8, at 28 (prepared statement, William E. Brock, U.S. Trade Representative).
exception in the FCPA. Changes in the international community’s perception of corruption and grease payments have contributed to the erosion of the logical foundation underlying the FCPA’s original exception for grease payments. Congress can address the troubles associated with grease payments by repealing the FCPA’s exception for grease payments, or by amending the statute to include a monetary limit set through country specific per-capita income evaluation for permissible grease payments. Transnational corruption will continue to thrive unless Congress acts, the DOJ promulgates guidelines, and corporations closely monitor and reduce reliance upon grease payments. Without the accompaniment of institutional reform, however, legislative solutions to corruption will only achieve limited success in this battle against corruption and its ill effects.
UNFAIR CONSEQUENCES: HOW THE REFORMS TO THE RULE AGAINST HEARSAY IN THE CRIMINAL JUSTICE ACT 2003 VIOLATE A DEFENDANT’S RIGHT TO A FAIR TRIAL UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Conor Mulcahy*

Abstract: For years, judges and legislatures in common-law jurisdictions have struggled to develop effective and equitable rules regarding the admissibility of hearsay statements. Particularly in criminal cases, in which a defendant’s very liberty is often at stake, governments have endeavored to strike the balance between the prosecution’s need for probative evidence against the accused and the defendant’s right to cross-examine those who have made statements against him. Parliament attempted to achieve such parity when it passed the Criminal Justice Act 2003, a watershed piece of legislation that significantly liberalized the admissibility of hearsay statements in English and Welsh criminal trials. Because the Act allows the jury to convict the defendant based on uncorroborated hearsay evidence alone, however, it contravenes the defendant’s right to a fair trial under the European Convention on Human Rights.

Introduction

In June of 1997, the Law Commission for England and Wales (Commission) released a report on possible reforms to the rule against hearsay in criminal trials.1 The report, entitled “Evidence in Criminal Proceedings: Hearsay and Related Topics,” proposed sweeping changes to the laws governing hearsay in criminal cases.2 The

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Commission included a model statute at the end of the report that incorporated its recommendations to the Parliament of the United Kingdom (Parliament) in a statutory format.³

Parliament incorporated the Commission’s recommendations in the Criminal Justice Act 2003 (CJA).⁴ which received Royal Assent and became law on November 20, 2003.⁵ Yet, because the CJA significantly liberalizes the admission of hearsay evidence in criminal trials, it may contravene the Convention for the Protection of Human Rights and Fundamental Freedoms, a treaty more popularly known as the European Convention on Human Rights (Convention).⁶ In particular, the relaxed admissibility standards in the CJA may offend a defendant’s right to confront witnesses, a privilege that the Convention guarantees.⁷

This Note explores whether the CJA, in its current form, complies with the mandates of the Convention. Specifically, the paper examines the Convention’s confrontation clause and its relationship to the admissibility of hearsay evidence in criminal trials. Part I discusses the most recent legislative developments in England and Wales concerning hearsay, and will outline the history of the Convention. Part II explains the Commission’s proposed reforms, and also examines the European Court of Human Rights’ (ECHR) interpretation of a defendant’s right of confrontation under the Convention. Part III makes the claim that the CJA does, in fact, offend a criminal defendant’s rights under the Convention and therefore must be amended.

I. BACKGROUND

A. Changes in Hearsay Law in England and Wales

Parliament created the Law Commission for England and Wales in 1965 “to keep the law of England and Wales under review and to recommend reform when it is needed.”⁸ The Commission publishes

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³ See generally id. at app. A (containing the Commission’s Draft Bill of Evidence).
⁷ See id. art. 6(3) (d), 213 U.N.T.S. at 228.
provisional reform proposals and collects feedback and critical commentary on those ideas. Then, after incorporating those suggestions it feels are warranted, the Commission submits a final proposal before Parliament.

In recent years, sometimes with the help of the Commission, Parliament has significantly modified the laws relating to the admissibility of hearsay evidence in England and Wales. A 1993 report by the Commission stressed the need for Parliament to abolish the exclusionary rule against hearsay in civil cases. That study led to the passage of the Civil Evidence Act 1995 that implemented the hearsay reforms that the Commission had advised were necessary. The Civil Evidence Act 1995 defines all hearsay evidence as admissible, but also allows the judge to determine the weight that he or she should accord to that evidence.

Until Parliament passed the CJA, the application of the rule against hearsay in criminal proceedings was governed primarily by the Criminal Justice Act 1988. This Act retained the traditional common law exceptions to the hearsay rule, including, inter alia, admissions and confessions of parties and their agents, statements by deceased persons, testimony concerning reputation, and public documents. The Criminal Justice Act 1988 also created additional exceptions for statements contained in documents, and both the term “statements” and the term “documents” were “widely defined.” Unfortunately, instead of clarifying application of the rule against hearsay, this Act added to the numerous exceptions to the rule and further confused many practitioners. Because the rule itself and its seemingly endless parade of exceptions continued to confuse the legal community, the

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9 Id.
10 Id.
11 See, e.g., Civil Evidence Act, 1995, c. 38 (Eng.) (presenting a novel approach to the admissibility of hearsay in civil proceedings).
13 See generally Civil Evidence Act, 1995, c. 38 (Eng.) (applying the Commission’s recommendations). Specifically, the Act declares that all hearsay evidence in civil trials is henceforth admissible, but also directs the judge to consider the amount of weight to accord to the evidence. See id. §§ 1, 4.
14 Id. § 4.
15 See Law Commission for England and Wales, supra note 2, at 19–22.
16 See id. at 17–18; see also Criminal Justice Act, 1988, c. 33, §§ 23–28.
17 Law Commission for England and Wales, supra note 2, at 19.
18 See id. at 48–50.
Secretary of State for Home Affairs asked the Commission in 1994 to consider whether the law of England and Wales relating to hearsay evidence in criminal cases needed to change.\textsuperscript{19}

The Royal Commission on Criminal Justice (RCCJ) had recommended that the Secretary make the request to the Commission because the RCCJ believed the law governing hearsay in criminal cases to be “exceptionally complex and difficult to interpret.”\textsuperscript{20} In order to ameliorate the situation, the RCCJ suggested that the Commission ponder the efficacy of a law that would relax—or even abolish—the rule against the admission of hearsay in criminal trials.\textsuperscript{21}

This particular recommendation, which, if eventually implemented, would significantly curtail the common-law rule against hearsay,\textsuperscript{22} was not a complete surprise to the Commission. Indeed, the Commission had agreed with the same suggestion in its report on hearsay in civil trials.\textsuperscript{23} Despite the fact that the Commission was treading on familiar ground, however, recommending hearsay reform in criminal trials involved different, more complicated questions.

First of all, the decreased role of the jury in civil trials caused much of the support for reform of the rule against hearsay in civil proceedings.\textsuperscript{24} One of the core purposes of common-law courts’ exclusion of hearsay is to protect the jury from considering untrustworthy evidence to be inherently true and valid.\textsuperscript{25} Although civil trials in England and Wales used to be conducted in front of juries, it is extremely rare now for these proceedings to involve juries.\textsuperscript{26} Because judges, who are legally trained and thus more aware of the dangers of hearsay evidence, now act as factfinders in the great majority of civil cases, both the Commission and Parliament found that there was little

\begin{footnotesize}
\textsuperscript{19} Id. at 1.
\textsuperscript{20} Id. (quoting Royal Commission on Criminal Justice, Report, ch. 8, para. 26 (1993)).
\textsuperscript{21} See id. at 1–2 (quoting Royal Commission on Criminal Justice, Report, ch. 8, para. 26 (1993)).
\textsuperscript{22} See Law Commission for England and Wales, supra note 2, at 1 (stating that “[t]he Royal Commission advocated major reform” when it made its statements about hearsay in criminal proceedings).
\textsuperscript{23} See Law Commission for England and Wales, supra note 12, at 24.
\textsuperscript{24} See generally Sally Lloyd-Bostock & Cheryl Thomas, Decline of the “Little Parliament”: Juries and Jury Reform in England and Wales, 62 Law & Contemp. Probs. 7 (1999) (chronicling the decline of the jury in English and Welsh trials).
\textsuperscript{25} See Law Commission for England and Wales, supra note 2, at 28–29 (footnotes omitted).
\textsuperscript{26} See Lloyd-Bostock & Thomas, supra note 24, at 7–8.
\end{footnotesize}
need for this prophylactic exclusion of evidence. The judge would just have to make an informed choice about how much weight to accord to the hearsay evidence. Parliament codified this approach in the Civil Evidence Act 1995. Yet the Commission could not make the same argument regarding hearsay in criminal proceedings because those cases are still tried by juries in England and Wales.

Furthermore, the Commission could not rely upon its earlier analysis of hearsay in civil cases because, generally, the stakes are higher in criminal trials than in civil ones. Because a criminal conviction is the ultimate form of societal moral condemnation, the government of the United Kingdom would not want to convict an innocent defendant on erroneous information contained in a hearsay statement. Thus, the Commission needed to scrutinize the question of hearsay reform in criminal cases more carefully than it had in its report on hearsay in civil proceedings.

B. Hearsay and The European Convention on Human Rights

In addition, the Commission needed to pay close attention to the mandates of the European Convention on Human Rights. After experiencing the atrocities of World War II, a number of European countries decided to codify certain inalienable rights within a treaty, and the Convention was the result of their labors. The rights contained in the document echoed those that the United Nations had recently recognized in its Universal Declaration of Human Rights.

Provisions in the Convention established the ECHR and gave the court jurisdiction to decide whether a member country had violated

27 See Law Commission for England and Wales, supra note 12, at 23–24.
28 See id. at 29–30.
29 Civil Evidence Act, 1995, c. 38, § 4 (Eng.).
30 See Lloyd-Bostock & Thomas, supra note 24, at 13.
31 Cf. European Convention on Human Rights, supra note 6, art. 6(3), 213 U.N.T.S. at 228 (enumerating special rights for criminal defendants alone).
32 See Law Commission for England and Wales, supra note 2, at 32.
33 See id.
34 See generally European Convention on Human Rights, supra note 6 (binding its signatories to its terms and guaranteeing minimum rights to everyone charged with a criminal offense).
the Convention.\footnote{See European Convention on Human Rights, \textit{supra} note 6, art. 19, 213 U.N.T.S. at 234; Kirst, \textit{supra} note 35, at 777.} The parties to the treaty also agreed that the ECHR could bestow just satisfaction upon harmed parties, and that the member countries would abide by the decisions of the court.\footnote{See European Convention on Human Rights, \textit{supra} note 6, art. 19, 213 U.N.T.S. at 234; Kirst, \textit{supra} note 35, at 777.} Thus, as a party to the treaty, the government of the United Kingdom must adhere to the Convention’s dictates on the inherent rights of criminal defendants.\footnote{See European Convention on Human Rights, \textit{supra} note 6, arts. 6(3), 46, 213 U.N.T.S. at 228, 246. It is important to note, however, that the ECHR has no power to reverse a conviction or to order any comparable action by a municipal court. Kirst, \textit{supra} note 35, at 781.}

Furthermore, the United Kingdom is one of the many signatories of the Convention that has incorporated the treaty into its own law.\footnote{See Human Rights Act, 1998, c. 42 (Eng.), §§ 1–4; Council of Eur., The European Convention on Human Rights, \textit{at} \textit{http://www.humanrights.coe.int/intro/eng/GENERAL/ECHR.HTM} (last visited May 11, 2005). Ireland and Norway are the only parties to the Convention that have not included the document as part of their own domestic laws. \textit{Id.}} Thus, if an English subject wishes to challenge his criminal conviction because he believes it offends the Convention, the English appellate courts must rule on that question.\footnote{See Kirst, \textit{supra} note 35, at 780; Council of Europe, \textit{supra} note 40.} In fact, the ECHR will not consider a case until after the aggrieved party has exhausted all state remedies.\footnote{Kirst, \textit{supra} note 35, at 780.}

When the ECHR does agree to hear a case, it does not sit as a single panel.\footnote{Id.} Instead, proceedings take place before a chamber of seven judges, or, from time to time, before a Grand Chamber of seventeen judges.\footnote{See id.} Because more than forty judges currently sit on the ECHR, and the panels consist of seventeen jurists at most, there is never a time when all of the judges hear a case together.\footnote{See \textit{id}.} Thus, the panels that decide the cases do not have the consistency and continuity of the U.S. Supreme Court.\footnote{Id. at 780–81.}

\section*{II. Discussion}

The rule against hearsay in England and Wales is generally defined as follows: “any assertion other than one made by a person
while giving oral evidence in the proceedings is inadmissible as evidence of any fact or opinion asserted.” The theory behind the rule is that it protects juries from hearing or seeing evidence that may be patently false or untrue. Because the author of a hearsay statement is neither under oath nor subject to cross-examination at the time she makes the statement, it is impossible to know if the statement actually is true. Over time, through both the common-law process and legislation, the general rule evolved to include many exceptions that allow parties to introduce hearsay evidence at trial. Most exceptions involve certain types of evidence that lawmakers believed were inherently reliable despite the fact that they are based on hearsay. After witnessing the confusion surrounding interpretation of the hearsay exceptions in the Criminal Justice Act 1988, practitioners and judges alike hoped for more sensible admissibility rules.

A. The Commission’s Hearsay Analysis

The goal of the Commission in its report on criminal hearsay was to simplify and rationalize the application of the rule against hearsay. Well aware of the consequences of changing evidence rules in criminal cases, the Commission came to its conclusions by carefully considering all of the arguments that could be made against further liberalizing admission of hearsay evidence in criminal proceedings.

First, the Commission considered the proposition that hearsay evidence, by its nature, is not the “best evidence” upon which factfinders could rely. It concluded, however, that the many exceptions to the hearsay rule show that hearsay is, quite often, the best available evidence. If hearsay could never be the best evidence, there would be no need for admissibility of any hearsay evidence at any time, because some other piece of “better” evidence could sup-

47 Law Commission for England and Wales, supra note 2, at 16 (citation omitted).
48 See id. at 23.
49 See id.
50 See id. at 17–18.
51 See id. at 18–22.
52 See Law Commission for England and Wales, supra note 2, at 17–22.
53 See id. at 23–24.
54 See id. at 1–2.
55 See id. at 2.
56 See id. at 23–34 (discussing the merits of the justifications for a strict rule against hearsay).
57 See Law Commission for England and Wales, supra note 2, at 23–24.
58 See id.
The many exceptions to the rule against hearsay belie this assumption; judges and legislatures never would have created the exceptions unless such hearsay evidence was the best available evidence.

The Commission then worried about the chance that a criminal defendant “could produce in evidence a letter or witness statement in which the declarant—alas, now unavailable—claims to have seen the offense being committed by someone other than the defendant” or perhaps one that supports his alibi. Such evidence could then raise reasonable doubt in the minds of the jury, and the guilty man would go free. Although this possibility concerned the Commission, it ultimately felt that they could avoid this danger by retaining the exclusionary rule for instances of multiple hearsay and hearsay from unidentified witnesses.

The Commission next considered the fact that hearsay evidence is not delivered by people under oath. It quickly dismissed this objection because there is no guarantee that an oath or affirmation, in itself, promotes truthful testimony. Instead, the Commission was more concerned about “the objection to hearsay most strongly pressed today[,]” namely the lack of an opportunity to cross-examine the author of a hearsay statement. After admitting that cross-examination is not always probative of the truth, the Commission nonetheless found this particular rationale for the rule against hearsay to be the most valid. Yet the Commission also felt that “even this justification is not valid for all hearsay, and in any event it does not justify the current form of the hearsay rule.”

The next subject that the Commission discussed in its report was the danger that juries would assign undeserved probative force to hearsay evidence. Many commentators doubt the competence of jurors to understand the complex jury instructions that would be necessary to inform them of the possible untrustworthiness of hearsay

59 See id.
60 See id.
61 Id. at 24.
63 See id. at 25.
64 Id. at 26.
65 Id. at 27.
66 Id.
67 See Law Commission for England and Wales, supra note 2, at 28.
68 Id.
69 See id. at 28–29.
The Commission rejected this argument, reasoning that judges often give juries complicated instructions on other points of law, and society assumes that the jury understands them. Because the Commission was confident in the jury’s ability to comprehend warnings on hearsay, it found that it could justify a recommendation for additional exceptions to the rule against hearsay.

The Commission also considered another argument against liberalization of the rule against hearsay: the right of a defendant to confront witnesses against her. Its rationale is based upon the premise that it is easier to lie to someone behind her back rather than to her face. The Commission noted, however, that recent developments in England and Wales show that this view is no longer persuasive in those countries. Nevertheless, the Commission conceded that “it is desirable for witnesses to give their evidence in the presence of the accused if possible,” but also commented that “there are other factors which may outweigh the need for this,” such as “the impossibility of obtaining the evidence directly from the witness in the courtroom.”

Thus, after discussing the pervasive rationales for the exclusionary rule against hearsay, the Commission concluded that the only reason that hearsay is inferior evidence is because advocates cannot test it through cross-examination. Therefore, the Commission drafted its reform recommendations with the notion that the inability to cross-examine is the sole defect in admitting hearsay into evidence. After contemplating the merits of several methods of reform, the Commission set forth a Draft Criminal Evidence Bill (Draft Bill) that incorporated the Commission’s recommendations to Parliament.

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70 See, e.g., id. (quoting Sir Patrick Devlin, Trial By Jury 114 (revised 3d impression 1965)).
71 See id. at 30–31.
72 See Law Commission for England and Wales, supra note 2, at 31–32.
73 See id. at 33–34.
74 Id. at 33.
75 See id. (mentioning how England and Wales permit witnesses to give evidence from behind a screen, or via closed circuit television).
76 Id.
77 Law Commission for England and Wales, supra note 2, at 33 n.74.
78 Id. at 34.
79 See id.
80 See id. at app. A.
B. The Criminal Justice Act 2003

When Parliament formulated the hearsay provisions of the CJA, it used the Commission’s Draft Bill as its principal model.\(^81\) In fact, Parliament copied several sections of the CJA nearly verbatim from the Draft Bill.\(^82\) The lengthy CJA begins by abolishing the traditional rule that hearsay is barred from evidence unless an exception exists that allows its admission.\(^83\) Instead, the statute states that hearsay is admissible, but only under certain circumstances.\(^84\) Of course, this is simply the corollary to the traditional rule; to say that hearsay is admissible only in certain exceptional situations is to say that hearsay is inadmissible unless those exceptional situations exist.\(^85\) Thus, although the CJA does not refer to its provisions as “exceptions” \(\textit{per se}\), from a practical standpoint, they function as exceptions to the rule against hearsay.

The statute, like the U.S. Federal Rules of Evidence, contains different exceptions depending upon whether the author of a hearsay statement is available or unavailable to give testimony at trial.\(^86\) A person is unavailable under the statute if she is dead, mentally or physically unfit to be a witness, outside the U.K. and it is not practical to secure her attendance, cannot be found after reasonable endeavors to locate her, or is in “fear” and the court allows her to not testify.\(^87\) The statute notes that courts should construe “fear” liberally; for example, a court could consider a witness who is afraid of financial loss due to her testimony to be in “fear.”\(^88\) However, the court must first grant leave before admitting a hearsay statement into evidence because its author is in “fear,”\(^89\) and the court should only do so “if [it] considers that the statement ought to be admitted in the interests of justice.”\(^90\)

\(^81\) See Criminal Justice Act, 2003, c. 44 (Eng.), Explanatory Notes, para. 50, available at http://www.hmso.gov.uk/acts/en2003/03en44-a.htm (last visited May 1, 2005). The Criminal Justice Act 2003 is a very long and complex statute. Because the focus of this Note is whether the Act’s modifications of the rule against hearsay contravene the confrontation clause of the Convention (Article 6(3)(d)), this Note will only examine those sections of the statute immediately relevant to this focus.

\(^82\) Compare, e.g., id. § 116, with Law Commission for England and Wales, \textit{supra} note 2, at app. A §§ 3, 5.

\(^83\) See Criminal Justice Act, 2003, c. 44 (Eng.), § 114(1).

\(^84\) See id.

\(^85\) Compare id. with Law Commission for England and Wales, \textit{supra} note 2, at app. A § 1.


\(^87\) Criminal Justice Act, 2003, c. 44 (Eng.), § 116(2).

\(^88\) Id. § 116(3).

\(^89\) Id. § 116(4).

\(^90\) Id.
The statute goes on to state that, if the court finds that a witness is unavailable, a prior statement by that witness is admissible when two conditions are met.\textsuperscript{91} The witness must be “identified to the court’s satisfaction,”\textsuperscript{92} and the statement must be such that “oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter.”\textsuperscript{93} In other words, an unavailable witness cannot be anonymous, and his or her statement is only admissible if it would be admissible if he or she were present.\textsuperscript{94}

In addition, a business record that was “prepared for the purposes of pending or contemplated criminal proceedings, or for a criminal investigation” is nevertheless admissible if the person who created the record is unavailable or “cannot reasonably be expected to have any recollection of the matters dealt with in the statement.”\textsuperscript{95} However, the judge has discretion to deem such business records inadmissible if he or she believes that the evidence is unreliable.\textsuperscript{96} In determining whether the evidence is trustworthy, the judge must look to the statement’s contents, the source of the information contained in the statement, the circumstances in which the information was supplied, or the circumstances in which the document was created or received.\textsuperscript{97}

The statute also recognizes various exceptions to the rule against hearsay when a witness is available to testify.\textsuperscript{98} For example, a previous statement by a testifying witness is admissible to prove the truth of its content if several conditions are met.\textsuperscript{99} While testifying in court, the witness must indicate that, to the best of his belief, he made the statement and it states the truth.\textsuperscript{100} In addition, the statement must identify or describe a person, object, or place.\textsuperscript{101} The witness must have made the statement “when the matters stated were fresh in his memory but he does not remember them, and cannot reasonably be expected to remember them, well enough to give oral evidence of them in the proceedings.”\textsuperscript{102} Furthermore, the witness must claim to

\textsuperscript{91} See id. § 116(1).
\textsuperscript{92} Criminal Justice Act, 2003, c. 44 (Eng.), § 116(1)(b).
\textsuperscript{93} Id. § (1)(a).
\textsuperscript{94} See id. § 116(1)(a)–(b).
\textsuperscript{95} See id. § 117(4)(a), § 117(5).
\textsuperscript{96} Id. §§ 117(6)–(7).
\textsuperscript{97} Criminal Justice Act, 2003, c. 44 (Eng.), § 117(7).
\textsuperscript{98} See, e.g., id. §§ 119–120.
\textsuperscript{99} See id. § 120(4)–(8).
\textsuperscript{100} Id. § 120(4)(b).
\textsuperscript{101} Id. § 120(5).
\textsuperscript{102} Criminal Justice Act, 2003, c. 44 (Eng.), § 120(6).
be a person against whom an offense has been committed, the offense must relate to the proceedings, and the hearsay statement must consist of a complaint by the witness about conduct which would, if proved, constitute all or part of the offense.  

This seemingly esoteric exception to the rule against hearsay is actually quite logical when divorced from its statutory language. The Commission included this exception in its Draft Bill in order to make admissible statements by crime victims that described elements of the crime shortly after the offense took place. For example, if a crime victim, soon after being attacked, described the assailant to a police officer, but cannot remember at trial exactly what he said at the time, his original statements are nevertheless admissible because of this exception.

Perhaps the most controversial provision in the CJA pertains to judicial discretion to admit hearsay evidence that the enumerated exceptions do not specifically cover. Section 114(1)(d) of the statute states that hearsay evidence can be admissible “if the court is satisfied that it is in the interests of justice for it to be admissible.” This catchall exception is akin to the residual hearsay exception in the U.S. Federal Rules of Evidence, but its language is somewhat broader. Despite the elasticity of the language in 114(1)(d), it is noteworthy that the Commission, in discussing an almost identical provision in the Draft Bill, envisioned that “it would only be used exceptionally.”

C. Hearsay Cases in the ECHR

The first case in which the ECHR dealt explicitly with criminal convictions based on hearsay evidence was Unterpertinger v. Austria. In that case, the defendant had been accused of assaulting his wife

103 Id. § 120(7)(a)–(c). Also, the victim must have made the complaint as soon as could reasonably be expected after the alleged conduct, the victim cannot have made the complaint because of a threat or a promise, and the witness must give oral evidence in connection with the statement before it is brought into evidence. Id. § 120(7)(d)–(f).

104 See id. § 120(4)–(8); see also Law Commission for England and Wales, supra note 2, at 156–57.

105 See Criminal Justice Act, 2003, c. 44 (Eng.), § 120(4)–(8).

106 See id. § 114(1)(d).

107 Id.

108 Compare id. with Fed. R. Evid. 807.

109 See Law Commission for England and Wales, supra note 2, at 129.

and stepdaughter, but neither testified against him at trial.\textsuperscript{112} The only evidence that the government introduced against the defendant was police reports containing statements that the two women had made to the authorities.\textsuperscript{113} The defendant was found guilty on the basis of this evidence alone.\textsuperscript{114} The ECHR held that, because he had not been able to cross-examine either his wife or his stepdaughter about the only evidence against him, the conviction violated the Convention.\textsuperscript{115} Instead of specifically pointing to the confrontation clause in article 6(3)(d), however, the court justified its decision based on the defendant’s general right to a fair trial as defined in article 6.\textsuperscript{116} The opinion did not proscribe the use of hearsay in all criminal cases, but rather warned that a state could not use hearsay evidence if it deprived the defendant of a fair trial.\textsuperscript{117}

Subsequent cases helped to define, more adequately, situations in which prosecutorial use of hearsay evidence contravened the Convention. In \textit{Barbera v. Spain}, evidence against the defendants included a written statement by their former accomplice, made when he was in police custody, in which he accused the defendants of committing the crime for which they were charged.\textsuperscript{118} Before trial, the witness disappeared and the authorities could not locate him.\textsuperscript{119} The court held that the trial was unfair, primarily because the defendants did not have the opportunity to cross-examine their former accomplice.\textsuperscript{120}

Another case that further clarified the relationship between hearsay and a defendant’s right to a fair trial was \textit{Delta v. France}.\textsuperscript{121} In that case, a robbery victim and her companion failed to appear in court despite having been summoned.\textsuperscript{122} Although they were the only witnesses to the crime, the French courts allowed the police officer who had taken their statements to testify as to what they had told him, and the defendant was found guilty on the basis of that evidence.\textsuperscript{123}

\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id. (citing Unterpertinger, 110 Eur. Ct. H.R. (ser. A) at 15, § 33).
\textsuperscript{116} See Kirst, supra note 35, at 783.
\textsuperscript{117} See id.
\textsuperscript{118} Id. (citing Barbera v. Spain, 146 Eur. Ct. H.R. (ser. A) (1989)).
\textsuperscript{119} Id.
\textsuperscript{120} See id. (citing Barbera, 146 Eur. Ct. H.R. (ser. A) at 37–38, § 89).
\textsuperscript{121} See Kirst, supra note 35, at 787 (citing Delta v. France, 191 Eur. Ct. H.R. (ser. A) at 2 (1990)).
\textsuperscript{122} Id.
\textsuperscript{123} Id. (citing Delta, 191 Eur. Ct. H.R. (ser. A) at 9–10, §§ 18–21).
cause the defendant never had an opportunity to examine either of the witnesses, the ECHR held that his trial had been unfair.\footnote{124}{See id.}

The \textit{Ludi v. Switzerland} case demonstrates that a trial can be unfair even if the hearsay evidence in question was not the only probative evidence against the defendant.\footnote{125}{See \textit{id.} at 789 (citing \textit{Ludi v. Switzerland}, 238 Eur. Ct. H.R. (ser. A) (1992)).} In \textit{Ludi}, a drug trafficking case, the evidence against the defendant included several telephone calls that the government had intercepted, statements by the defendant after he was arrested, statements by co-defendants, and a report by an undercover officer.\footnote{126}{Kirst, \textit{supra} note 35, at 789 (citing \textit{Ludi}, 238 Eur. Ct. H.R. at 10, §§ 16–18).} The officer refused to testify in order to preserve his anonymity, and the defendant argued that his absence rendered the trial unfair.\footnote{127}{\textit{Id.} (citing \textit{Ludi}, 238 Eur. Ct. H.R. at 21, § 49).} The ECHR agreed, finding that the fact the officer was unavailable for cross-examination, despite the existence of alternative ways to testify that would have preserved his anonymity, made the trial unfair.\footnote{128}{\textit{Id.}}

Although it would seem from the preceding cases that the ECHR believes that violations of the Convention exist whenever hearsay evidence is the significant basis upon which the government relied to convict the defendants, other cases indicate that this assumption is incorrect.\footnote{129}{See \textit{id.} at 788 (citing \textit{Asch v. Austria}, 203 Eur. Ct. H.R. (ser. A) (1991); \textit{Isgro v. Italy}, 194 Eur. Ct. H.R. (ser. A) (1991)).} For example, in \textit{Isgro v. Italy}, the court found that the prosecution’s use of a hearsay accusation by an alleged accomplice did not create an unfair trial for several reasons: (1) the accomplice was not anonymous; (2) the defendant did confront the accomplice at a hearing before the investigating judge at which each accused the other of lying; (3) the defendant did not contest the impartiality of the investigating judge; and (4) the accusation by the accomplice was not the only evidence.\footnote{130}{\textit{Id.} (citing \textit{Isgro}, 194 Eur. Ct. H.R. (ser. A) (1991), at 12–13, § 35).}

Likewise, in \textit{Asch v. Austria}, a case with facts almost identical to \textit{Unterpertinger}, the ECHR held that the Austrian government had not violated the Convention.\footnote{131}{Kirst, \textit{supra} note 35, at 788 (citing \textit{Asch}, 203 Eur. Ct. H.R. (ser. A) (1991)).} The court distinguished \textit{Unterpertinger} by noting that the government’s use of the victim’s statement to police was not the only evidence upon which the trial court relied to convict the defendant.\footnote{132}{\textit{Id.} (citing \textit{Asch}, 203 Eur. Ct. H.R. (ser. A) at 11, §§ 30–31).}
The ECHR attempted to clarify its policy on hearsay and the Convention in *Ferrantelli v. Italy*. The defendants in the case had been convicted of murdering two police officers. The evidence against the defendants included their, and an alleged accomplice’s, confessions to police. In the alleged co-conspirator’s first confession, he stated that he had committed the murders with the two defendants. The next day, he retracted that statement and instead said that he acted alone. Before the defendants’ trial, however, the accomplice committed suicide. The Italian court used the first confession, in which the accomplice had identified the defendants as culpable, to convict the defendants.

The ECHR found that the use of the original confession did not violate the Convention. The court noted that all evidence “must normally be produced in the presence of the accused at a public hearing,” and that generally the prosecution must give the defendant an opportunity to question a witness at some point. Recognizing that these rules are not absolutes, however, the ECHR held that Italy had not contravened the Convention. As Professor Kirst notes, however, the court “did not describe the standard by which it would determine when it was permissible for a court to deviate from the rules that should normally be followed.”

Although the ECHR has not, as of yet, made that standard explicit, two more recent cases help to shed light on the subject. In *Verdam v. Netherlands*, the defendant had been convicted of raping several women. The prosecution could not locate two of the women for testimony at trial, so instead it used the statements the women had given to police. Defense counsel had been present for only one of

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134 *Id.*
135 *Id.*
138 *Id.* at 790–91.
139 *Id.* at 791.
140 *Id.*
142 *Id.* (citing *Ferrantelli*, 1996-III Eur. Ct. at 950, § 51).
144 *Id.*
146 Kirst, *supra* note 35, at 796.
the statements. The ECHR insinuated that, if the conviction had been based “to a decisive extent” on hearsay statements, the court would find the trial to be unfair. On the contrary, the ECHR also found that a trial court could rely on evidence that corroborated the truth of hearsay statements. If such corroborating evidence existed, use of the hearsay evidence would not offend the Convention.

The fact that the prosecution had no corroborating evidence against the defendant in Luca v. Italy rendered his trial unfair according to the court. In that case, the defendant was convicted of drug crimes because a man who the authorities caught possessing cocaine indicated that the defendant had sold it to him. The informant had refused to testify at trial in order to protect himself from self-incrimination. The ECHR held that, because the conviction was based solely upon the statements of a person whom the defendant was never able to question, the trial had been unfair.

D. The Commission’s Analysis of the ECHR Hearsay Cases

When the Law Commission for England and Wales wrote its report and drafted its model statute on hearsay in criminal cases, the Draft Bill that Parliament substantially copied when drafting the CJA, the Commission was keenly aware that the United Kingdom was a signatory to the Convention and, as such, had agreed to honor the mandates of the treaty. In its report, after examining the ECHR cases discussed above, the Commission came to several conclusions about the relationship between hearsay and the right to a fair trial as guaranteed by the Convention.

First, the Commission analyzed the use of the word “witness” in article 6(3)(d), which states that every defendant in a criminal case has the right “to examine or have examined witnesses against him.” On the basis of its analysis of ECHR cases, the Commission concluded

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147 Id. (citing Verdam, No. 35253/97, Eur. Ct. H.R. (1999)).
148 Id. (citing Verdam, No. 35253/97, Eur. Ct. H.R. (1999)).
149 See id.
150 Id. (citing Verdam, No. 35253/97, Eur. Ct. H.R. (1999)).
151 Kirst, supra note 35, at 797 (citing Luca, 2001-II Eur. Ct. H.R. 167 (2001)).
153 Id.
155 See LAW COMMISSION FOR ENGLAND AND WALES, supra note 2, at 56.
156 See id. at 57–66.
157 European Convention on Human Rights, supra note 6, art. 6(3)(d), 213 U.N.T.S. at 228.
that “the word ‘witness’ goes beyond its usual meaning (to an English lawyer) of someone who attends the trial to give oral evidence.”

Instead, the meaning of “witness” includes a person who has made a statement to police that the prosecution then attempts to enter into evidence at trial. Yet the Commission also noted that all of the people whom the ECHR has defined as “witnesses” were those who have voluntarily given information to criminal justice officials. In other words, just because a witness testifying at trial repeats the comments of a third person not present at trial to prove the truth of the comments, there is no guarantee that the Convention affords the defendant the right to question the absent individual.

Even though an English court would certainly identify such testimony as hearsay, the ECHR would not necessarily consider the third person to be a “witness” under article 6(3)(d) of the Convention, thus eradicating the possibility of a violation under that section of the treaty.

After concluding that the ECHR cases clearly indicate that the defendant does not have an inherent right to question witnesses against him at trial, the Commission considered a more difficult question—is it ever possible to enter the statement of an absent witness into evidence if the defendant has never had the opportunity to question that witness? The Commission posited that two interpretations are possible. A literal reading of the Convention suggests a negative answer, because article 6(3) explicitly states that every criminal defendant has the rights listed in subparts (a) through (e), which include the right “to examine or have examined witnesses against him.” Unterpertinger took this strict constructionist view.

The Commission, however, adopted an alternative theory, namely that “the rights expressly conferred by article 6(3) are not absolute rights: they are merely factors which have to be considered in deciding a broader question—‘Did the defendant receive a fair trial as required

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158 Law Commission for England and Wales, supra note 2, at 57.
159 Id. & n.7.
160 Id. at 57.
161 Id.
162 Id.
163 Law Commission for England and Wales, supra note 2, at 59 & n.16.
164 Id. at 59–60.
165 Id. at 60.
166 European Convention on Human Rights, supra note 6, art. 6(3), 213 U.N.T.S. at 228; Law Commission for England and Wales, supra note 2, at 60.
by article 6(1)?”  

In the Commission’s view, a trial in which the statements of a witness whom the defendant has never questioned are admitted is not unfair under the Convention, provided that two conditions are met: (1) it must be impossible to produce the witness for questioning; and, more importantly, (2) other evidence must support any hearsay statements used against the defendant. Several ECHR decisions, according to the Commission, indicated that the more liberal approach to interpretation of article 6(3) had become the law.

Despite its rejection of the strict constructionist view, the Commission’s original conclusion regarding the relationship between hearsay evidence and article 6(3) was that hearsay, unsupported by any other probative evidence, could not be sufficient proof of any element of a crime. But many jurists and scholars criticized that position, arguing that the ECHR did not consider the existence of supporting evidence to be a necessary component of a fair trial. Moreover, other pundits worried that disagreement over what actually constitutes “supporting evidence” would produce endless litigation and a great deal of confusion.

Having accepted this criticism as valid, the Commission chose not to include a supporting evidence requirement into the Draft Bill. Instead, the Commission included a “catch-all” provision, article 14, which, in their opinion, would ensure the statute’s compliance with the Convention. Parliament apparently agreed with the Commission’s analysis and, in lieu of implementing a corroborating evidence requirement, included the majority of the language from article 14 in section 125 of the CJA. Section 125 states that if

(a) the case against the accused is based wholly or partly on a statement not made in oral evidence in the proceedings, and (b) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be un-

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168 Id. at 61.
169 Id.
170 See id. & n.26.
171 See id. at 66.
172 See id. & n.26.
173 Law Commission for England and Wales, supra note 2, at 66.
174 Id. at 66–67.
175 See id. at 67.
176 Compare Criminal Justice Act, 2003, c. 44 (Eng.), § 125, with Law Commission for England and Wales, supra note 2, at app. A § 14(1).
safe, the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury.\textsuperscript{177}

Parliament most likely concurred with the view of the Commission that article 14, acting together with other safeguards such as the prohibition against the admissibility of anonymous witnesses’ hearsay statements, would provide “adequate protection for the accused” under the Convention.\textsuperscript{178}

III. Analysis

A. Gaps Between the Commission’s Analysis and ECHR Case Law

Certainly, the Commission put forth a good faith effort to ensure that its Draft Bill complied with the Convention and, specifically, article 6(3).\textsuperscript{179} Yet the Commission itself recognized that the ECHR cases are somewhat inconsistent and often difficult to reconcile with one another.\textsuperscript{180} Furthermore, the ECHR tends to view the Convention as an ambulatory document; therefore, the court’s interpretation of the treaty has changed—and will continue to change—over time.\textsuperscript{181} Because the court takes such a flexible approach, it is nearly impossible to predict whether particular governmental practices of the member countries will, in fact, offend the Convention.\textsuperscript{182}

Even so, the ECHR case law strongly supports many of the Commission’s conclusions regarding the hearsay jurisprudence of the court. For example, it is clear that the Convention does not require all witnesses against a defendant to testify at trial in order for their statements to be admissible.\textsuperscript{183} In addition, the court will not find that a trial was unfair simply because hearsay evidence was most likely a major factor in the defendant’s conviction.\textsuperscript{184} Although the cases do not necessarily draw a firm line between fair and unfair use of hearsay, the Commission was correct in stating that, in order to violate the Con-

\begin{itemize}
  \item\textsuperscript{177} Criminal Justice Act, 2003, c. 44 (Eng), § 125.
  \item\textsuperscript{178} LAW COMMISSION FOR ENGLAND AND WALES, supra note 2, at 67.
  \item\textsuperscript{179} See id. at 56–68.
  \item\textsuperscript{180} See id. at 56.
  \item\textsuperscript{181} Id.
  \item\textsuperscript{182} See id.
  \item\textsuperscript{183} See LAW COMMISSION FOR ENGLAND AND WALES, supra note 2, at 59 & n.16.
  \item\textsuperscript{184} See Kirst, supra note 35, at 791 (citing Ferrantelli, 1996-III Eur. Ct. H.R. 937).
\end{itemize}
vention, the evidence must be so untrustworthy that the fundamental fairness of the trial is in question.\textsuperscript{185}

In contrast, the reasoning of the Commission was deficient when it dealt with the question of convictions premised upon hearsay statements alone. The ECHR has held repeatedly that a trial is unfair if the defendant’s conviction was predicated on an uncorroborated hearsay statement and the defendant never had the opportunity to question the statement’s author.\textsuperscript{186} In all fairness to the Commission, however, the ECHR did not decide \textit{Luca}, the case which clarified the need for corroboration in cases based solely on hearsay, until after the Commission had written its report.\textsuperscript{187} Parliament, on the other hand, enacted the CJA after the \textit{Luca} decision had been handed down, so the legislators should have been on notice that the Convention mandates a corroboration requirement.\textsuperscript{188}

Thus, the CJA contains several provisions that may contravene article 6(3) of the Convention. One such area of concern is section 116, which makes previous statements of a witness admissible if that witness is unavailable at trial.\textsuperscript{189} This provision seems to suggest that the recorded statements of an unavailable witness, such as a deceased person, would be admissible against the defendant, regardless of whether she ever had the opportunity to question that witness.\textsuperscript{190} Because analysis of the ECHR cases shows that convictions based upon hearsay evidence alone are inherently unfair if the defendant never had the opportunity to question the author of the hearsay statements, the court would almost certainly find a conviction based on such evidence to be unfair.\textsuperscript{191}

Although Parliament did not heed the teachings of \textit{Luca} when it created the CJA, it did include section 125 in an attempt to anticipate

\begin{footnotes}
\item See id. at 782–83.
\item See id. at 796–97 (citing \textit{Luca}, 2001-II Eur. Ct. H.R. 167 (2001)) (making explicit the formerly implicit requirement that corroborating evidence is necessary when the conviction is dependent upon an untested hearsay statement).
\item See id.
\item See Criminal Justice Act 2003, c. 44 (Eng.), § 116.
\item See id. § 116(1)–(2) (a).
\end{footnotes}
future developments in the interpretation of the Convention.\textsuperscript{192} Despite the fact that Parliament was incorrect in its assumptions about the relationship between hearsay and corroborating evidence, there is a possibility that section 125 renders that issue moot.\textsuperscript{193}

**B. Section 125 and the Luca Corroboration Requirement**

Section 125 requires the judge to direct a verdict for the defendant when his conviction could only be based upon hearsay evidence that is “so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe.”\textsuperscript{194} Thus, in order to comply with the Convention as interpreted in \textit{Luca}, English and Welsh appellate judges simply could hold that any uncorroborated hearsay is inherently unconvincing.\textsuperscript{195} Perhaps this is self-evident; after all, it is difficult to imagine that English or Welsh judges, historically distrustful of hearsay, would be willing to convict someone of a crime based on hearsay evidence alone.\textsuperscript{196}

However, the Commission did not believe that every case in which a conviction was premised upon uncorroborated hearsay would be inherently “unconvincing.”\textsuperscript{197} The Commission gave an example in which uncorroborated hearsay could, in fact, be quite convincing, stating that “the hearsay statement might consist of a statement in a business document prepared by somebody with substantial knowledge of the matters set out, and yet be incapable of any form of corroboration save for a statement by the writer’s superior that the writer was a reliable and conscientious employee.”\textsuperscript{198} The Commission’s desire to allow such a case to proceed to the factfinder persuaded the Commission to reject a corroboration requirement.\textsuperscript{199} Instead, the Commission wrote section 14, hoping that it would ensure the Draft Bill’s compliance with the Convention without forcing judges to direct a verdict in all cases based on uncorroborated hearsay.\textsuperscript{200} Therefore, in the Commission’s view, section 14, as written, allows judges to submit

\textsuperscript{192} See \textit{Law Commission for England and Wales}, supra note 2, at 67–68 (discussing the rationale for creating section 14 of the Draft Bill, which is virtually identical to section 125).

\textsuperscript{193} See \textit{Criminal Justice Act 2003}, c. 44 (Eng.), § 125.

\textsuperscript{194} Id. § 125(1)(b).


\textsuperscript{196} See \textit{Law Commission for England and Wales}, supra note 2, at 67.

\textsuperscript{197} Id.

\textsuperscript{198} See \textit{id.}

\textsuperscript{199} See \textit{id. at} 67; \textit{see also id. at} app. A § 14(1).

\textsuperscript{200} See \textit{id. at} 67; \textit{see also id. at} app. A § 14(1).
some cases based solely upon uncorroborated hearsay to the factfinder.\textsuperscript{201} It stands to reason that, since section 125 of the CJA is almost an exact duplication of section 14, Parliament intended section 125 to be interpreted similarly.\textsuperscript{202}

Thus, judicial scrutiny of section 125 presents a significant problem. In Parliament’s view, section 125 does not apply to some cases based on uncorroborated hearsay,\textsuperscript{203} but the ECHR has held that convictions based upon hearsay are unfair unless there is corroborating evidence.\textsuperscript{204} Therefore, if appellate judges were to construe the statute in accordance with the drafters’ intent, it would contravene the Convention.\textsuperscript{205} Even so, such an interpretation may never arise, because the United Kingdom has incorporated the Convention into its own domestic law.\textsuperscript{206} As such, it would seem that the ECHR case law, and Luca specifically, would bind the English and Welsh appellate courts, thereby requiring them to hold that the evidence in cases based upon uncorroborated hearsay is \textit{per se} “unconvincing.”\textsuperscript{207}

On the other hand, if Parliament were simply to amend section 125, there would be no possibility of judicial interpretation issues.\textsuperscript{208} Parliament would only have to add a short statement within the section, clarifying the corroboration requirement.\textsuperscript{209} It should amend section 125(1)(b) by splitting it into two subparts.\textsuperscript{210} The amended section 14(1)(b) should read, “(i) the statement is not corroborated by other evidence, or (ii) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the accused, his conviction of the offence would be unsafe.”\textsuperscript{211}

This amendment would guarantee that English and Welsh judges direct verdicts for defendants when their convictions could only be

\textsuperscript{202} See Criminal Justice Act, 2003, c. 44 (Eng.), § 125.
\textsuperscript{203} See id.
\textsuperscript{204} See Kirst, \textit{supra} note 35, at 797 (citing Luca, 2001-II Eur. Ct. H.R. 167 (2001)).
\textsuperscript{206} See Human Rights Act, 1998, c. 42 (Eng.), §§ 1–4; Council of Europe, \textit{supra} note 40.
\textsuperscript{207} See Criminal Justice Act, 2003, c. 44 (Eng.), § 125.
\textsuperscript{208} See Kirst, \textit{supra} note 35, at 797 (citing Luca, 2001-II Eur. Ct. H.R. 167 (2001)) (noting the corroboration requirement).
\textsuperscript{209} See id.
\textsuperscript{210} See Criminal Justice Act 2003, c. 44 (Eng.), § 125(1)(b).
\textsuperscript{211} See id.
the result of uncorroborated hearsay evidence.\textsuperscript{212} The amendment would also retain Parliament’s prohibition against convictions premised upon “unconvincing” hearsay.\textsuperscript{213} Furthermore, as amended, the statutory construction would clarify any possible ambiguity about whether uncorroborated hearsay is necessarily “unconvincing.”\textsuperscript{214} Because the amended statute would state explicitly that a case based upon uncorroborated hearsay always requires a directed verdict, judges would not have to decide the question.\textsuperscript{215}

Certainly, this proposed amendment would not render the CJA completely free of issues of interpretation.\textsuperscript{216} The corroboration requirement that the ECHR announced in \textit{Luca} raises many complex problems.\textsuperscript{217} Most notably, it is impossible to know, at this point, how much evidence the prosecution must produce in order to satisfy the corroboration requirement in cases premised upon hearsay.\textsuperscript{218} Furthermore, considering the instability of ECHR precedent, it is difficult to determine whether the corroboration requirement will survive.\textsuperscript{219} Based on the cases available currently, however, the CJA contravenes the Convention in its present form.\textsuperscript{220} Therefore, either Parliament or the appellate bench must take measures, such as those noted above, to make it conform with the treaty.\textsuperscript{221}

\textbf{Conclusion}

In creating its Draft Bill, the Commission took reasonable steps to ensure that the statute would comply with the European Convention on Human Rights. However, the Commission’s theory that a conviction based solely upon uncorroborated hearsay would not violate the Convention proved to be incorrect. Further, by including substantial portions of the Draft Bill in the CJA, Parliament enacted a law that contravenes the treaty. Although section 125 of the Act contains lan-

\textsuperscript{212} See id. § 125(1).
\textsuperscript{213} See id.
\textsuperscript{214} See id.
\textsuperscript{215} See Criminal Justice Act 2003, c. 44 (Eng.), § 125(1).
\textsuperscript{216} See generally id. (a lengthy, complex statute).
\textsuperscript{217} See Kirst, supra note 35, at 797 (citing Luca, 2001-II Eur. Ct. H.R. 167 (2001)).
\textsuperscript{218} See Law Commission for England and Wales, supra note 2, at 67 (making a similar argument when arguing against the efficacy of a corroboration requirement).
\textsuperscript{219} See id. at 56.
\textsuperscript{220} Compare id. at 67–68, with Kirst, supra note 35, at 797 (citing Luca, 2001-II Eur. Ct. H.R. 167 (2001)).
\textsuperscript{221} See European Convention on Human Rights, supra note 6, art. 46, 213 U.N.T.S. at 246.
guage that the Commission assumed would prevent contravention of the Convention, that provision is inadequate because it does not explicitly contain a corroboration requirement. Therefore, Parliament should amend section 125 of the CJA so that the statute recognizes the need for corroborating evidence in criminal cases based solely upon hearsay statements.
DEFINING AWAY RELIGIOUS FREEDOM IN EUROPE: HOW FOUR DEMOCRACIES GET AWAY WITH DISCRIMINATING AGAINST MINORITY RELIGIONS

NATHANIEL STINNETT*

Abstract: Despite multiple international and regional prohibitions against religious discrimination, many European Democracies continue to discriminate against minority religions. In particular, this discrimination often occurs due to definitional ambiguity surrounding the term “religion.” Using the examples of Russian, Belgian, French, and German law, this Note reveals how many countries violate the international treaties to which they are signatories by defining many religious groups as “sects,” “cults,” or groups otherwise unworthy of official “religion” status. After discussing the necessary components of a successful definition of “religion,” this Note argues that the most effective way to protect freedom of religion is to abandon the term “religion” altogether and adopt a polythetic approach that protects a list of various religious practices, not religion, from discriminatory treatment.

INTRODUCTION

Article 18 of the Universal Declaration of Human Rights (Universal Declaration) succinctly enshrines religious freedom, stating “[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”¹ Other international agreements even legally oblige the vast majority of the world’s nations to respect religious freedom; nevertheless, the right to religious freedom continues to be restricted throughout the world.²

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Although totalitarian and authoritarian regimes are often the worst enemies of religious freedom, their persecution of religious minorities is usually blatant, well-publicized, and clearly denounced by the rest of the world. What often goes unreported is that many of the world’s democracies are just as guilty of restricting religious freedom as the totalitarian regimes that they so often denounce. In particular, some European democracies create official religious hierarchies or discriminate against minority religions by categorizing them as “sects” or “cults.” These categorizations not only render such “cults” ineligible for certain government benefits and protections, but also often stigmatize religious minorities in such a way that they are subject to abuse within their communities. Furthermore, non-democratic nations often copy these “anti-cult” laws, using them as a basis for outright discrimination and persecution.

So many countries slip through the legal loopholes of religious freedom for two basic reasons: (1) “religion” is almost impossible to define; and (2) a group’s freedom of religion is always measured against the State’s need to maintain public order. This Note focuses on how best to close the definitional loopholes and ensure that freedom of thought, conscience, and religion are rights enjoyed by every individual, regardless of the spiritual community to which he or she belongs. First, I discuss the ways in which four European democracies restrict the freedom of minority and non-traditional religions; second, I show how the applicable international law, while explicitly forbidding such restrictions, is ridden with loopholes; third, I describe why there is no acceptable legal definition of religion; and fourth, I argue that group-oriented legal distinctions should be abandoned for a balance between individual freedoms and maintaining public order.


d at http://www.state.gov/g/drl/rls/irf/2002/13608.htm [hereinafter State Dep’t, Executive Summary].

3 Id. pt. I, ¶¶ 1–7.
4 Id. ¶¶ 4–5.
5 Id. ¶ 5.
6 State Dep’t, Executive Summary, supra note 2, ¶¶ 4–6.
7 Id. ¶ 5.
I. FOUR COUNTRIES: FOUR EXAMPLES OF Restricting the Freedom of Minority Religions

It was largely in response to a series of religiously-inspired mass suicides during the mid-1990s, that many European governments began to restrict the freedoms of certain minority religions.\(^9\) In particular, from 1995–1997, members of the Order of the Solar Temple committed numerous murder-suicides in France and Switzerland resulting in the deaths of over sixty people.\(^10\) France and Belgium explicitly characterized their “anti-cult” legislation and practices as a reaction to the Solar Temple suicides,\(^11\) whereas Germany and Russia have simply stated a desire to target “totalitarian sects” or groups that are dangerous to the democratic order.\(^12\) Regardless of the motivating incidents behind the discriminatory legislation of various European countries, most governments are consistent in that they justify such restrictions of religious freedom in the name of tradition, culture, and maintaining public safety.\(^13\)

Although the impetus behind such anti-cult legislation is to prevent the many societal dangers that spring from religious groups, the result has been the creation of two-tiered societies, where certain religions enjoy far more rights and freedom than do others.\(^14\) Although many European countries have passed some sort of anti-cult legislation, I have chosen to highlight the paths taken by the Russian Federation (Russia), Belgium, France, and Germany.\(^15\) I concentrate on these four countries largely because they each contain examples of


\(^13\) See State Dep’t, Executive Summary, supra note 2, ¶¶ 6–7.

\(^14\) Id. ¶¶ 4–7.

\(^15\) Id. ¶ 5.
relatively “innocent” religious organizations that have been harmed by anti-cult laws.16

A. Russia

After the fall of the Soviet Union, Russia incorporated into its legal code a 1990 Soviet law known as “On Freedom of Religious Confession” (FRC).17 The FRC declared all religions equal under the law, mandated the separation of church and state, and established voluntary registration procedures for religious groups so that they could gain tax exemptions and establish official places of worship.18 Since its ratification on December 12, 1993, the Russian Constitution has also guaranteed freedom of religious expression, equality of religions, and separation of church and state.19 Unfortunately, practice does not always follow principle, and federal and local governments often do not respect the Constitution’s provision for equality of religions.20

Perhaps the most egregious example of the Russian government’s explicit discrimination against certain religious groups can be found in the 1997 law known as “On Freedom of Conscience and on Religious Associations” (FCA).21 The FCA categorizes all religious communities either as “groups” or “organizations,” with the rights and activities of those designated as “groups” being severely limited.22 Only after existing within Russia for fifteen years with at least ten citizen members, may a religious congregation register and qualify for “organization” status, thereby gaining the legal status of a juridicial person.23 Juridicial person status is extraordinarily important since it permits the “organization” to enjoy certain tax benefits, proselytize, open a bank account, own property, conduct worship services in prisons and state-owned hospitals, publish literature, and issue invitations to foreigners.24 Furthermore, representative offices of foreign reli-

17 State Dep’t, Russia Report, supra note 12, ¶ II, ¶ 3.
18 Id.
20 State Dep’t, Russia Report, supra note 12, ¶ 1.
22 State Dep’t, Russia Report, supra note 12, ¶ II, ¶ 4; FCA, supra note 21, chs. II–III.
23 FCA, supra note 21, art. 9.1.
24 State Dep’t, Russia Report, supra note 12, ¶ II, ¶ 5; FCA, supra note 21, chs. II–III.
gious organizations must obtain “organization” status simply to conduct liturgical services and other religious activities.\textsuperscript{25}

Although the FCA gives no explicit rationale for creating this two-tiered system, article 3.2 of the law does state that religious freedom may be curtailed to defend “the constitutional system, morality, health, or the rights and legal interests of man and citizen . . . ,” or to secure “the defense of the country and the security of the state.”\textsuperscript{26} However, the U.S. Department of State has characterized the FCA in another manner, claiming that the intent of some of the FCA’s sponsors “appears to have been to discriminate against members of foreign and less established religions by making it difficult for them to manifest their beliefs through organized religious institutions.”\textsuperscript{27}

Indeed, the FCA’s discriminatory registration and classification processes have effectively disenfranchised thousands of minority religious associations, many of which are foreign, and few (if any) of which pose any threat to Russian society.\textsuperscript{28} Those religious associations that had previously registered under the more liberal FRC had to re-register under the FCA regime by December 31, 2000 or face deprivation of juridical status by a process known as “liquidation.”\textsuperscript{29} By the 2000 deadline, the time and expense of the FCA’s registration process had proven onerous enough that an estimated 2,095 previously registered organizations were subject to liquidation.\textsuperscript{30} However, time and expense are not the only barriers of the registration, re-registration, and liquidation processes; the FCA often is used as a blatant tool of discrimination even against well-funded, international organizations.\textsuperscript{31} The Salvation Army was liquidated for years because it was described as a paramilitary organization; many Jehova’s Witnesses congregations have been deemed “a threat to society”; and local governments often simply forbid Muslims from even trying to register at all.\textsuperscript{32} In a few instances (such as with the Salvation Army), the Constitutional Court eventually rules that such

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{25} FCA, \textit{supra} note 21, art. 13. Article 13.1 of the FCA defines foreign religious organizations as those which have been “created outside the confines of the Russian Federation and according to the laws of a foreign state.” \textit{Id.}
\item \textsuperscript{26} \textit{Id.} art. 3.2.
\item \textsuperscript{27} State Dep’t, Russia Report, \textit{supra} note 12, § II, ¶ 4.
\item \textsuperscript{28} \textit{Id.} § II, ¶ 8.
\item \textsuperscript{29} FCA, \textit{supra} note 21, art. 27.4.; State Dep’t, Russia Report, \textit{supra} note 12, § II, ¶ 8 (noting that the liquidation date of the 1999 amended version of the FCA was postponed one year).
\item \textsuperscript{30} State Dep’t, Russia Report, \textit{supra} note 12, § II, ¶ 8.
\item \textsuperscript{31} \textit{Id.} § II, ¶ 9.
\item \textsuperscript{32} \textit{Id.} § II, ¶¶ 23, 26, 28.
\end{itemize}
\end{footnotesize}
liquidations are improper, but often times City Courts continue to delay or obstruct the rescinding of liquidation orders.\textsuperscript{33}

\textbf{B. Belgium}

Much like Russia, Belgium has established a two-tiered society, where certain religions are officially recognized, while others are not.\textsuperscript{34} Roman Catholicism, Protestantism, Judaism, Anglicanism, Islam, Orthodox Christianity (Greek and Russian), and the Council of Non-Religious Philosophical Communities of Belgium all make up the seven officially recognized religious groupings.\textsuperscript{35} Only these seven official groups have access to certain legal rights and government subsidies for everything from ministers and teachers to the renovation of church buildings.\textsuperscript{36} Although the Belgian government does not condemn unrecognized religious groups, such groups are clearly discriminated against in that they are not eligible for government subsidies.\textsuperscript{37}

For those religions that wish to join this group of seven, their recognition process is fraught with vague and subjective criteria, applied by political decision-making bodies.\textsuperscript{38} In order to qualify for government recognition, a religion must (1) have a structure or hierarchy, (2) have a sufficient number of members, (3) have existed in the country for a long period of time, (4) offer a social value to the public, and (5) abide by the State’s laws and respect the public order.\textsuperscript{39} The ambiguity of these criteria is further clouded by a lack of any definitions for the phrases “sufficient,” “a long period of time,” or “social value.”\textsuperscript{40} Finally, although the Ministry of Justice recommends approval or rejection of all applications, the Parliament has final approval over all recognized status proceedings.\textsuperscript{41} In short, representatives of the majority go through a vague and arbitrary process for deciding whether to recognize minority religions.\textsuperscript{42}

To further complicate matters, the Belgian government even has begun discriminating among unrecognized religious groups.\textsuperscript{43} In

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{33} Id. § II, ¶ 26.
\item \textsuperscript{34} State Dep’t, Belgium Report, supra note 11, § II, ¶ 2.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id. § II, ¶¶ 2–3.
\item \textsuperscript{37} Id. § II, ¶ 5
\item \textsuperscript{38} Id. § II, ¶ 4.
\item \textsuperscript{39} State Dep’t, Belgium Report, supra note 11, § II, ¶ 4.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id. § II, ¶ 6.
\end{itemize}
\end{footnotesize}
1996, the Belgian Parliament established a special commission to evaluate the potential dangers that religious sects may represent to society. The commission’s 1997 report classified sects into two broad categories: those that are respectable (defined as “organized groups of individuals espousing the same doctrine with a religion”) and those that are “harmful sectarian organizations.” “Harmful sectarian organizations” were defined as “groups having or claiming to have a philosophical or religious purpose whose organization or practice involves illegal or injurious activities, harms individuals or society, or impairs human dignity.”

Attached to the commission’s report was a list of religious groups such as Jehova’s Witnesses, the Church of Jesus Christ of Latter-Day Saints, the Church of Scientology, and the Young Women’s Christian Association. This list quickly became known as the “Dangerous Sects List” and, although the report’s introduction clearly stated that the list merely consisted of those groups that had been mentioned during testimony, the damage was already done. When the Parliament adopted several of the report’s recommendations, it chose not to adopt the list itself; nevertheless, the groups have since been subject to discriminatory treatment by courts, banks, and the general public.

C. France

The French Constitution guarantees freedom of religion, and France’s Law of Separation (often referred to as the “1905 Law”) forbids discrimination on the basis of faith. Although the 1905 Law requires religious communities to register with the government, the registration process does not seem to be exclusionary, and communities may be simultaneously registered in both of the available categories: (1) “associations cultuelles” (tax-exempt worship associations) or (2) “associations culturelles” (non-tax-exempt cultural associations). In order to qualify for tax-exempt status, a group’s sole purpose must be the practice of religious rituals; therefore, most religious groups separate into both

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44 State Dep’t, Belgium Report, supra note 11, § II, ¶ 6.
45 Id.
46 Id..
47 Id.
48 Id.
49 State Dep’t, Belgium Report, supra note 11, § II, ¶ 6–7.
51 State Dep’t, France Report, supra note 9, § II, ¶ 2.
associations cultuelles and associations culturelles, with the latter taking charge of publicity, running schools, and other non-ritualistic duties.\textsuperscript{52}

Although the French government does not create an explicit hierarchy of religions, the French Parliament did follow Belgium’s lead by commissioning a Board of Inquiry into Cults in 1996 (1996 Commission).\textsuperscript{53} The 1996 Commission’s report admitted the difficulty of defining the concept of a cult, yet it did mention the following cult-like characteristics:

Mental destabilization; exorbitant character of the financial requirements; isolation from society; danger to physical health; embrigadement [forced conscription] of the children; the more or less antisocial speech; disorders with the law and order; importance of the legal contentions; the possible diversion of the traditional economic circuits; [and] attempts at infiltration of the public authorities.\textsuperscript{54}

Astonishingly, the report of the 1996 Commission proceeded to identify 173 groups as cults, including the Mormons, Jehovah’s Witnesses, the Church of Scientology, and the Theological Institute of Nimes (an evangelical Christian Bible College).\textsuperscript{55} None of these “cults” were banned, but many have since claimed to be the victims of intolerance and discrimination.\textsuperscript{56}

Following this report in 1998, the government also established the “Interministerial Mission in the Fight against Sects/Cults” to analyze the “phenomenon of cults” and coordinate the government’s response to cult activities.\textsuperscript{57}

Finally, the June 2001 About-Picard Law lists criminal activities for which religious associations could be subject to complete dissolution, among which are such vague activities as violating a person’s freedom, dignity, or identity; false advertising; and creating or exploiting a psy-

\textsuperscript{52} Id.
\textsuperscript{54} French Cult Commission, supra note 53, § I, A(2d).
\textsuperscript{55} Id. § I, B(1); State Dep’t, France Report, supra note 9, § II, ¶ 13. Both the Belgian and French parliamentary commissions were formed in response to a number of highly publicized mass suicides in the mid-1990s by the Order of the Solar Temple, a religious organization with significant membership in France, Switzerland, and Canada. State Dep’t, France Report, supra note 9, § II, ¶ 13; State Dep’t, Belgium Report, supra note 11, § II, ¶ 6.
\textsuperscript{56} State Dep’t, France Report, supra note 9, § II, ¶ 13.
\textsuperscript{57} Id. § II, ¶ 14.
chological or physical dependence. Although, as of 2002, no cases had been brought under the About-Picard Law, French religious leaders have raised serious concerns about the law’s ambiguity and reach.

D. Germany

Germany’s Constitution provides for freedom of religion and the separation of church and state. Furthermore, the federal government may recognize a religious community by granting it the status of “corporation under public law,” so long as the organization can assure the government of its permanence and size and that it contributes socially, spiritually, or materially to society. Becoming a “corporation under public law” is highly desirable because it not only confers tax-exempt status upon religions but also entitles them to levy taxes on their own members (collected by the State). Until recently, religious communities also had to prove their loyalty to the State for tax-exempt status, but under a 2000 Constitutional Court case brought by Jehovah’s Witnesses, the “loyalty to the state” provision was struck down.

Despite these encouraging federal developments, several lander (states) have published pamphlets harmful to the reputations of various religious groups. In particular, many such pamphlets focus upon the Church of Scientology, a favorite target of both the federal and state Offices for the Protection of the Constitution (OPCs). For example, in 1998, the Hamberg OPC published “The Intelligence Service of the Scientology Organization,” a pamphlet claiming that Scientology’s spies were infiltrating workplaces and governments to prepare for their final destruction. Furthermore, until March 2001, federal and state governments required all firms bidding on govern-

59 State Dep’t, France Report, supra note 9, § II, ¶ 15.
61 State Dep’t, Germany Report, supra note 12, § II, ¶ 2.
62 Id.
63 Id.
64 Id. § II, ¶ 10.
65 Id. § II, ¶¶ 10–11.
ment contracts to sign contracts stating that none of the firm’s employees were Scientologists.67 Although the federal government has since limited the scope of this “sect filter,” Scientologists continue to report wide-spread official discrimination throughout Germany.68

II. EUROPEAN AND INTERNATIONAL STANDARDS OF RELIGIOUS FREEDOM AND HOW THEY DEFINE RELIGION

The many international legal standards that apply to Belgium, France, Germany, and Russia clearly guarantee freedom of religion, while often balancing that freedom with States’ rights to secure the public safety and rights of individuals.69 Unfortunately, these instruments rarely define “religion” in a clear and definitive way,70 often because “religion” is very difficult to define in legal terms.71 Indeed, in an attempt to overcome this difficulty, international legal instruments often refer to “freedom of thought, conscience, and religion” in toto and sometimes even resort to cataloguing specific rights and practices rather than bothering to define any of these three freedoms.72 The result is an impressive body of international law supporting freedom of religion, with little hint as to which religious groupings qualify for these guarantees of freedom.73

A. The Universal Declaration of Human Rights

Truly a landmark document, the Universal Declaration was passed by the United Nations in 1948, shortly after the horrors of World War II had subsided.74 Although the Universal Declaration imposes no legally-binding obligations, it has since lived up to its claim as “a common standard of achievement for all peoples and all nations . . . ,” serving as the basis for all human rights instruments that have followed it.75 In particular, the language of article 18’s guarantee of

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67 State Dep’t, Germany Report, supra note 12, § II, ¶ 15.
68 Id. § II. ¶¶ 15–16.
69 See State Dep’t, Executive Summary, supra note 2, ¶ 4.
71 See Lerner, supra note 70, at 907.
72 Id. at 907–08. Freedom of “belief” is also often inserted after “religion,” so as to include atheistic, agnostic, and rationalistic world views. Id.
73 Id. at 931–32.
75 Universal Declaration, supra note 1, ¶ 1.
“the right to freedom of thought, conscience and religion . . .” for all humankind has been mimicked time and again when defining the legal parameters of religious freedom. Unfortunately, broad moral aspirations do not always translate into concise legal documents, and international law has yet to define “freedom of religion” in the years since the Universal Declaration’s passage.77

B. European Convention for the Protection of Human Rights and Fundamental Freedoms

Since being signed in Rome on November 4, 1950, the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) has been ratified by forty-five countries, including Belgium, France, Germany, and Russia.78 Article 9 of the European Convention not only guarantees “freedom of thought, conscience and religion,” but also that the

[f]reedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.79

Article 9, like the rest of the European Convention, is subject to the interpretation of the European Court of Human Rights (ECHR), and the ECHR has clearly read article 9 to protect religions from discriminatory treatment.80

In 1993, the ECHR first interpreted article 9 in the case of Kokkinakas v. Greece, where Mr. Kokkinakas had been convicted under a Greek law that restricted proselytizing by Jehovah’s Witnesses.81 The ECHR held that the Greek law violated article 9, in part, because the

76 Id., art. 18; Davis, supra note 74, at 225–26.
77 See Lerner, supra note 70, at 930–32.
restrictions upon Jehovah’s Witnesses were neither “proportionate,” nor “necessary . . . for the protection of the rights and freedoms of others.”\footnote{Miner, supra note 80, at 624 (citing Kokkinakas, 260 Eur. Ct. H.R. (ser. A) (1993), quoting article 9 of the European Convention).} Also in 1993, the ECHR decided \textit{Hoffman v. Austria}, a case in which an Austrian woman had been denied custody of her children because, as a Jehovah’s Witness, her beliefs would endanger her children’s well-being.\footnote{Hoffman v. Austria, 255 Eur. Ct. H.R. (ser. A) at 45 (1993). In denying custody, the Austrian court feared that the mother might refuse her children blood transfusions on religious grounds and that the mother’s religious beliefs would make the children social outcasts. Miner, supra note 80, at 625–26.} In finding that Austria had violated the European Convention, the ECHR admitted that Austria’s aim had been legitimate (protecting children), but also held that Austria had impermissibly discriminated against Mrs. Hoffman because she was a Jehovah’s Witness.\footnote{Hoffman, 255 Eur. Ct. H.R. (ser. A) at 59–60; Miner, supra note 80, at 625–26.} In short, the ECHR stated that the European Convention affords “protection against different treatment, without an objective and reasonable justification, of persons in similar situations.”\footnote{Miner, supra note 80, at 626.}

Taken together, \textit{Kokkinakas} and \textit{Hoffman} stand for the distinct notion that the European Convention “may not always protect particular religious beliefs, but it does protect religions from distinctions and unequal protection based solely upon membership in that religion.”\footnote{European Convention, supra note 79, art. 9.} Unfortunately, the European Convention does not clearly define the terms “religion” and “belief.”\footnote{Manoussakis v. Greece, 260 Eur. Ct. H.R. (Ser. A) (1996). As is pointed out in Section IV of this paper, it is unrealistic for the ECHR to prohibit certain interpretations of “religious beliefs” effectively, when the European Convention itself does not does not define “religious beliefs.” See infra notes 148–166 and accompanying text.} And although the ECHR has stated in \textit{Manoussakis v. Greece} that a State may not “determine whether religious beliefs or the means used to express such beliefs are legitimate,” Belgium, France, Germany, and Russia clearly still decide what is, or is not, a bona fide religion.

\textbf{C. The International Covenant on Civil and Political Rights}

Belgium, France, Germany, and Russia are also parties to the International Covenant on Civil and Political Rights (International Cove-
nant). Much like the European Convention, the International Covenant guarantees freedom of religion, but it also explicitly provides that each country’s laws must “prohibit any discrimination” for religious reasons. In a clearer fashion than the ECHR’s Kokkinakas and Hoffman interpretations of the European Convention, the International Covenant simply and explicitly prohibits religious discrimination.

Although broadly granting protection to freedom of thought, conscience, religion, and belief, the International Covenant also fails the definition test in that nowhere does it define these frustrating, but obviously important, terms. Recognizing this failure, the Human Rights Committee, established under the International Covenant, has stated:

> [t]he terms “belief” and “religion” are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.

In light of the legal environments in Belgium, France, Germany, and Russia, it certainly seems that these countries have not complied with the Human Rights Committee’s broad construction of “belief” and “religion” within the International Convention.

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91 International Covenant, supra note 90, art. 26.

92 Compare International Covenant, supra note 90, art. 26, with Miner, supra note 80, at 626.


94 Id.; State Dep’t, Executive Summary, supra note 2, pt. II, ¶¶ 35, 38–40.
D. Non-binding Documents

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981 Declaration) was adopted by the General Assembly of the United Nations on November 25, 1981. Although it is not a binding treaty obligation, the 1981 Declaration “is generally regarded throughout the world as enumerating the fundamental rights of freedom of religion and belief that belong to all persons . . . .” Furthermore, the 1981 Declaration creates an affirmative duty among States to “take effective measures to prevent and eliminate discrimination on the grounds of religion.” Continuing the unfortunate struggle to define religion and belief, the 1981 Declaration states:

the expression “intolerance and discrimination based on religion or belief” means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

The product of over two year’s of meetings, the Concluding Document of the Vienna Meeting 1986 of the Representatives of the Participating States of the Conference on Security and Co-operation in Europe (Concluding Document) also represents a step toward ensuring religious freedom within the signatory countries. Much like the Universal Declaration, European Convention, International Covenant, and 1981 Declaration, the Concluding Document ensures “the freedom of the individual to profess and practice religion or belief,” and it seeks “to prevent and eliminate discrimination against individuals or

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97 Miner, supra note 80, at 628.

98 1981 Declaration, supra note 96, art. 4(1).

99 Id. art. 2(2).

communities, on the grounds of religion or belief . . . ”101 The Concluding Document is not a self-executing or binding instrument, nor does it define religion or belief.102 Therefore, although Belgium, France, Germany, and Russia are all signatories to the Concluding Document, none of these countries would be legally bound to the Concluding Document’s precepts even if those precepts were better defined.103

III. Religions and Cults: How to Distinguish Between Two Undefinable Terms?

A. Why Is It So Difficult to Define Freedom of Religion?

Not only do the previously discussed human rights instruments fail to define “religion,” but the term remains completely undefined across the entire spectrum of international law.104 And although legal rights often go undefined, freedom of religion is a right fraught with unique definitional difficulties.105

T. Jeremy Gunn has explained that the difficulty in defining religion often lies in both the underlying assumptions about the nature of religion and the linguistic form in which its definitions are presented.106 Gunn suggests that definitions of religion usually begin by presuming one of three principal theories about the nature of religion:

first, religion in its metaphysical or theological sense (e.g., the underlying truth of the existence of God, the dharma, etc.);
second, religion as it is psychologically experienced by people (e.g., the feelings of the religious believer about divinity or ultimate concerns, the holy, etc.); and third, religion as a cultural or social force (e.g., symbolism that binds a community together or separates it from other communities).107

101 Id. principles 16, 16.1; Davis, supra note 74, at 227.
102 See Concluding Document, supra note 100, principles 16, 16.1; Davis, supra note 74, at 227.
103 See Concluding Document, supra note 100, ¶ 1.
105 Id. at 190–92.
106 Id. at 193–95.
107 Id. at 193–94.
Furthermore, each definition of religion will take either an “essentialist” or a “polythetic” linguistic form. An essentialist definition of religion assumes that each religion shares certain common elements with other religions, and so identifies those common elements within an all-inclusive definition of religion. Conversely, polythetic definitions of religion assume no specific common element, and therefore describe religious practices and thoughts with the hope that a family resemblance might be detected.

In addition to these methodological difficulties, when creating a set of rules that will regulate everyday life, those who craft legal definitions of religion often stumble upon the practical difficulties of religions interacting with established social and cultural norms. For instance, many statutory and judicial characterizations of religion may contain historical biases in favor of traditional or familiar faiths, “[t]hus legal systems may explicitly or implicitly evaluate (or rank) religions.”

B. The Definitional Problems Encountered by Russia, Belgium, France, and Germany

Although Russia makes no explicit statutory or judicial attempt to define religion (thereby avoiding any linguistic difficulties), the FCA’s two-tiered categorization of religious communities reveals many of the methodological and practical flaws discussed by Gunn. First, by concentrating solely upon a community’s size and permanence within Russia, the FCA’s approach neglects two of the three principal theories of the nature of religion (the metaphysical and psychological aspects of religion), in favor of an approach that views religion purely as a cultural or social force. Second, the FCA is a perfect example of how legal definitions of religion often founder upon the rocks of practical social and historical biases. The two dominant spiritual forces in recent Russian history have been the Soviet atheistic legacy and the previous (and secretly concurrent) hegemony of Russian Or-

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108 Id. at 194.
109 Gunn, supra note 104, at 194.
110 Id. at 194–95 (citing Ludwig Wittgenstein, Philosophical Investigations 32e (G. E. M. Anscombe trans., Blackwell 3d ed. 1958)).
111 Id. at 195–96.
112 Id. at 196.
113 FCA, supra note 21, chs. II–III; see Gunn, supra note 104, at 190–95.
114 FCA, supra note 21, art. 9.1; see Gunn, supra note 104, at 193–94.
115 State Dep’t, Russia Report, supra note 12, § II, ¶ 2; Gunn, supra note 104, at 195–97.
thodoxy.\textsuperscript{116} Indeed, the FCA even explicitly recognizes the “special contribution of Orthodoxy to the history of Russia and to the establishment and development of Russia’s spirituality and culture.”\textsuperscript{117} Judged against these social considerations, it should come as no surprise that Russian laws on religious freedom test a spiritual community’s legitimacy by its size and permanence.\textsuperscript{118}

Like Russia, Belgium’s process for officially recognizing a religion depends upon an exclusively “cultural force” view of the nature of religion, excluding the more personal metaphysical and psychological aspects of religion.\textsuperscript{119} Although Belgium does not have Russia’s history of hegemonic spiritual dominance, practical social concerns have clearly led the Belgian government to establish criteria that define religion in a way that (like Russia) stresses structure, size, and permanence.\textsuperscript{120} Indeed, the very fact that the Belgian Parliament retains final approval of all recognition proceedings further emphasizes the majoritarian social pressure upon deciding which religions shall be deemed legitimate.\textsuperscript{121}

Like Russia and Belgium, France does not offer an explicit legal definition of religion, yet the French system of dividing communities into \textit{associations cultuelles} and \textit{associations culturelles} reveals a distinctly different view of the nature of religion.\textsuperscript{122} Whether a group qualifies for tax-exempt, \textit{associations cultuelles} status depends upon the existence of ritualism and the absence of more secular concerns such as publicity and education.\textsuperscript{123} Although this view acknowledges the social aspects of religion (a group’s unique symbolism and activities), the French approach also recognizes the metaphysical aspect of religion as something that is divorced from every-day, secular activities.\textsuperscript{124} This unique approach must surely stem from the practical difficulties of fitting a legal definition of religion into an historically secularist political society.\textsuperscript{125}

\begin{footnotes}
\item[116] State Dep’t, Russia Report, \textit{supra} note 12, § II, ¶ 2.
\item[117] FCA, \textit{supra} note 21, ¶ 2.
\item[118] See id. art. 9.
\item[119] See \textit{id}. art. 9.
\item[120] Id.
\item[121] Id.
\item[122] See generally Law of 1905, \textit{supra} note 50; State Dep’t, France Report, \textit{supra} note 9, § II, ¶ 2.
\item[123] State Dep’t, France Report, \textit{supra} note 9, § II, ¶ 2.
\item[124] Id.; Gunn, \textit{supra} note 104, at 193–94.
\end{footnotes}
Finally, German law also avoids explicitly defining religion, yet its system for granting public corporation status (with factors including a group’s permanence, size, and contribution to society) shows a now familiar bias toward viewing religion as a social or cultural phenomenon.\(^{126}\) A hint of the public’s social concerns can also be seen in the need for religious communities to contribute to society; perhaps, this social contribution element stems from the country’s history and resulting fear of anti-social, ideologically totalitarian groups.\(^{127}\)

C. The Definitional Problems Encountered in International Instruments

The Universal Declaration, the European Convention, the International Covenant, the 1981 Declaration, and the Concluding Document all fail to define “religion,” perhaps implicitly recognizing the impossibility of an adequate definition.\(^{128}\) Yet, despite any definitional defects, these instruments often use such broad and inclusive language to list their protected freedoms that many of Gunn’s theoretical and linguistic challenges are almost met.\(^{129}\)

The Universal Declaration satisfies two of the three theoretical approaches to defining religion by recognizing it both as an individual psychological experience (guaranteeing the right to change religions or beliefs) and/or a cultural or social experience (guaranteeing the right to practice alone or in a community).\(^{130}\) Likewise, the Universal Declaration fully embraces an inclusive, polythetic linguistic approach to defining its freedoms.\(^{131}\) By not only including freedom of “thought” and “conscience” with freedom of religion, but also listing the various actions and manifestations of spiritual belief, the Universal Declaration rejects an essentialist approach and recognizes that there may not be any one element that is common to all religions or systems of belief.\(^{132}\) In these ways, the Universal Declaration manages

\(^{126}\) German Constitution, \textit{supra} note 60, art. 4; State Dep’t, Germany Report, \textit{supra} note 12, § II, ¶ 2; Gunn, \textit{supra} note 104, at 193–94.


\(^{128}\) Gunn, \textit{supra} note 104, at 189–90.

\(^{129}\) Lerner, \textit{supra} note 70, at 907–08; Gunn, \textit{supra} note 104, at 193–97.

\(^{130}\) Universal Declaration, \textit{supra} note 1, art. 18 (stating “[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance”); Gunn, \textit{supra} note 104, at 193–94.

\(^{131}\) See Universal Declaration, \textit{supra} note 1, art. 18.

\(^{132}\) \textit{Id.}
to combat many of the deficiencies of definitions of “religion” without actually having to define the term.\textsuperscript{133}

Article 9, section 1 of the European Convention copies the exact language of article 18 of the Universal Declaration in its guarantee of “freedom of thought, conscience and religion” and its polythetic approach to protecting the various manifestations of religion or belief.\textsuperscript{134} Furthermore, the Kokkinakas, Hoffman, and Manoussakis line of cases reveals that the ECHR’s interpretation of the European Convention prohibits state discrimination among various religions.\textsuperscript{135} Therefore, the European Convention combines the Universal Declaration’s polythetic structure and its recognition of religion as both a psychological and a cultural experience with an ECHR interpretation that recognizes the practical discriminatory consequences of applying laws to peoples with established cultural biases.\textsuperscript{136} Yet, as is discussed in Section V of this paper, even instruments with language as broad and inclusive as that found in the European Convention can suffer from their neglecting to define religion.\textsuperscript{137}

As previously discussed, the ramifications of the International Covenant’s failure to define “religion” and “belief” have been recognized by its own Human Rights Committee.\textsuperscript{138} The Committee bravely tried to reverse the failings of these definitional problems by stating that the terms should be broadly construed and the rights of traditional religions should also extend to “religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.”\textsuperscript{139} The Committee even went on to explicitly denounce the use of definitional niceties to discriminate against minority religions.\textsuperscript{140} Nevertheless, the combined International Covenant/Human Rights Committee approach simply addresses the practical concerns of defining religion without addressing any of Gunn’s methodological problems.\textsuperscript{141} In order to stop discrimination against minority religions

\textsuperscript{133} See id.; Gunn, supra note 104, at 193–97.
\textsuperscript{134} Compare European Convention, supra note 79, art. 9 with Universal Declaration, supra note 1, art. 18.
\textsuperscript{135} Miner, supra note 80, at 623–26.
\textsuperscript{136} European Convention, supra note 79, art. 9; Miner, supra note 80, at 623–26.
\textsuperscript{137} See European Convention, supra note 79, art. 9.
\textsuperscript{138} International Covenant, supra note 90, art. 18; Human Rights Committee, supra note 94, general comment 22.
\textsuperscript{139} Human Rights Committee, supra note 94, general comment 22.
\textsuperscript{140} Id.
\textsuperscript{141} See International Covenant, supra note 90, art. 18; Human Rights Committee, supra note 94, general comment 22; Gunn, supra note 104, at 193–94.
and beliefs, as well as their analogues, it is still necessary to define “religion.”

As one might expect, since the 1981 Declaration and the Concluding Document are non-binding instruments, they have the leeway to go even further than the European Convention and the International Covenant in denouncing discrimination against minority religions and beliefs. Nevertheless, these documents’ strength of language is still fundamentally weakened by a lack of definitional certainty. For instance, in clarifying its definition of “intolerance and discrimination based on religion or belief,” the 1981 Declaration seems to abandon any hope of defining either “religion” or “belief,” and rather concentrates on a polythetic approach to defining the various types of intolerance and discrimination that may occur. As was the case with the European Convention and the International Covenant, the 1981 Declaration’s attempt to broaden the protection for minority religions is laudable, but this broadening ignores the practical difficulties of protecting any right that remains undefined. Similarly, the Concluding Document bravely seeks the prevention and elimination of all “discrimination against individuals or communities on the grounds of religion or belief . . .”, yet neither of these grounds are defined.

IV. ABANDON DEFINITIONS AND CLASSIFICATIONS OF RELIGION AND RELY UPON PUBLIC ORDER DOCTRINES

The European legal environment of religious freedom is now quite polarized. International law seems to strive for an ever-broadening protection of religious freedom, and is therefore unable to define religion in a way that does not omit certain spiritual communities. On the other hand, knowingly or unknowingly, Russia, Belgium, France, and

142 See Lerner, supra note 70, 907–08.
143 Compare European Convention, supra note 79, art. 9, with Lerner, supra note 70, 913–21.
144 See Concluding Document, supra note 100, principles 16–16.11; see also 1981 Declaration, supra note 96, art. 2.
145 1981 Declaration, supra note 96, art. 2(2) (stating “the expression ‘intolerance and discrimination based on religion or belief’ means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis”).
146 See Gunn, supra note 104, 195–99 (commenting on how societal biases can lead to definitional stretching when deciding what is legally regarded as a “religion”).
147 Concluding Document, supra note 100, principle 16.1.
Germany evade the reach of these international instruments by establishing a definitional hierarchy of spiritual communities that clearly places certain groups outside the definition of “religion.” Sometimes these countries’ definitions of religion are restrictive because of cultural biases or preconceptions about the very nature of religion, but other times they simply stumble upon the linguistic difficulties of defining a word that means many things to many people.

The preferred solution lies in a polythetic definition of religion that avoids discussing the nature of religion in favor of a list of its possible manifestations. In practical linguistic terms, this would not only enshrine freedoms “of” certain things (religion, belief, thought, and conscience), but also freedoms “to do” certain things in accordance with any system of beliefs (teach, practice, worship, and observe).

This language, and these concepts, are not new; in fact, in 1948, the Universal Declaration called for everyone to have the right “to manifest his religion or belief in teaching, practice, worship and observance”, and this exact language has been copied by the legally binding European Convention. However, the freedom “to do” lists found in these instruments are clearly and explicitly linked to manifestations of “religion.” By tying these freedoms to the word “religion” without defining it, the Universal Declaration and European Convention allow states to define the term in ways that may contravene the instruments’ very purpose.

A. What Term Should Replace “Religion”?

It is tempting to consider phrases, such as “system of belief” or “faith-based community,” that might possibly serve as substitutions for “religion” in international instruments. Nevertheless, it is important to realize that any analogues of “religion” would fall into the same definitional pitfalls of the original term. Indeed, by its very nature, religion is (among other things) a practice that contemplates that

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150 State Dep’t, Executive Summary, supra note 2, pt. II, ¶¶ 35, 38–40.
151 See State Dep’t, Russia Report, supra note 12, § II; State Dep’t, France Report, supra note 9, § II; State Dep’t, Germany Report, supra note 12, § II; State Dep’t, Belgium Report, supra note 11, § II; Gunn, supra note 104, at 193–97.
152 See Gunn, supra note 104, at 193–95.
153 Universal Declaration, supra note 1, art. 18.
154 Id.
155 Id.; European Convention, supra note 79, art. 9.
156 See State Dep’t, Executive Summary, supra note 2, ¶¶ 4–6.
which cannot be readily explained by ordinary perceptions of reality.\textsuperscript{158} It is this very feature that makes the term inherently impossible to define.\textsuperscript{159} Any attempt at an essentialist definition of religion through analogous terminology would almost, by necessity, rob the term of its intended meaning.\textsuperscript{160}

The preferred, although counter-intuitive, approach would be to guarantee religious freedom without even defining religion or attempting to find analogous terminology.\textsuperscript{161} By protecting the manifestations (teaching, practice, worship, and observance) of any belief system, international human rights instruments would protect religions from discriminatory treatment without even mentioning the word “religion.”\textsuperscript{162} Admittedly, such a definitional scheme would certainly challenge the cultural biases of many countries, as many non-traditional systems of belief would gain the same protection from discrimination as traditional religions.\textsuperscript{163} Indeed, under such a scheme it might even be difficult to differentiate certain political or economic movements from spiritual ones; yet, it is perhaps easier to deal with such problems by defining political and economic terminology, rather than struggling with spiritual terminology.\textsuperscript{164}

Furthermore, as is stated in the European Convention, each State will (and should) always retain the right to limit manifestations of religious freedom as is “necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”\textsuperscript{165} Reliance upon such public order doctrines would protect states from dangerous individuals, while respecting and protecting the rights of any particular group of people.\textsuperscript{166}

\textsuperscript{158} See id.
\textsuperscript{159} See id.
\textsuperscript{160} See id.
\textsuperscript{161} Cf. Lerner, supra note 70, 907–21 (outlining the evolution of international instruments that define and protect religious freedom).
\textsuperscript{162} Universal Declaration, supra note 1, art. 18. The terminology “teaching, practice, worship, and observance” is that which is used by the Universal Declaration. Id.
\textsuperscript{163} See Gunn, supra note 104, 195–97.
\textsuperscript{164} See State Dep’t, Germany Report, supra note 12, ¶ 2 (explaining Germany’s refusal to recognize the Church of Scientology as a religion because it is actually an economic enterprise).
\textsuperscript{165} European Convention, supra note 79, art. 9(1–2).
\textsuperscript{166} See id. art. 9(2).
CONCLUSION

Although it lacks a definition of religion, international law clearly does not accept the limitation of religious freedom due to definitional niceties. A country may not shirk its duty to assure each individual citizen equal freedoms of thought, conscience, religion, and belief. Nevertheless, even democratic countries with freedom of religion enshrined in their own constitutions continue to restrict religious freedom by discriminating against individuals, simply due to the traits of the spiritual communities to which those individuals belong.

Although certain cultural and social biases often contribute to these discriminatory definitional schemes, public safety is the overwhelming legal justification for treating “cults” and minority religions differently. Understanding this to be the case and recognizing their status as supposed paragons of human rights, Western democracies (such as Belgium, France, Germany, and Russia) ought to abandon preferential schemes for certain religious communities and rely upon currently existing public order doctrines. In other words, crack down on dangerous activities and individuals, not on religious groups that may or may not be prone to certain dangerous activities.