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Articles

Notes

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ARTICLES

NOTES

In the rapidly expanding discipline of international law, the *Texas International Law Journal* helps readers stay abreast and informed of recent developments and new scholarship by providing access to leading international legal, theoretical, and policy analysis. The *Journal* publishes academic articles, essays, and student notes in the areas of public and private international law, international legal theory, the law of international organizations, comparative and foreign law, and domestic laws with significant international implications. The editors and staff aim to fulfill these needs by concentrating on groundbreaking articles that will be useful to both practitioners and scholars. We hope you enjoy this latest issue.

The *Journal* is among the oldest and best-established student-published international law journals in the United States. In the wake of the Bay of Pigs disaster and the Cuban Missile Crisis, our publication began as an offshoot of the Texas International Law Society.[1] In January 1965, under the guidance of Professor E. Ernest Goldstein, we planted the Texas flag in the international arena with our first issue, entitled *The Journal of the University of Texas International Law Society*. Publications thereafter were biannual, taking the name *Texas International Law Forum* until summer 1971, when the *Journal* adopted its present title and began publishing three or four issues per year. Of the more than one hundred student-published international law journals across the country, only three schools have an older international heritage: Harvard, Columbia, and Virginia.

Over the years, the *Journal* staff has made the most of its established heritage. We have developed international repute by forging close ties with numerous scholars and authors worldwide. As a result, we receive over six hundred unsolicited manuscripts each year and are extremely selective in our publication choices. This position has helped us develop one of the largest student-published subscription circulations of any international law journal in the United States. The *Journal*'s subscription base includes law schools, government entities, law firms, corporations, embassies, international organizations, and individuals from virtually every state in the U.S. and more than forty-five countries.

With over thirty editorial board members and more than eighty staff members made up of full-time J.D. and LL.M. students, the *Journal* maintains a refined and well-organized editing process. As economic integration accelerates and nations forge closer ties in the new millennium, we are confident the *Journal* will continue to provide a significant contribution to the burgeoning field of international law.

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The Honorable William O. Douglas, former Justice of the Supreme Court of the United States; **W. Page Keeton**, former dean of the University of Texas School of Law; **Thomas Buergenthal**, former president of the Inter-American Court of Human Rights; **Charles Alan Wright**, former professor at the University of Texas School of Law, co-author of the leading treatise *Federal Practice and Procedure*, and former president of the American Law Institute; **Louis Henkin**, former president of the American Society of International Law, chief reporter of the Restatement of Foreign Relations Law of the

1. E. Ernest Goldstein, *Thank You Fidel! Or How the International Law Society and the* Texas International Law Journal *Were Born*, 30 TEX. INT'L L.J. 223 (1995).

United States, and former editor-in-chief of the *American Journal of International Law*; **the Honorable Richard J. Goldstone**, member of the Constitutional Court of South Africa and former chief prosecutor of the United Nations International War Crimes Tribunal for the former Yugoslavia and Rwanda; and **the Honorable Dalia Dorner**, Associate Justice of the Supreme Court of Israel.

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Robert Reich, former U.S. Secretary of Labor, former professor of government and public policy at Harvard University, and former director of public policy for the Federal Trade Commission; **Joseph Jove**, former U.S. ambassador to Mexico; **Andreas Lowenfeld**, professor at New York University School of Law and leading international law scholar; **Dean Rusk**, U.S. Secretary of State under President Johnson; **Ewell "Pat" Murphy**, former chairman of the International Law Section of the American Bar Association and respected practicing attorney in the field of international business transactions; **Walter S. Surrey**, former chairman of the National Council for U.S.-China Trade and former president of the American Society of International Law; and **W. Michael Reisman**, professor at Yale Law School and member the board of directors of the American Society of International Law.

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The *Journal* hosts an annual symposium offering in-depth treatment of a topic of international legal concern. The purpose of these symposia is to promote the awareness of important developments in the formation of international law and to forge closer ties among scholars, practitioners, students, and members of the global legal community. We welcome your interest in these events. For more information regarding our annual symposium, please contact our Symposium Coordinator at tilj@law.utexas.edu or visit www.tilj.org/symposium.

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The Business of Migrant Worker Recruitment: Who Has the Responsibility and Leverage to Protect Rights?

BASSINA FARBENBLUM & JUSTINE NOLAN*

ABSTRACT

Recruitment of low-wage migrant workers has become a vast global commercial enterprise, particularly in Asia. As the industry becomes increasingly associated with systemic human-rights abuses, calls for wholesale transformation are emerging. This Article establishes that states and businesses share human rights responsibilities to ensure migrant worker protection and access to remedy. It then addresses the next obvious question: Who are the relevant actors to drive recruitment industry reform and what roles should they play? The authors contend that systemic change requires establishing a global market that commercially incentivizes fair recruiters and the suppliers that engage them, along with a transnational governance framework that identifies and sanctions those that do not. The Article identifies the unique forms of leverage that state, business, and civil society actors can exert to realize this change and explains why these stakeholders must act in concert *to overcome commercial, political, and practical barriers to reform.*

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INTRODUCTION

Governance of temporary labor migration is emerging as one of the most significant social, economic, and human rights challenges of this century. This is especially the case in Asia, where the temporary migration of men and women for low-wage jobs abroad has increased exponentially over the past two decades and is a central pillar of the development strategy of many countries in the region.[1] In 2013, of the estimated 231.5 million migrants in the world, over 95 million came from the Asia

1. ASIA-PACIFIC RCM THEMATIC WORKING GRP. ON INT'L MIGRATION, ASIA-PACIFIC MIGRATION REPORT 2015: MIGRANTS' CONTRIBUTIONS TO DEVELOPMENT 9 (2015) [hereinafter RCM WORKING GROUP].

Pacific region, an almost 50 percent increase compared to 1990.[2] By far, the predominant flows are of temporary labor migrants.[3]

Labor migration has the potential to improve the lives of migrant workers and their families, and to bring increased prosperity to their communities and countries of origin through remittances and development of new skills. However, for many migrant workers, this promise has not been realized. Low-wage migrant workers are routinely underpaid and made to work long hours under unsafe conditions; their precarious immigration and economic status in their country of employment often acts as a powerful barrier to protesting against and obtaining remedies for mistreatment.[4] In recent years, media and scholars have shone a particular spotlight on the systemic exploitation of Asian migrants working in construction, manufacturing, fishing, and domestic work, in the Middle East, as well as elsewhere in Asia.[5]

For many low-wage migrant workers, abuses connected with their migration for work do not begin in their country of employment, but during recruitment in their country of origin. In many countries, particularly in Asia, myriad private "merchants of labour" now operate formally and informally across national and international borders, shepherding workers (for a fee) from their villages and towns to their eventual workplaces abroad.[6] Migrant worker recruitment has evolved into a vast global commercial enterprise[7] that intersects with a product or service chain that often has a transnational brand at the top.[8] Indeed, in the Asia Pacific region, the role of recruitment agencies "has grown to such an extent that they may go beyond facilitation [of temporary migration] to even driving migration themselves."[9]

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2. *Id.*

3. *Id.*

4. *See, e.g.*, Ian Urbina, *Sea Slaves: The Human Misery that Feeds Pets and Livestock*, N.Y. TIMES (July 7, 2015), http://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html, [http://perma.cc/9BYH-RK8E] (discussing the conditions of sea workers in Thailand).

5. *See id.*; *see also* VERITÉ, FORCED LABOR IN THE PRODUCTION OF ELECTRONIC GOODS IN MALAYSIA (2014), http://www.verite.org/sites/default/files/images/VeriteForcedLaborMalaysian Electronics2014.pdf [http://perma.cc/NFU5-35BL] (discussing the poor conditions of migrant workers in the Malaysian electronics industry); AMNESTY INT'L, THE DARK SIDE OF MIGRATION: SPOTLIGHT ON QATAR'S CONSTRUCTION SECTOR AHEAD OF THE WORLD CUP (2013), https://www.amnestyusa.org/sites/default/files/mde220102013eng.pdf [https://perma.cc/E63K-PDM8] [hereinafter THE DARK SIDE OF MIGRATION] (discussing the conditions of migrant workers building Qatar's World Cup stadiums); HUMAN RIGHTS WATCH, WALLS AT EVERY TURN: ABUSE OF MIGRANT DOMESTIC WORKERS THROUGH KUWAIT'S SPONSORSHIP SYSTEM (2010), http://www.hrw.org/sites/default/files/reports/kuwait1010 webwcover.pdf [http://perma.cc/XV5W-6SDL] [hereinafter HRW] (discussing abuse of migrant domestic workers in Kuwait).

6. *See generally* INT'L LABOUR ORG. (INT'L INST. FOR LABOUR STUDIES), MERCHANTS OF LABOUR (Christiane Kuptsch ed., 2006).

7. INT'L ORG. FOR MIGRATION, RECRUITMENT MONITORING & MIGRANT WELFARE ASSISTANCE: WHAT WORKS? 17, 48–49 (2015), http://apmigration.ilo.org/resources/recruitment-monitoring-and-migrant-welfare-assistance-what-works/ [https://perma.cc/PP8Q-8HYB] [hereinafter IOM] (tabulating approximate number of licensed recruitment agencies in select Asian countries of origin in 2014).

8. JENNIFER GORDON, INT'L LABOUR ORG., GLOBAL LABOUR RECRUITMENT IN A SUPPLY CHAIN CONTEXT 13 (2015), http://un-act.org/wp-content/uploads/2016/02/wcms_377805.pdf [https://perma.cc/4JG4-4LT7].

9. RCM WORKING GROUP, *supra* note 1, at 10.

Systemic "abuses and fraudulent practices"[10] within the recruitment industry have been documented by a number of scholars in recent years.[11] They include the charging of inflated fees that sometimes require workers to go into significant debt; deception of workers concerning the salary and conditions of work they can expect; and the failure to provide workers with appropriate training and essential pre-departure information, including their contract.[12] These abuses commonly give rise to situations of forced labor and human trafficking.[13]

As calls for transformation of the industry emerge,[14] the next question for states, businesses, international organizations, advocacy organizations, donors, and others becomes: Who are the relevant actors to drive change and what roles should they play? To answer this question, this Article considers the human rights responsibilities of state and non-state actors globally to ensure fair recruitment of migrant workers, and the leverage that each stakeholder has to transform the industry and ensure accountability and access to remedy where abuses persist. In doing so, we seek to illustrate why exertion of leverage by these stakeholder groups *in concert* is essential to shifting the economic drivers of recruitment abuses, ensuring accountability for misconduct, and to overcome current economic disincentives to action by states and businesses.

Each stakeholder group has a unique and indispensable role to play in the transformation of the migrant recruitment industry.[15] For example, state regulation of migrant worker recruitment has improved markedly in recent years; however, governments have struggled to curb abusive recruitment practices at a systemic level.[16] There remain critical un-tapped opportunities for countries of migrant worker origin and migrant worker employment to enable and incentivize businesses to adopt fair recruitment practices, and to better identify and sanction those that do not. At the same time, the recent yet steady evolution of a global social expectation that companies

10. Private Employment Agencies Convention arts. 8(2) & 10, *adopted on* June 19, 1997, 2115 U.N.T.S. 249 [hereinafter Private Employment Convention]. The International Labour Organization Convention (ILO) uses this term in the convention, and this term will be used in this Article to refer to the range of harmful recruitment practices set out in the current section.

11. *See generally* IOM, *supra* note 7; GORDON, *supra* note 8; Patricia Pittman, *Alternative Approaches to the Governance of Transnational Labor Recruitment*, 50 INT'L MIGRATION REV. 269 (2015); Dovelyn Rannveig Agunias, *Regulating Private Recruitment in the Asia-Middle East Labour Migration Corridor*, Issue in Brief (Int'l Org. Migration, Geneva, Switzerland & Migration Pol'y Inst., Washington, D.C.), Aug. 2012.

12. *See infra* Parts I.A, I.B, I.C.

13. *Id.*

14. *See, e.g.*, *About*, OPEN WORKING GRP. ON LABOUR MIGRATION & RECRUITMENT, http://recruitmentreform.org/about [https://perma.cc/W3U7-S9H4] (last visited Sept. 26, 2016) (showing that there are organizations attempting to change industry standards on foreign labor); FAIR MIGRATION: SETTING AN ILO AGENDA, REPORT OF THE ILO DIRECTOR GENERAL TO THE INTERNATIONAL LABOUR CONFERENCE (2014), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_242879.pdf [https://perma.cc/Z7JE-BY7E] (calling for an ILO agenda for fair migration and emphasizing the growing concern about abusive and fraudulent recruitment practices affecting migrant workers).

15. *See* Janie A. Chuang, *Giving as Governance? Philanthrocapitalism and Modern-Day Slavery Abolitionism*, 62 UCLA L. REV. 1516, 1520–21 (2015) (discussing of the influence of private and state actors in preventing forced labor and human trafficking, including abusive recruitment practices).

16. *See* GORDON, *supra* note 8, at 3 (observing that the migrant worker recruitment process appears at times to be not only "ungoverned but ungovernable").

should respect international human rights[17] incentivizes businesses to play a greater regulatory role in protecting human rights and providing redress for harms. States globally can also play far more proactive regulatory roles as procurers of goods and services involving migrant labor. Similarly, civil society, trade unions, and migrant workers can influence businesses to improve their practices. These initiatives can complement regulatory efforts by states to institute a fairer approach to transnational labor recruitment.

The notion of networked governance or, put more simply, shared responsibility, is a useful framework in regard to these various stakeholders. It recognizes both the importance and limitations of government in enforcing rights and seeks to supplement those regulatory gaps by directly involving other crucial stakeholders in preventing and redressing rights violations. As the United Nations (U.N.) Special Rapporteur on the Human Rights of Migrants has observed:

> Creating this wholesale shift [to a fair recruitment system] cannot be achieved by tackling separate elements of the problem, or working exclusively with limited stakeholder groups. It requires a comprehensive range of initiatives that tackle the root causes and structural elements of current practices over the short, medium and long term. It must include the perspectives of all stakeholders: migrants, civil society, private sector, governments, and international organizations.[18]

The central aim of this Article is to diagnose and recommend what each of these actors can do in practice and how they can act in concert to fulfill the human rights of migrant workers. We begin in Part I by outlining the pervasive multilayered business model that dominates global recruitment of low-wage migrant workers and the systemic abusive practices that have evolved within it. Part II highlights the human rights obligations and responsibilities that attach to states and businesses in relation to migrant recruitment. Part III examines the leverage that business, states, and civil society have to prevent abuses and to drive fair recruitment practices. It considers opportunities for reform and emerging good practices, illustrating the interdependent nature of these sources of leverage and the ways their integration can overcome economic and practical barriers to implementation by individual stakeholder groups. Part IV addresses the roles of businesses, states, and civil society in ensuring migrant workers' access to remedy in the event that abuses persist, recognizing the critical gaps that currently exist. The Article concludes by identifying the leverage that stakeholders can exert to create a market that commercially incentivizes fair recruiters and the suppliers that engage them, and that identifies and sanctions those that do not—the essential conditions for a "wholesale shift" to a fair recruitment model.

17. *See id.* at iii (stating that the principles and rights of migrant workers enshrined in the 1998 ILO declaration on Fundamental Principles and Rights at Work are recognized as fundamental human rights).

18. François Crépeau (Special Rapporteur on the Human Rights of Migrants), *Report on the Human Rights of Migrants*, para. 47, U.N. Doc. A/70/310 (Aug. 11, 2015).

I. THE BUSINESS OF MIGRANT WORKER RECRUITMENT

The majority of temporary low-wage labor migration from Asia is facilitated by private recruitment agencies (also known as manpower agencies) and individual recruitment agents (also known as brokers or subagents).[19] Some migrant workers also use informal social networks for part or all of the recruitment process.[20] A small number of countries have government-to-government recruitment schemes[21] or direct employer recruitment, though these are not common along the Asia-Middle East migration corridor.[22]

The private recruitment industry is highly fragmented. There are now hundreds or thousands of relatively small licensed recruitment agencies located in the capital or major cities of most Asian origin countries,[23] and hundreds, or potentially thousands, of additional unlicensed agencies.[24] There are few, if any, large transnational corporations (TNCs) or brand-name agencies substantially involved in the recruitment of low-wage migrant workers.[25] While some agencies have registered subagents or staff operating at the local level, it is far more common for a migrant's first point of contact to be an independent, individual agent—generally someone known to the worker or introduced through friends, family, or a local figure of authority.[26] Most recruitment agencies use a number of individual brokers who identify workers and deliver them to the agency in the capital, generally on commission.[27]

Once a worker is connected with a recruitment agency in a country of origin, that agency then facilitates a relationship between the worker and a third party abroad (unless a worker's social contact directly connects him or her with the destination country third party). That third party is generally an employer, another recruitment

19. *See* IOM, *supra* note 7, at 1 ("By the 2000s, the majority of [Columbo Process Member States] migrants were paying for the services of a recruiter in order to migrate.").

20. *See* Md Mizanur Rahman, *Bangladeshi Labour Migration to the Gulf States: Patterns of Recruitment and Processes*, 33 CAN. J. DEV. STUD. 214, 215–16 (2012) (referencing literature analyzing the social networks that facilitate and sustain migration across international borders).

21. *See* IOM, *supra* note 7, at 59–60 (citing examples of government-to-government recruitment schemes in Asia).

22. Rahman, *supra* note 20, at 215.

23. *See* IOM, *supra* note 7, at 17, 48–49 (listing and tabulating the approximate numbers of licensed recruitment agencies in select Asian countries of origin in 2014).

24. SARAH PAOLETTI, ELEANOR TAYLOR-NICHOLSON, BANDITA SIJAPATI, & BASSINA FARBENBLUM, MIGRANT WORKERS' ACCESS TO JUSTICE AT HOME: NEPAL 128 (2014); BASSINA FARBENBLUM, ELEANOR TAYLOR-NICHOLSON, & SARAH PAOLETTI, MIGRANT WORKERS' ACCESS TO JUSTICE AT HOME: INDONESIA 124 (2013); Tasneem Siddiqui, *Protection of Bangladeshi Migrants Through Good Governance*, *in* MERCHANTS OF LABOUR, 63, 78 (Christiane Kuptsch ed., 2006).

25. *See* Johan Lindquist, *Labour Recruitment, Circuits of Capital and Gendered Mobility: Reconceptualizing the Indonesian Migration Industry*, 83 PAC. AFF. 115, 125 (2010) (finding that the individual subagent industry, which finds suitable worker for recruitment agencies, has flourished).

26. *Id.*

27. *See, e.g.*, PAOLETTI ET AL., *supra* note 24, at 54 (discussing how recruitment agencies in Nepal have between twenty and fifty individual agents at any one time); RAY JUREIDINI, MIGRANT LABOUR RECRUITMENT TO QATAR: REPORT FOR QATAR FOUNDATION MIGRANT WORKER WELFARE INITIATIVE 58 (2014), http://www.qscience.com/userimages/ContentEditor/1404811243939/Migrant_Labour_Recruitment_to_Qatar_Web_Final.pdf [https://perma.cc/K4BU-Q4D5] (discussing sub-agents' compensation in remote communities).

agency in the destination country (often called a "placement agency") that then places the worker with an employer, or a labor supply agency that employs the migrant and leases him or her out to various companies on a temporary basis.[28] Labor supply companies are becoming increasingly prevalent in the Gulf.[29] They have come under criticism for shielding companies from responsibility for the treatment of migrant workers by removing the direct relationship between companies and workers in the recruitment process.[30]

Recruitment agencies and subagents serve important functions. They enable millions of aspiring low-wage workers to access employment opportunities abroad. They provide aspiring workers with information about foreign employment, help them obtain documentation, and navigate government requirements for working abroad.[31] Nevertheless, systemic misconduct within the recruitment industry often creates the conditions for, or directly causes, many of the abuses that migrant workers suffer.[32]

At the core of the problem lies a set of powerful structural forces that combine to make migrant workers especially vulnerable to deceptive and extortionate conduct by recruiters. These forces include: A combination of poverty and unemployment at home and the promise of higher wages in countries of employment; the oversupply of migrant labor across countries of origin compared with the demand in low-wage industries in destination countries;[33] large numbers of recruitment intermediaries competing for opportunities to place workers within a limited supply of overseas jobs; and a business culture in which TNCs, employers, and their suppliers do not expect to bear the costs of recruiting low-wage migrant workers within their supply chain.[34]

In a context of limited government oversight, three core categories of harmful recruitment practices have germinated in response to these forces[35] and are described

28. *See, e.g.*, JUREIDINI, *supra* note 27, at 62 (discussing the recruitment of migrant workers through "labor supply agencies").

29. *See, e.g., id.* (discussing labor supply companies in Qatar).

30. *Id.*

31. Bassina Farbenblum, *Governance of Migrant Worker Recruitment: A Rights-Based Framework for Countries of Origin*, 7 ASIAN J. INT'L. L. 152, 157 (2017).

32. Crépeau, *supra* note 18, paras. 18, 26–30.

33. Nilim Baruah, *The Regulation of Recruitment Agencies: Experience and Good Practices in Countries of Origin in Asia, in* MERCHANTS OF LABOUR 37, 42 (Christiane Kuptch ed., 2007).

34. Farbenblum, *supra* note 31, at 176–77.

35. Human rights violations that occur during the recruitment process may be primarily attributable to the recruitment agency, but attribution may also be shared by a number of actors, including governments and businesses further up the supply chain, for either failing to provide or enforce regulatory oversight. Recruitment agencies may also bear a degree of responsibility for abuses that occur during employment. For example, the agency's staff may know harm is likely to occur because they are aware of previous worker mistreatment, or they are aware that the work conditions are unsafe. The same would be true if the recruiter knowingly sends a worker to a job for which he or she does not possess the necessary skills, which readily results in abuse or dismissal of the worker by the employer. The extent to which recruiters are expected to, and can in practice, undertake due diligence regarding prospective employers remains unclear and merits further consideration.

briefly below. These practices are common to countries of origin across South and Southeast Asia,[36] and indeed globally.[37]

A. Fees

Recruitment agencies and individual subagents routinely charge migrant workers non-transparent fees and costs well beyond regulated limits.[38] Migrant workers often sell personal property and take out loans from local moneylenders to cover the inflated recruitment fees and costs.[39] Such loans commonly attract usurious interest rates.[40] As a result, many workers leave home with high, and mounting, debts. Those debts often compel workers to acquiesce to poorer work conditions or lower wages than those promised by the subagent or recruitment agency at home, for fear of deportation and debt-laden unemployment.[41] Such circumstances readily give rise to forced labor conditions.[42] There is considerable debate regarding the point at which these and other routine abuses in recruitment, such as deceptive conduct (discussed in the next section), constitute forced labor or human trafficking,[43] in light of international law definitions

36. Farbenblum, *supra* note 31, at 157 nn.13–22 (citing relevant studies and reports).

37. *See, e.g.*, THE INT'L LABOUR RECRUITMENT WORKING GRP., THE AMERICAN DREAM UP FOR SALE: A BLUEPRINT FOR ENDING INTERNATIONAL LABOUR RECRUITMENT ABUSE 5 (2013), http://fairlaborrecruitment.files.wordpress.com/2013/01/final-e-version-ilrwg-report.pdf [https://perma.cc/K5P4-A5K5] (describing the "disturbingly common patterns of recruitment abuse" faced by internationally recruited migrant workers in the United States); JUREIDINI, *supra* note 27, at 2, 7.

38. *See* JUREIDINI, *supra* note 27, at 35–49 (discussing overcharging in recruitment fees in India, Nepal, Bangladesh, and Sri Lanka). Although most states continue to allow agencies to charge fees up to a specified limit, ILO instruments and many policy institutions and human rights groups have now adopted the position that recruitment fees should always be borne by employers, and the charging of any fees to migrant workers should be prohibited. *See* Farbenblum, *supra* note 33, at 5 n.14 (discussing ILO instruments that address recruitment fees).

39. JUREIDINI, *supra* note 27, at 8.

40. *See* AMNESTY INT'L, FALSE PROMISES: EXPLOITATION AND FORCED LABOUR OF NEPALESE MIGRANT WORKERS 7 (2011), http://www.amnesty.org/en/documents/ASA31/007/2011/en/ [https://perma.cc/U32Y-2NYU] [hereinafter FALSE PROMISES] (discussing that, in Nepal, migrants pay anywhere from 15 to 60 percent in interest to moneylenders as compared to the maximum acceptable interest charge of fourteen percent stipulated by the Government).

41. *See* INT'L LABOUR ORG., A GLOBAL ALLIANCE AGAINST FORCED LABOUR: GLOBAL REPORT UNDER THE FOLLOW UP TO THE ILO DECLARATION ON THE FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK 2 (2005), http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_081882.pdf [https://perma.cc/QYV4-WHVZ] (discussing "induced indebtedness" as a "key instrument of coercion," and further detailing that workers must often choose between "highly exploitative conditions" and "running the risk of deportation").

42. *See, e.g.*, Julia O'Connell Davidson, *Troubling Freedom: Migration, Debt and Modern Slavery*, 1 MIGRATION STUD. 176, 176 (2013) (stating circumstances that give rise to forced labor conditions); *see* HÉLÈNE HARROFF-TAVEL & ALIX NASRI, TRICKED AND TRAPPED: HUMAN TRAFFICKING IN THE MIDDLE EAST 13 (2013), http://www.ilo.org/wcmsp5/groups/public/—-arabstates/—-ro-beirut/documents/publication/wcms_211214.pdf [https://perma.cc/25VJ-6S9M] (stating that the ILO estimates there are 600,000 individuals subjected to forced labor in the Middle East).

43. *See* Marja Paavilainen, *Towards a Cohesive and Contextualised Response: When is it Necessary to Distinguish Between Forced Labour, Trafficking in Persons and Slavery?*, 5 ANTI-TRAFFICKING REVIEW 158, 158 (2015) (discussing key perspectives in determining when abuses constitute forced labor); *see also* Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT'L L. 609, 609–613 (2014) (discussing different ways that forced labor has been defined, and how this has led to legal

contained in article 2 of the International Labour Organization (ILO) Forced Labour Convention[44] and article 3 of the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol).[45]

B. Deception

A second category of recruiter misconduct concerns active deception and omissions that result in workers migrating for employment without their voluntary informed consent. This occurs in a number of ways. First, subagents routinely misinform workers about salary, working conditions, and living conditions associated with prospective employment.[46] In a study of Nepalese migrant workers returning from the Gulf, Amnesty International found that almost 93 percent of workers reported that they had been deceived pre-departure regarding their salary, the nature of the job, their hours of work, overtime pay, and/or rest days.[47] Misrepresentations of this sort are the basis upon which recruiters justify their inflated fees and charges; workers, believing what they are told, decide that the promised financial reward will outweigh the up-front financial investment, debt, and profound social costs of the decision to migrate.[48]

Recruitment agencies often shift blame to subagents for migrant worker misinformation, but few agencies provide migrant workers with contracts that adequately set out the employment terms in a language that the worker understands; moreover, terms are often not explained to workers and contracts are not provided prior to payment of significant fees, nor at a time when the migrant worker is still able to refuse the position offered.[49] Recruitment agencies generally do not ask workers what they have been told by their subagents, or what they expect of the position. Nor do these agencies seek to clarify any misinformation. Recruitment agency misconduct is not limited to these omissions, and may include active deception. For example, in the Gulf there is a widely reported practice of workers being told by employers and placement agencies to sign a "substituted" contract on arrival, with less favorable wages

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uncertainties).

44. Convention Concerning Forced or Compulsory Labour, art. 2, May 1, 1932, 39 U.N.T.S. 55 [hereinafter Forced Labour Convention].

45. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 3, Dec. 12, 2000, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol]; *see also* U.N. OFFICE ON DRUGS AND CRIME, THE ROLE OF RECRUITMENT FEES AND ABUSIVE AND FRAUDULENT PRACTICES OF RECRUITMENT AGENCIES IN TRAFFICKING IN PERSONS, at 6 (2015) (discussing the relationship between abusive recruitment practices and trafficking in persons).

46. JUREIDINI, *supra* note 27, at 137; Mohammad A. Auwal, *Ending the Exploitation of Migrant Workers In The Gulf*, 34 FLETCHER FORUM WORLD AFF. 87, 92 (2010). This intentional deception may, under certain conditions, give rise to human trafficking as defined in art. 3 of the Palermo Protocol, *supra* note 45.

47. FALSE PROMISES, *supra* note 40, at 6 n.9.

48. *See id.* at 28, 53; Michael Clemens & Timothy Ogden, *Migration as a Strategy for Household Finance: A Research Agenda on Remittances, Payments, and Development* 3 (Ctr. of Glob. Dev., Working Paper No. 354, 2014) http://www.cgdev.org/sites/default/files/migration-strategy-household-finance-research-agenda.pdf [https://perma.cc/XKV6-CR84].

49. PAOLETTI ET AL., *supra* note 24, at 66, 133; FARBENBLUM ET AL., *supra* note 26, at 65.

and conditions than those agreed before departure.[50] Interviews with Nepalese recruitment agencies suggest that they are aware that the contract presented to workers and the Department of Labour and Employment differs from the "real" contract that workers sign upon arrival in Qatar.[51]

Relatedly, document falsification and outright fraud are not uncommon among subagents and recruitment agencies, with prospective workers commonly recruited (and paying fees) for positions that do not exist, or migrating based on falsified documentation.[52] Travel on falsified documents places the worker at risk of detention and deportation and/or being classified as an irregular migrant by both the country of origin and the country of employment. Migrants in an irregular status are often excluded from accessing protection and services offered by both countries, and are especially vulnerable to exploitation by employers.[53]

C. *Non-Compliance with Pre-Departure Protection Responsibilities, Including Information and Training*

A third category of misconduct concerns recruitment agencies' non-compliance with their key pre-departure and post-return migrant worker protection responsibilities. This includes recruitment agencies' failure to provide migrant workers with required job training and information, as well as non-provision or deliberate retention of workers' key documents such as their recruitment and/or employment contract and insurance policy.[54] In some cases this is done as a means of controlling the worker or in order to extract bribes for the documents at a later stage.[55] In addition to the direct harm that they cause to migrant workers in their home country, these acts and omissions create conditions that render workers more vulnerable to abuse and less able to access protection and remedies while abroad. Further harms within this category include physical and other abuses perpetrated against migrant workers in training centers and housing compounds managed by recruitment agencies pre-departure,[56] such as indefinite confinement or restricted movement of women migrant workers.[57] Recruiters may also subject prospective migrant workers to threats and

50. JUREIDINI, *supra* note 27, at 87–89; *see also* Andrew Gardner et al., *A Portrait of Low-Income Migrants in Contemporary Qatar*, 3 J. ARAB. STUD. 1, 8 (2013) ("The data presented here . . . more generally reinforce the role that misinformation, deception, and unrealistic expectations continue to play in the migration conduit which shuttles migrants to Qatar and other countries.").

51. JUREIDINI, *supra* note 27, at 88.

52. PAOLETTI ET AL., *supra* note 24, at 64–65; *see* FARBENBLUM ET AL., *supra* note 26, at 47, 104 (describing procedures migrants go through after being defrauded by brokers).

53. *See* JUREIDINI, *supra* note 27, at 66, 87 (giving examples of migrants in an irregular status being detained, or stuck in the black market for labor, because they cannot afford to return home).

54. *See, e.g.*, HRW, *supra* note 5, at 23–24; FALSE PROMISES, *supra* note 42, at 52–60 (each describing recruitment agents' responsibilities in contrast to what recruiting agencies actually provide to migrants).

55. *See Rights Group: Migrant Workers Abused in UAE*, USA TODAY (Oct. 22, 2014, 11:07 PM) http://www.usatoday.com/story/news/world/2014/10/22/migrant-workers-united-arab-emirates/17754831/ [https://perma.cc/6K8V-A44L].

56. *Help Wanted: Abuses against Female Migrant Domestic Workers in Indonesia and Malaysia*, HUMAN RIGHTS WATCH 30–35 (July 22, 2004), http://www.hrw.org/sites/default/files/reports/indonesia0704full.pdf [https://perma.cc/EK4L-MC9G].

57. *Id.* at 32.

intimidation, including verbal and psychological abuse, in order to coerce them into making decisions regarding their migration that they would not otherwise make.

II. HUMAN RIGHTS RESPONSIBILITIES OF STATES AND BUSINESS TO PREVENT, DETECT, AND REMEDY ABUSES IN RECRUITMENT

A. State Obligations

A range of international instruments impose obligations on states in relation to the governance of migrant worker recruitment.[58] These instruments include labor rights, human rights, and anti-trafficking conventions, as well as numerous non-binding U.N. and ILO instruments and key non-binding sub-regional instruments.[59] For example, the Migrant Workers' Convention[60] requires states to effectively supervise and monitor recruitment agencies, subagents, and other intermediaries to ensure they respect the rights of migrant workers.[61] The widely ratified Convention on the Elimination of All Forms of Discrimination Against Women has also been interpreted by its supervising treaty body as requiring states to regulate and monitor recruitment in order to realize the fundamental human rights of female migrant workers.[62] The 2014 ILO Protocol to the Forced Labor Convention similarly requires states to prevent

58. These instruments have been considered in detail by scholars elsewhere and will therefore only be described briefly in this section. For discussion of states' obligations under human rights treaties and other international instruments regarding migrant worker recruitment, see Farbenblum, *supra* note 31, at Part. III.A.4. For a detailed discussion of the historical evolution, content, and application of ILO conventions and standards related to migrant worker recruitment, see BEATE ANDREES, ALIX NASRI, & PETER SWINIARSKI, INT'L LABOUR ORG., REGULATING LABOUR RECRUITMENT TO PREVENT HUMAN TRAFFICKING AND TO FOSTER FAIR MIGRATION: MODELS, CHALLENGES AND OPPORTUNITIES 15–31 (2015).

59. Recruitment has been a focus of several regional dialogues within Asia. The only formal agreement that has emerged to date is the non-binding Association of South East Asian Nations Declaration on the Protection and Promotion of the Rights of Migrant Workers, which requires origin country member states to "[e]stablish and promote legal practices to regulate recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts, regulation and accreditation of recruitment agencies and employers, and blacklisting of negligent/unlawful agencies." Ass'n of S. E. Asian Nations Declaration on the Protection and Promotion of the Rights of Migrant Workers, art. 14, Jan. 30, 2007; *see also* Farbenblum, *supra* note 33, at 25 n.131 (providing further context for ASEAN declaration).

60. Int'l Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter Migrant Workers Convention]. Four key Asian countries of origin have ratified the Migrant Workers Convention: Bangladesh, Indonesia, Philippines and Sri Lanka. Comm. on Migrant Workers, Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UNITED NATIONS HUMAN RIGHTS, http://www.ohchr.org/Documents/HRBodies/CMW/StatRatCMW.pdf [https://perma.cc/TQQ7-6GFU] (last visited Sept. 30, 2016). Cambodia has signed but not ratified the Convention. *Id.*

61. U.N. Comm. on the Protection of the Rights of all Migrant Workers and Members of Their Families, General Comment No. 1 on Migrant Domestic Workers, para. 33, U.N. Doc. CMW/C/GC/1 (2011) [hereinafter General Comment No. 1 on Migrant Domestic Workers].

62. Comm. on the Elimination of Discrimination against Women, General Recommendation No. 26 on Women Migrant Workers, para. 24, U.N. Doc. CEDAW/C/2009/WP.1/R (2008) [hereinafter General Recommendation No. 26 on Women Migrant Workers].

abusive practices in recruitment and to ensure migrant workers' access to appropriate and effective remedies, including compensation.[63] Though the 2014 Protocol has not yet been ratified by countries in Asia, the Protocol's provisions on recruitment inform states' obligations to prevent forced labor under the Forced Labor Convention, which has been widely ratified across Asia and globally.[64] The 2014 ILO Forced Labour Recommendation provides additional guidance on governance measures necessary to prevent forced labor, such as requiring that workers receive detailed transparent contracts during recruitment to prevent deception or misinformation.[65] Addressing deception in migrant worker recruitment is also key to states' compliance with their obligations under the Palermo Protocol, in which trafficking is defined as, among other things, recruitment through deceptive means for the purpose of exploitation.[66]

In its first General Comment on the Migrant Workers Convention, the U.N. Committee on Migrant Workers made clear that recruitment regulation is not the sole responsibility of origin countries.[67] According to the Committee, "[s]tates of employment share the responsibility for regulating and monitoring recruitment and placement processes,"[68] which includes ensuring that all recruitment agencies in the country of employment are subject to authorization, approval, and supervision by public authorities.[69] Recruitment governance obligations under a number of ILO instruments similarly extend to countries of employment.[70]

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63. Protocol of 2014 to the Forced Labour Convention, 1930, arts. 2(d), 4(1) June 11, 2014, INT'L LABOUR ORG. Protocol P029; *see generally* Private Employment Agencies Convention, *supra* note 10; Private Employment Agencies Recommendation, June 19, 1997, INT'L LABOUR ORG. R. 188 (describing state obligations regarding supervision of private recruitment agencies).

64. Forced Labour Convention, *supra* note 44; *see also Ratifications of C029 - Forced Labour Convention*, 1930, INT'L LABOUR ORG. (NO. 29), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312174 [https://perma.cc/2XA8-8V57] (last visited May 1, 2016) [hereinafter *Ratifications of the Forced Labour Convention*] (showing date of ratification of the Forced Labour Convention by each country).

65. Forced Labour (Supplementary Measures) Recommendation, 2014, art. 8 June 11, 2014, INT'L LABOUR ORG. R. 203; *see* Workers Convention, *supra* note 62, arts. 33, 37 (States' obligations extend further to ensure that all prospective, current, and returned migrant workers not only receive and understand their employment contract, but also receive a range of further key information related to safe migration); *see also* The Convention on the Elimination of All Forms of Discrimination Against Women, art. 14 Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (requiring states parties to provide training and other protective measures in order to fulfill women migrant workers' fundamental human rights); General Recommendation No. 26 on Women Migrant Workers, *supra* note 62, para. 24 (requiring countries of origin to provide training and other services to fulfill obligations to women in rural areas).

66. The Palermo Protocol, *supra* note 45, art. 3(a), defines trafficking as "the recruitment . . . of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation."

67. General Comment No. 1 on Migrant Domestic Workers, *supra* note 61, para. 31.

68. *Id.*

69. *Id.* para. 34.

70. *See supra* Part II.A (explaining that ILO's Forced Labor Recommendation sets out state governance measures to prevent forced labor and that ILO's Protocol to the Forced Labor Convention requires states to prevent abusive recruitment practices).

Many obligations, particularly those related to the prevention of forced labor[71] and human trafficking,[72] are not confined to migrant worker countries of origin and employment, but apply to states globally. These responsibilities are directly enlivened when states operate as procurers of goods and services, and regulators of TNCs operating within their jurisdiction.[73] Responsibilities regarding the promotion of fair recruitment may also be incidental to states' commitments to promoting sustainable development.[74]

B. The Responsibility of Business to Respect Human Rights

The responsibility for protecting human rights has long been assumed to be the duty of the state.[75] More recently, though, discussion has shifted to focus on the human rights responsibilities of corporations and how such duties and/or responsibilities might be allocated between state and non-state actors. The private sector is a key actor in the field of transnational migrant worker recruitment. The recruitment industry has proven stubbornly resistant to traditional state-centric "command control" regulatory techniques[76] and, despite attempts by a number of governments to take measures such as limiting or prohibiting recruitment fees or licensing recruitment agencies, effective enforcement has been lacking.[77]

The adoption by the U.N. Human Rights Council in 2011 of the Guiding Principles on Business and Human Rights[78] signaled acceptance of the notion of a corporate

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71. To date, 178 countries have ratified the Forced Labour Convention. *Ratifications of the Forced Labour Convention*, *supra* note 64.

72. To date, there are 169 state parties to the Palermo Protocol. *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&clang=_en [https://perma.cc/JVX9-RVW4] (last updated January 8, 2016, 7:31 AM).

73. *See infra* Part IV.

74. *See* Farbenblum, *supra* note 31, at 182 (discussing the economic impact of abusive recruitment practices); *see also* U.N. GAOR, 70th Sess., Transforming Our World: The 2030 Agenda for Sustainable Development [at 8.7, 8.8, 12.7, 17.16], U.N. Doc. A/RES/70/1 (Sept. 25, 2015) (focusing on the shared responsibility of states and companies to work together to develop sustainable practices that will amongst other things, protect migrant workers, eradicate forced labor, and promote sustainable public procurement policies).

75. Justine Nolan, *From Principles to Practice: Implementing Corporate Responsibility for Human Rights*, *in* THE BUSINESS AND HUMAN RIGHTS LANDSCAPE 387, 387 (J Martin & K Bravo eds., 2015).

76. Command and control regulation might be loosely defined as direct regulation of a company/industry activity by legislation that directs what is, and is not, permitted; its reach is commonly territorially limited. CHARLES H. KOCH, JR. ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 22–24 (6d ed. 2010).

77. *See infra* text accompanying note 180–81 (observing that monitoring and enforcement mechanisms for recruitment regulations are lacking globally).

78. John G. Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *Guiding Principles*] (operationalizing the 2008 "Protect, Respect and Remedy" Framework for Business and Human Rights, also developed by the Special Representative); *see also* John G. Ruggie (Special Representative of the Secretary-

responsibility to respect human rights that exists independently of, and as a complement to, states' duties to protect human rights.[79] While primarily a negative responsibility—to refrain from harm—the duty to respect also includes proactive, positive responsibilities. The Guiding Principles, for example, asks companies to conduct due diligence concerning "adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships."[80] The opaque nature of the migrant worker recruitment chain means that the parameters of such due diligence are not clearly defined; the transnational employer at the top of the supply chain may argue that it is not "directly linked" to a recruitment process that involves layers of agents and subagents, even though these agents recruit workers for its business operations. There is no legal obligation in the Guiding Principles for any company to either conduct such due diligence or to publish its results.[81]

The OECD Guidelines for Multinational Enterprises are another "soft law" initiative that enlists the cooperation of governments in encouraging businesses to develop rights-respecting policies and practices.[82] The OECD Guidelines are "recommendations addressed by governments to multinational enterprises operating in or from adhering countries."[83] First launched in 1976 with only a passing reference to human rights, they were updated in 2011 to incorporate the tenets of the Guiding Principles.[84] The OECD Guidelines are voluntary in their application, and multinational enterprises are invited to adopt the guidelines in their management systems and incorporate them into their corporate operations.[85]

While both the U.N. and OECD initiatives are broad ranging and potentially applicable to all types of business operations, there has also been some recent interest in developing sector specific guidelines that set forth minimum requirements with respect to recruitment, living and working conditions, and general treatment of migrant workers—The Dhaka Principles for Migration with Dignity is one such initiative.[86] It

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General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/8/5 (April 7, 2008).

79. *See* JOHN G. RUGGIE, THE UN "PROTECT, RESPECT AND REMEDY" FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS (Sept. 2010), https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf [https://perma.cc/DK9Z-6WCJ] (commenting that the corporate responsibility to respect rights is a notion that has been gradually emerging and is "acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and now affirmed by the Human Rights Council itself").

80. *Guiding Principles*, *supra* note 78, at 17.

81. *Id.* at 5.

82. ORG. FOR ECONOMIC COOPERATION AND DEV., GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf [https://perma.cc/FVT4-FYJ7] [hereinafter OECD GUIDELINES].

83. *Id.* at 3. OECD counts among its members the European Union, the United States of America, the U.A.E., Indonesia, and Qatar. *Id.* at 91.

84. *See id.* at 3–4 (discussing the May 2011 amendments to the OECD Guidelines).

85. *Id.* at 13.

86. Inst. for Human Rights and Bus., *The Dhaka Principles for Migration with Dignity* (Dec. 18, 2012), http://www.dhaka-principles.org/pdf/2012-12-18-Dhaka-Principles-Long-Version-English.pdf [https://perma.cc/5AZJ-UBY8] [hereinafter *Dhaka Principles*].

acknowledges the necessity of a multi-stakeholder approach to temporary labor migration that involves businesses, governments, civil society, and inter-governmental organizations coming together to address responsibilities towards migrant workers.[87]

The Dhaka Principles are based on international human rights standards, the Guiding Principles, and core ILO standards.[88] They are a set of human-rights-based principles intended to enhance respect for the rights of migrant workers from the moment of recruitment, during employment, and through to further employment or safe return to home countries.[89] They are intended for voluntary use by all industry sectors and in any country where workers migrate either inwards or outwards.[90] While the Dhaka Principles were launched in 2012,[91] it is difficult to assess their uptake and impact due in part to the limited transparency and reporting from companies involved in recruitment. As a sector-specific guideline, it is potentially useful in highlighting the particular rights that are most relevant to migrant workers and on the role businesses can play in securing such rights. However, the Dhaka Principles are necessarily broad and lack specificity around implementation. Principle 9, for example, stipulates that "[m]igrant workers should have access to judicial remedy and to credible grievance mechanisms, without fear of recrimination or dismissal."[92] However, no further guidance is given as to what these grievance mechanisms might look like, or how workers' rights would be enforced and monitored. Although the Dhaka Principles are a useful guide and highlight the need for special measures to be adopted toward the often-vulnerable migrant worker population, they need a corollary system of monitoring, enforcement, and transparency to ensure compliance on the part of recruiters and businesses.

III. LEVERAGE TO EFFECT CHANGE: THE ROLES OF BUSINESS, STATES, AND CIVIL SOCIETY IN DRIVING FAIR RECRUITMENT

Responsibilities for protecting the rights of migrant workers and curbing abusive recruitment practices are distributed across states—including migrant worker countries of origin and destination, and states, globally—and businesses, including recruitment agencies, employers, suppliers, and TNCs at the top of supply chains. In reality, though, the complexity of transnational migrant worker recruitment makes it difficult for any single business or state actor to fulfill its human rights responsibilities and transform migrant worker recruitment practices. It is becoming increasingly clear that

87. *See id.* ("The Dhaka Principles have been developed over the past two years in consultation with a range of stakeholders including the International Trade Union Confederation, the ILO, global companies including recruitment agencies, grassroots and international NGOs and a number of governments.").

88. *Id.*

89. *Id.*

90. *See id.* at 3 ("The Dhaka Principles were developed by the Institute for Human Rights in consultation with a range of stakeholders from business, government, trade unions and civil society and are intended to be a reference point for all actors involved in the worker migration process.").

91. *Id.*

92. *Dhaka Principles, supra* note 86, at 1, Principle 9.

recruitment practices cannot be systemically altered absent a multi-stakeholder approach.

This section addresses the question of transformative steps that each actor can take to create the "wholesale shift" to the fair recruitment system[93] demanded by human rights responsibilities. It does so through the concept of "leverage." This concept is drawn in part from the use of the term in the Guiding Principles, in which it denotes an "ability to effect change in the wrongful practices of an entity that causes harm."[94] Leverage is distinct from control and need not be demonstrated by explicit coordination of other supply chain actors (for example, via a legal relationship); rather, in this case, it refers to the ability of one stakeholder to affect another's practices via its strategic position in the chain.[95] Though leverage is a loose concept, its benefit lies in its applicability to all actors involved in the migrant worker recruitment process, including states and businesses (from the TNC at the top to the smaller recruitment agencies or labor brokers at the bottom).

A. The Role of Business

There are a number of ways in which businesses can exert leverage to transform recruitment practices, as illustrated by a range of initiatives recently instituted across the private sector. This section of the Article considers initiatives by individual TNCs, quasi-government procurers of goods and services, and business and recruitment industry peak bodies and coalitions. The development and implementation of these private guidelines and regulatory methods that do not rely on the role of the state as the sole "human rights protector" aim to encourage corporate compliance with international human rights standards; such compliance also serves to protect the brand reputation of compliant companies.[96] Such initiatives can drive a change in corporate culture to recognize that workers, wherever they are located, must be treated with dignity and respect.

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93. Crépeau, *supra* note 18, para. 47.

94. *Guiding Principles*, *supra* note 78, para. 19.

95. *Id.*

96. The rise of private voluntary initiatives aimed at regulating corporate adherence to human rights has a rich but relatively brief history. It is well-documented and includes prominent examples such as the Sullivan Principles that regulated business conduct in South Africa during the apartheid era, and more recent initiatives such as the Fair Labor Association and the Forestry Stewardship Council. *See, e.g.*, Dara O'Rourke, *Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring*, 31 POL'Y STUD. J. 1, 10–11 (2003) (describing the purpose of the Fair Labor Association); ELLIOT J. SCHRAGE, PROMOTING INTERNATIONAL WORKER RIGHTS THROUGH PRIVATE VOLUNTARY INITIATIVES: PUBLIC RELATIONS OR PUBLIC POLICY? 9 (2004) (discussing Starbucks' use of fair trade coffee to boost its brand reputation); David Vogel, *Private Global Business Regulation*, 11 ANN. REV. POL. SCI. 261, 269 (2008) (noting that many business managers believe "there are business benefits associated with improving their social and environmental practices and in agreeing to voluntary regulatory standards").

1. Individual TNCs

In our view, one of the primary focuses of reform should be persuading powerful TNCs at the top of product or service supply chains to use their leverage to drive compliance by recruiters lower in the chain.[97] As argued by Gordon:

> It is the firm at the top of the chain that makes the decision to structure its enterprise through subcontracting relationships, usually because such a structure allows the firm to lower its costs and risks. These savings are largely the result of the firm's transfer of risk and legal liability for employment to its subcontractors, the lower wages and costs it achieves by putting jobs out to bid, and its release from obligations to pay benefits.[98]

The leverage of TNCs to shift the recruitment market is exemplified by two recent examples whereby powerful companies in the technology sector sought to regulate and redress wrongs in their migrant worker recruitment process. Each of these initiatives seeks to address some of the abusive practices identified earlier—the improper payment of fees, deception in the recruitment process, and non-compliance with pre-departure responsibilities.

In November 2014, Hewlett Packard (HP) launched its Foreign Migrant Worker Standard (the Standard).[99] The Standard recognizes that layers of agents and subagents tend to increase the risk of abusive practices. Accordingly, the Standard requires employment contracts for foreign migrant workers to be signed directly with HP's supplier, and not with a recruitment agent.[100] While the Standard does not prohibit the use of recruitment agents, it notes that suppliers "should seek, where possible, to minimize the use of recruitment agents."[101] The Standard also prohibits the confiscation of passports, the payment of any "recruitment fee," and requires suppliers to pay workers directly.[102] HP has an extensive international supply chain, and such changes have the potential to have a ripple effect throughout the technology sector.[103] By encouraging, if not requiring, "direct hire" of migrant workers within the Standard, HP is attempting to thwart some of the harms that emanate from the multi-layered recruitment process.[104] The Standard also recognizes that preventing deception in recruitment is central to the prevention of human trafficking and forced labor.[105]

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97. *See* GORDON, *supra* note 8, at 3 (discussing incentive initiatives of countries of employment that focus on encouraging TNCs to regulate within their supply chain).

98. *Id.* at 19.

99. *See generally HP Supply Chain Foreign Migrant Worker Standard,* HEWLETT PACKARD, (Sept. 1, 2015), http://h20195.www2.hp.com/V2/getpdf.aspx/c04484646.pdf [https://perma.cc/29ZC-GY5Z] [hereinafter *The Standard*].

100. *Id.* at 3.

101. *Id.*

102. *Id.* at 4.

103. HEWLETT PACKARD, HP 2011 Global Citizenship Report 91 (2001) http://www.hp.com/hpinfo/globalcitizenship/media/files/hp_fy11_gcr_supply_chain_responsibility.pdf [https://perma.cc/5SMT-N6MV].

104. *The Standard*, *supra* note 99, at 3 (inferring implicitly the harm of recruitment agents).

105. *See id.* at 2 ("[T]here shall be no deception, fraud, or coercion in the recruitment, placement,

Apple's stand against recruitment fees is another example of the extent to which commercial leverage can be used to create change. It is widely accepted that migrant worker recruitment fees are substantially driven by employers failing to pay for the costs of recruitment, and by further fees and bribes exacted by employers and placement agents in destination countries.[106] The imposition of recruitment fees and the involvement of multiple layers of actors in the recruitment process create obstacles to establishing fair recruitment practices and must be addressed in part by restructuring supply chain business models so that employers and TNCs at the top of the chain expect to bear the legitimate costs of migrant worker recruitment. This concern ultimately needs to be addressed by changing TNC and supplier business practices such that the costs of recruitment are borne by the end user and not the migrant worker.[107]

Apple's Supplier Responsibility 2009 Progress Report (the Report) highlighted that the recruitment of migrant workers by its suppliers posed a serious challenge to the maintenance of the company's labor standards.[108] The Report noted that Apple's suppliers used multiple third-party labor agencies to source workers from other countries and that it was common practice to charge workers a recruitment fee.[109] In response, Apple updated its Supplier Code of Conduct and issued a standard for Prevention of Involuntary Labor and Human Trafficking.[110] This standard initially limited recruitment fees to the equivalent of one month's net wages.[111] However, in 2014 Apple announced that, starting in 2015, no worker employed on an Apple line could be charged any recruitment fees.[112] Since 2008, Apple has required its suppliers to reimburse what it regards as excess recruitment fees.[113] In 2014, this requirement resulted in Apple's suppliers reimbursing US$3.96 million in excess fees to over 4,500 foreign contractors.[114] This brought US$20.96 million of total reimbursements to over 30,000 foreign contract workers between 2008 and 2014.[115]

These two examples illustrate the potential for a TNC to use its leverage to regulate the conduct of its suppliers and redress harms already suffered by migrant workers during the recruitment process. However, in each of these examples, the financial burden of improving the recruitment process principally fell on the TNC's

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transportation or management of foreign migrant workers.").

106. *See, e.g.*, Urbina, *supra* note 4 (discussing how ships recruit migrant labor in Southeast Asia).

107. At the same time, there is much to be gained from transnational collaboration among origin countries to ban recruitment fees and create a level playing field in relation to recruitment costs to employers. *See infra* Part III.B.2 (explaining that countries of origin have particular leverage to enable the operationalization of state and industry governance of recruitment practices).

108. SUPPLIER RESPONSIBILITY: 2009 PROGRESS REPORT, APPLE INC. 6 (2009), http://images.apple.com/supplier-responsibility/pdf/Apple_SR_2009_Progress_Report.pdf [https://perma.cc/FWH4-PWTM] [hereinafter APPLE PROGRESS REPORT].

109. *Id.* at 6–7.

110. APPLE INC., SUPPLIER CODE OF CONDUCT 2 (2016), http://images.apple.com/supplier-responsibility/pdf/supplier_code_of_conduct.pdf [https://perma.cc/5TP6-PMCG].

111. APPLE PROGRESS REPORT, *supra* note 108, at 7.

112. SUPPLIER RESPONSIBILITY: 2014 PROGRESS REPORT, APPLE INC. 15 (2014), http://www.apple.com/my/supplier-responsibility/pdf/Apple_SR_2014_Progress_Report.pdf [https://perma.cc/YG8V-UJKU].

113. *Id.*

114. SUPPLIER RESPONSIBILITY 2015 PROGRESS REPORT, APPLE INC. 18 (2015), https://www.apple.com/my/supplier-responsibility/pdf/Apple_SR_2015_Progress_Report.pdf [https://perma.cc/YYL7-3ZT5].

115. *Id.*

suppliers, and it is not clear if the TNCs provided additional funding for their suppliers. The "carrot" to comply is the promise of continued business with the multinational, and the "stick" is that of being cast aside and losing a lucrative contract. For these practices to be sustainable, TNCs must take into account the costs of compliance by providing financial incentives to their suppliers. The same is true of government procurers of goods and services that prohibit fee payments by migrant workers in their supply chains, but do not necessarily incorporate into the tendering process the costs of compliance with this requirement and the auditing and other measures it entails, making compliant suppliers less financially competitive.[116] As a result, businesses (and states) at the top of a supply chain will likely need to offer suppliers a longer-term commitment to using their goods and services if they expect suppliers to invest resources in complying with fair recruitment standards.

Employers can also be more transparent about absorbing recruitment costs themselves. The Leadership Group for Responsible Recruitment, a new initiative launched in May 2016 by five companies—The Coca-Cola Company, HP Inc., Hewlett Packard Enterprise, IKEA, and Unilever—declares commitment to the "'Employer Pays Principle,' which states that the costs of recruitment should be borne not by the worker but by the employer."[117] As the details of the new initiative are not yet fully formulated, it is not clear whether the "Employer Pays Principle" applies directly to the transnational brand or falls onto its suppliers, but the general principle stands—workers should not have to pay for a job. This initiative is also supported by other stakeholders such as the Institute for Human Rights and Business, the Interfaith Center on Corporate Responsibility, the International Organization for Migration, and Verité, and broadly aims to champion the "Employer Pays Principle" within a diversity of industries, calling for similar commitments from other companies to drive positive change across all sectors.[118]

2. Quasi-Government Procurers

A different model to standards imposed by individual TNCs is the establishment of self-regulating regional organizations and standards, such as the Qatar Foundation's Mandatory Standards of Migrant Workers' Welfare for Contractors and Subcontractors.[119] The Qatar Foundation is a quasi-governmental organization, and the

116. *See* Farbenblum, *supra* note 31, at 177–78 n.152 (explaining imperatives for state and TNC procurers to incorporate recruitment cots into tendering processes).

117. *Introducing the Leadership Group for Responsible Recruitment*, INST. FOR HUMAN RIGHTS AND BUS. (May 04, 2016), http://www.ihrb.org/news-events/news-events/the-leadership-group-responsible-recruitment/? [https://perma.cc/J867-3DDV].

118. *Id.*

119. QATAR FOUNDATION FOR EDUCATION, SCIENCE AND COMMUNITY DEVELOPMENT, MANDATORY STANDARDS OF MIGRANT WORKERS' WELFARE FOR CONTRACTORS AND SUBCONTRACTORS 10 (2013), http://www.qf.org.qa/app/media/2379 [https://perma.cc/78EL-9GJT] [hereinafter MANDATORY STANDARDS]. The Qatar Foundation is a semi-private chartered non-profit organization that is supported by a significant government endowment. *See* QATAR FOUNDATION, ABOUT QATAR FOUNDATION, http://www.qf.org.qa/about/about [https://perma.cc/5CE3-QC9B] (last visited Aug. 14, 2016). Since 2006, the Qatar Foundation has launched more than $20bn worth of construction projects. Elizabeth Bains, *Qatar Foundation*, MEED MIDDLE EAST BUSINESS INTELLIGENCE (Feb. 12, 2012), http://www.meed.com/

Mandatory Standards are in part a response to the increased public scrutiny that has been placed on Qatar's labor practices as it continues its rapid building and development expansion plans in preparation for the FIFA World Cup in 2022.[120] The QF Mandatory Standards are not designed as general reference guidelines but are narrowly focused so as to be applicable only to "[w]orkers of [Qatar Foundation] Contractors and Sub-Contractors."[121] Compliance with the Mandatory Standards is expected of all contractors and subcontractors with the Qatar Foundation. Provisions regarding recruitment stipulate that "[w]orkers shall not be charged any Recruitment and Processing Fees or Placement Fees."[122] Further, the Mandatory Standards require that Qatar Foundation contractors and subcontractors can only utilize the service of recruitment agencies that are registered and licensed in the jurisdiction in which they operate[123] and that there is a due diligence obligation on the contractor to ensure that those recruitment agencies will not charge workers fees.[124]

In 2013, another Qatari quasi-governmental organization known as the Supreme Committee for Delivery and Legacy launched its Workers' Charter.[125] The Charter requires all potential contractors and subcontractors to comply with its principles, as well as relevant Qatari laws for projects related to the World Cup.[126] These standards, if enforced, can lead to improved conditions for workers on certain projects. However, they are no substitute for accompanying state-led regulation and enforcement to ensure the protection of migrant workers' rights both during recruitment and employment.

The Mandatory Standards, like the examples above concerning HP and Apple, largely place the responsibility for establishing and enforcing ethical recruitment practices on contractors and subcontractors. Here, the Qatar Foundation is using its leverage to influence the behavior of its labor suppliers. In all three cases some responsibility remains with the entity at the top of the supply chain to conduct adequate due diligence to ensure its mandate is followed.

3. Industry Peak Bodies

Industry-led initiatives, such as the Global Business Coalition Against Trafficking (GBCAT),[127] the code adopted by the International Confederation of Private Employment Agencies (CIETT),[128] and the International Organization for Migration's

countries/qatar/qatar-foundation/3123845.article [https://perma.cc/AJB5-8ZHX].

120. THE DARK SIDE OF MIGRATION, *supra* note 5, at 82.

121. MANDATORY STANDARDS, *supra* note 119, para. 5.3.

122. *Id.* para. 11.1.1.

123. *Id.* para. 11.2.1.

124. *Id.* para. 11.2.3.

125. SUPREME COMM. FOR DELIVERY AND LEGACY, SC WORKERS' WELFARE STANDARDS 2 (1st ed. 2013), http://www.sportingintelligence.com/wp-content/uploads/2013/11/SC-WORKERS-WELFARE-STANDARDS-EDITION-1-2.pdf [https://perma.cc/F8B9-F6LC].

126. *Id.*

127. GLOBAL BUSINESS COALITION AGAINST TRAFFICKING, http://www.gbcat.org [https://perma.cc/NR7L-T28D] (last visited May 1, 2016).

128. INT'L CONFEDERATION OF PRIVATE EMP'T SERVICES, CIETT CODE OF CONDUCT 1, http://www.ciett.org/uploads/media/Ciett_Code_of_Conduct.pdf [https://perma.cc/V4ZN-84UR] (last visited May 1, 2016) [hereinafter CIETT CODE].

(IOM) International Recruitment Integrity System (IRIS) framework,[129] are each attempts to mobilize businesses to focus on the particular vulnerabilities of migrant workers and the potential harms that can result from harmful recruitment and employment practices. The IOM, for example, is developing and promoting IRIS as an "international voluntary 'ethical recruitment' framework."[130] According to the IOM, the framework aims to create a public-private alliance of governments, employers, recruiters and other partners committed to ethical recruitment. IRIS aims to "assist employers in identifying recruitment intermediaries who share their commitment to fair recruitment and be based on international labor standards and industry best practices."[131] IOM developed an IRIS Code of Conduct with broadly framed principles including respect for laws and rights at work and prohibition of recruitment fees;[132] however, progress toward operationalizing these general principles has been slow. The lack of detail in the standards combined with a lack of clarity about how they would be enforced makes it difficult to assess the potential of this initiative at this stage.

Within the recruitment industry itself, CIETT adopted a new code[133] in 2015 that includes a provision that "[p]rivate employment services shall take all appropriate measures to ensure that workers have access to remedy, as provided by law, and to credible grievance mechanisms, without fear of recrimination or discrimination."[134] As the trade association representing recruitment agencies and other private employment services at the global level, CIETT is playing a self-regulatory role in guiding its members—national associations of private employment services or international employment and recruitment companies—to improve recruitment practices that would ideally complement statutory regulation. CIETT has developed a complaints procedure that would allow it to hear and investigate complaints against any of its members, and the penalty imposed may result in suspension from the organization.[135] For the most part, however, CIETT members are larger firms that focus on recruitment of higher-wage migrants and have limited involvement in the recruitment of low-wage migrant workers.

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129. INT'L ORG. FOR MIGRATION, INT'L RECRUITMENT INTEGRITY SYSTEM, http://iris.iom.int/about-iris [https://perma.cc/SC5S-FK4D] (last visited May 1, 2016) [hereinafter IRIS].

130. *Id.*

131. INT'L RECRUITMENT INTEGRITY SYSTEM, EXPERT MEETING REPORT 1 (2014), http://iris.iom.int/sites/default/files/document/IRIS Expert Meeting Report-F.pdf [https://perma.cc/M3CF-PESP].

132. INT'L RECRUITMENT INTEGRITY SYSTEM, *IRIS Stands For* . . . , https://iris.iom.int/iris-stands-... [https://perma.cc/LLS5-7SZF] (last visited Oct. 10, 2016).

133. CIETT CODE, *supra* note 128.

134. *Id.* at Principle 10.

135. *See id.* at 4–5 ("Complaints must relate to a Ciett direct member's activities related to employment and recruitment policy and/or practices. . . . Complaints may relate to perceived violation of the Ciett Code of Conduct; any formally documented policies, guidelines or initiatives developed by a Ciett member; any applicable human rights, labour laws and regulations; and/or perceived contravention of generally accepted recruiting and placement practices . . . . If the Quality Standards and Compliance Officer determines that there has been a violation of the Ciett Code of Conduct, and that such a violation is sufficiently grave to warrant suspension of membership or expulsion, it shall refer the matter, after having consulted the Ciett Board, to the Ciett General Assembly with a recommendation as to an appropriate sanction.").

The end goal here is a paradigm shift that affects the way companies, governments, and society view this issue, with state regulatory efforts being viewed as part of the solution, but not the only solution. Companies, in particular global transnational companies, are being asked to play a significant role in responding to human rights challenges. Although 30 to 40 years ago very few companies acknowledged any affirmative obligation to address human rights standards, this concept is no longer anathema to many companies.[136] For many (but not all) companies, the question is no longer whether it should address human rights issues but rather how it should do so, at what cost, and with whom it should collaborate in addressing the problems that exist. These questions enable a company to then use its leverage to ensure greater respect for workers' rights in its supply chain, beginning at the point of worker recruitment.

B. The Role of States

1. States as Influencers of Supply Chains

States will always have a critical role to play in compelling or incentivizing businesses at the top and middle of a goods or services supply chain to ensure fair recruitment by all entities within the chain. This is because any recruitment transformation by TNCs will take time and will be imperfect, and because many other businesses that benefit from migrant labor lack intrinsic motivation to demand fair recruitment practices within their supply chain.[137] This may be the case, for example, if they are not part of a transnational supply chain or are part of an industry that is not subject to public scrutiny.

One way in which countries of migrant worker employment can influence supply chains is through the establishment of recruitment restrictions and liabilities imposed on employers, in addition to directly regulating recruitment/placement agencies based in the country of employment (discussed below in Part (IV)(2)(B)). Some countries of employment have imposed recruitment restrictions on employers in bilateral memoranda of understanding with migrant worker countries of origin.[138] However, without dedicated enforcement by the country of employment these agreements have limited practical impact.[139] In contrast, other countries of employment have introduced laws which establish joint liability regimes, making employers and other beneficiaries of migrant labor legally responsible for misconduct in recruitment within their supply

136. *See, e.g.*, RICHARD M. LOCKE, THE PROMISE AND LIMITS OF PRIVATE POWER 4–10 (2013) (profiling companies that have embraced human rights); *see also* U.N. GLOBAL COMPACT, https://unglobalcompact.org [https://perma.cc/44RZ-N7EZ] (last visited Oct. 10, 2016) (demonstrating that a vast number of companies have, in theory, embraced the concept of humans rights via their involvement with the compact).

137. *See* GORDAN, *supra* note 8, at 15 (explaining that actors at the top of the chain are excused from liability for abuses that occur lower down the chain).

138. *See, e.g.*, IOM, *supra* note 7, at 60 (describing and citing agreements that Saudi Arabia has concluded with Indonesia (2014), Sri Lanka (2014) and the Philippines (2013)).

139. *E.g.*, Piyasiri Wickramasekara, Something Is Better than Nothing: Enhancing the Protection of Indian Migrant Workers Through Bilateral Agreements and Memoranda of Understanding 25 (2012) ("In general, there is little evidence to show that the Indian Government has made any tangible measures following the signing of the MOUs . . . . [T]here is hardly any information to show that the MOU has made any difference in the country of destination.").

chain.[140] The Canadian province of Manitoba has, for example, enacted a law that prohibits recruiters from charging fees to workers and prohibits employers from passing along any recruitment costs to their migrant worker employees.[141] The Manitoba law also requires employers to use only government-registered recruitment agencies, and employers can be compelled to reimburse workers for recruitment charges levied by any of their suppliers, including labor hire companies.[142] Similar laws have since been enacted by a range of other Canadian provinces.[143]

The Netherlands has adopted a somewhat different public-private hybrid approach to establishing employer accountability for the conduct of recruiters and other subagents.[144] Under Dutch law, all entities higher in the supply chain are responsible for a staffing agency or subcontractor's failure to pay minimum wages and other benefits.[145] Alongside the law, the non-government organization (NGO) Stichting Normering Arbeid (SNA) (Foundation for Employment Standards) offers a voluntary certification program for employment agencies based on regular audits for compliance with standard worker protections.[146] In a manner that bridges the public and private, a firm that contracts with a certified labor provider (and the firms above it in the subcontracting chain) is protected against worker claims under Dutch law, and is eligible for mitigated penalties from the government.[147] Despite the voluntary nature of SNA certification, firms have begun to demand certification of all agencies in their subcontracting chains.[148]

Some countries in the Middle East have also begun to directly regulate recruitment agencies within their countries, mostly by implementing licensing schemes for agencies sourcing foreign workers. For example, specific laws on the licensing of private employment agencies (e.g., Jordan and Lebanon), references in labor codes to private employment agencies supplemented by ministerial resolutions or decrees establishing licensing requirements (e.g., Qatar and the United Arab Emirates (U.A.E.)), and in some countries, further sector-specific labor laws particularly with regard to sectors that are heavily reliant on foreign labor such as domestic work and the garment industry (e.g., Jordan).[149] In 2016, the Government of Dubai launched the Taqdeer Award in an attempt to incentivize companies to improve employment practices.[150] The Award Program targets Dubai-based companies in the construction sector; and the government ranks the companies based on their labor policies, health

140. *See* GORDON, *supra* note 8, at 22–32 (providing an overview of a number of these schemes).

141. Worker Recruitment and Protection Act, S.M. 2008, c 23 (Can.).

142. *Id.*

143. FAY FARADAY, PROFITING FROM THE PRECARIOUS: HOW RECRUITMENT PRACTICES EXPLOIT MIGRANT WORKERS 75 (Metcalf Foundation, 2014).

144. *See* GORDON, *supra* note 8, at 26–28 (discussing the Dutch framework).

145. *Id.* at 27.

146. *Id.* at 27–28; *see also Labour Standards Register*, STICHTING NORMERING ARBEID, http://www.normeringarbeid.nl/en/default.aspx [https://perma.cc/6WBR-L4HJ] (last visited May 1, 2016).

147. GORDON, *supra* note 8, at 28.

148. *Id.*

149. *See generally* ANDREES ET AL., *supra* note 58, at 63–65.

150. *Award Aims and Objectives*, GOV'T OF DUBAI: TAQDEER AWARD, http://www.taqdeeraward.ae/theaward/Aims_Objectives [https://perma.cc/J29E-XMUF] (last visited May 3, 2016).

and safety, recruitment, wages, and facilities.[151] Companies receiving a high rating will then be awarded priority in government projects.[152]

State initiatives to influence supply chains have not been confined to migrant worker countries of employment. At a global level, states are beginning to exert leverage over the recruitment process in countries of origin via their regulation of TNCs within their own jurisdiction, for example, by imposing increased transparency and reporting standards on corporate supply chains.[153] Some states are also utilizing their economic leverage to impose recruitment standards in the supply chains of goods and services that the state itself procures.[154]

To date, states' regulation of TNCs with respect to recruitment practices has largely focused on imposing increased reporting requirements and disclosure on TNCs regarding the labor practices in their supply chains. In 2015, the United Kingdom passed the Modern Slavery Act, which mandates transparency in supply chains.[155] The Act requires companies[156] to prepare an annual statement describing steps that they have taken to ensure that slavery and human trafficking is not present in their operations or in any of their supply chains, and to publish this information on the company's website.[157] The statement may include information about the company's policies, due diligence processes, risks, performance indicators, and training relating to slavery and human trafficking.[158] If the company has not taken any such steps, it must issue a statement to that effect.[159] The scope of the disclosure obligation is opaque because the Act does not define "supply chain."[160] Furthermore, there are no financial or other penalties attached to non-compliance with the disclosure obligation; instead, the Act aims to harness the power of the consumer to demand and use information to help prevent slavery and exploitation.[161] Early analysis of the first 75 statements published pursuant to the Act showed that only 29 percent complied with the Act's basic procedural requirements—that the statement is approved by the Board, signed by

151. *Id.*

152. *Id.*

153. *See, e.g.*, Modern Slavery Act 2015, c. 30, § 54 (UK) (U.K. regulation requiring TNCs to comply with certain reporting standards).

154. *See infra* text accompanying notes 167–69 (discussing U.S. regulations on supply chains).

155. Modern Slavery Act 2015, c.30, § 54 (UK).

156. *Id.* § 54(4),(2),(12) (stating that the disclosure obligation in § 54 applies to "commercial organisation[s]" which in turn are defined as bodies corporate (wherever incorporated) or partnerships (wherever formed) and which "carr[y] on business, or part of a business" in the United Kingdom (U.K.), and that the entity must supply goods or services (although there is no requirement that they be supplied in the U.K.) and have a total turnover greater than a prescribed amount (which at the time of writing has not yet been set)).

157. *See id.* § 54(4), (7) (requiring a statement of steps to reduce human trafficking, as well as posting requirements if an organization has a website). The Act applies to companies with total turnover above an amount to be determined by the Secretary of State. *Id.* § 54(2)(b). Regulations have set the turnover, or group turnover—that is, the total turnover of a company and its subsidiaries—to £36 million or more. Modern Slavery Act 2015 Regulations 2015 No. 1833 (UK).

158. Modern Slavery Act 2015, c.30, § 54(5) (UK).

159. *Id.* § 54(4)(b). The Act also provides for enforcement through injunction or specific performance. *Id.* § 54(11).

160. *See generally* Modern Slavery Act 2015, c. 30.

161. 28 Feb 2012, 541 Parl. Deb., H.C. (2012) 172 (U.K.), http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120228/debtext/120228-0002.htm#12022857000002 [https://perma.cc/37KP-RQP4].

a company director (or equivalent), and made available on the homepage of the company's website.[162] Further, the analysis also disclosed that only nine statements covered the six content areas on which information may be included, such as organizational structure, company policies, and due diligence.[163] While it is still early, the analysis of the Act's impact thus far suggests that broadly framed reporting requirements that do not couple transparency with any penalty for non-compliance may not be the most effective mechanism for achieving transparency and accountability.

The Modern Slavery Act was modeled on, but is potentially broader than, California's Transparency in Supply Chains Act.[164] Since 2012, large retailers and manufacturers doing business in California have been required to disclose on their websites the extent to which the company engages in verification of product supply chains to address risks of slavery, forced labor, and human trafficking. Disclosures must describe steps taken, such as verifying product supply chains, auditing suppliers, and requiring direct suppliers to certify that materials comply with local laws regarding slavery and human trafficking.[165] There is no penalty for failing to take steps, only for failing to disclose whether or not a company engages in supply chain due diligence.[166] The Supply Chains Act does not address what constitutes appropriate due diligence.[167] The sanction for non-compliance is potential injunctive relief by the California State Attorney General,[168] meaning that companies will not face a monetary penalty for failure to disclose, but that they will receive an order from the Attorney General to take specific action.

While these legislative examples demonstrate how states can indirectly "regulate" or at least monitor abusive recruitment practices that may be indicative of forced labor or trafficking of migrant workers, such regulation also aims to harness the power of consumers to demand that businesses use their leverage to ensure greater respect for workers' rights. In August 2015, two separate lawsuits, one filed against Costco[169] and

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162. *Register of Slavery and Human Trafficking Corporate Statements Released to Date to Comply with the UK Modern Slavery Act*, BUS. & HUMAN RIGHTS RESOURCE CENTRE AND CORE, https://business-humanrights.org/sites/default/files/documents/CORE%20BHRRC%20Analysis%20of%20Modern%20Slavery%20Statements%20FINAL_March2016.pdf [https://perma.cc/9K82-TY6W] (last visited May 1, 2016) [hereinafter *Corporate Statement Analysis*]; *see also UK Modern Slavery Act & Registry*, BUS. & HUMAN RIGHTS RES. CTR., https://business-humanrights.org/en/uk-modern-slavery-act-registry [https://perma.cc/BH3A-MLND] (last visited May 1, 2016) [hereinafter Registry of Corporate Compliance Statements] (listing and providing sources to company statements in compliance with the Modern Slavery Act).

163. *Corporate Statement Analysis*, *supra* note 162.

164. *Compare* Modern Slavery Act 2015, c. 30, *with* California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43 (West, Westlaw through CH. 893 of 2016 Reg. Session) [hereinafter Supply Chains Act] (showing the extent of the Supply Chains Act). The scope of the Supply Chains Act is potentially limited by its reference to the "direct supply chain for tangible goods offered for sale." CAL. CIV. CODE § 1714.43(a)(1). In addition, the Supply Chains Act only applies to retail sellers or manufacturers *operating in California* with more than US$100 million in worldwide gross receipts. *Id.*

165. Supply Chains Act, *supra* note 147, § 1714.43(c).

166. *See id.* § 1714.43 (explaining the requirements retail manufacturers and sellers must comply with while operating in California).

167. *Id.*

168. *Id.* § 1715.43(d).

169. *See generally* Class Action Complaint, Sud v. Costco Wholesale Corp., No. 3:15-cv-03783 (N.D. Cal. Aug. 19, 2015), ECF No. 1.

the other against Nestlé,[170] alleged the use of slave labor in each company's supply chain. Both lawsuits were filed in California by consumers and separately accuse the companies of knowingly supporting a system of slave labor in their supply chain to import seafood products into the U.S. The lawsuit against Nestlé was dismissed in December 2015,[171] and the Costco case was dismissed in January 2016.[172] The lawsuits stemmed in part from the disclosure expectations set by the Supply Chains Act and the plaintiffs argued that the companies' uses of forced labor are inconsistent with their mandated disclosures.[173] Neither Costco nor Nestlé was accused of directly engaging in such practices; rather, the accusations concern supplier relationships with companies that are sourcing seafood from suppliers that do allegedly engage in such practices.[174] The reporting regulations established by California potentially enable public monitoring of abusive recruitment practices in supply chains and provide a mechanism for holding companies accountable both for what they say and what they do in their supply chains, including how their suppliers recruit their workers.[175]

Another example from the United States highlights how states can use their leverage via public procurement regulations to require companies to probe their supply chains to investigate recruitment practices and working conditions.[176] Under U.S. procurement regulations, federal contractors who supply products on a list published by the Department of Labor must certify that they have made a good faith effort to determine whether forced or indentured child labor was used to produce the items listed.[177] Federal contractors providing supplies acquired or services to be performed outside of the United States with a value greater than US$500,000 must provide a compliance plan and certification after completing due diligence that no contractor or subcontractor is engaged in human trafficking.[178]

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170. *See generally* Complaint for Violation of California Consumer Protection Laws, Barber v. Nestlé USA Inc., No. 8:15-cv-1364 (C.D. Cal. filed Aug. 27, 2015).

171. Order Granting Defendants' Motion to Dismiss, Barber v. Nestlé USA Inc., No. 8:15-cv-01364 (C.D. Cal Dec. 9, 2015), ECF No. 39. The plaintiffs' allegation was not that Nestlé failed to comply with the Supply Chains Act; rather, they argued that Nestlé was obligated to make additional disclosures at the point of sale regarding the likelihood that a given can of its Fancy Feast product contained seafood sourced by forced labor. *Id.* at 2. Nestlé successfully argued that the claim was barred by the "safe harbor doctrine" because the California legislature had already considered the requisite disclosures that large companies with potential forced labor in their supply chains would need to make to consumers and elected not to require any further disclosures. *Id.* at 4.

172. Order on Motions to Dismiss, Sud v. Costco Wholesale Corp., No. 15-cv-03783-JSW (N.D. Cal. Jan. 15, 2016), ECF No. 76.

173. Sud v. Costco Wholesale Corp., No. 15-cv-03783-JSW, 2016 WL 192569, at *1 (N.D. Cal. Jan 15, 2016); Barber v. Nestlé USA, Inc., 154 F. Supp.3d 954, 956–57 (C.D. Cal. 2015).

174. *Costco,* 2016 WL 192569, at *1; Nestlé, 154 F. Supp.3d at 956–57.

175. *See Barber*, 154 F. Supp.3d at 962 (discussing the level of disclosure required by the California Legislature to adequately inform consumers).

176. U.S. DEP'T OF STATE, U.S. GOVERNMENT APPROACH ON BUSINESS AND HUMAN RIGHTS 14 (2013), http://www.humanrights.gov/wp-content/uploads/2013/06/usg-approach-on-business-and-human-rights-updatedjune2013.pdf [https://perma.cc/C5N8-2PMG].

177. *Id.*

178. Combating Trafficking in Persons, 48 C.F.R. § 52.222-50(h) (2015); *see also* Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 910, 130 Stat. 122, 239 (2016) (eliminating the "consumptive demand exception," a long-standing loophole in the prohibition against the importation into the United States of goods made with forced labor). Pursuant to the consumptive demand exception, companies have been able to import goods produced with forced labor if the "consumptive demand" for those

The exploitation of workers in global supply chains is one of the most significant reputational issues facing companies today. Each of these laws aim to incentivize companies (by exposing them to greater scrutiny and potential financial liability) to conduct due diligence into the conditions in which workers in their supply chain are both recruited and employed. Reporting by itself does not guarantee accountability. Rather, reporting is a tool that has the power to advance accountability by increasing transparency around corporate operations, which may then trigger pressure to improve corporate human rights performance. The examples discussed above illustrate how states, which may be countries of origin and/or destination, can still influence the recruitment process.

2. Countries of Origin as Direct Regulators of Recruitment Practices

Countries of origin have particular leverage to enable state regulation and private sector standards governing recruitment agencies in ways that could not be achieved by overseas actors alone. They can do this by establishing systems that further encourage compliance, and by detecting, preventing, or deterring non-compliance. This section focuses primarily on the five key forms of leverage that countries of origin can exert through direct regulation of migrant recruitment and the structural barriers to exercising that leverage in practice. Though not a primary focus of this section, countries of employment also have significant leverage to drive fair recruitment through direct regulation of the recruitment agencies (sometimes called placement agencies) based in those countries. Many of the functions discussed below in relation to countries of origin may similarly apply to countries of employment in this respect.

a. Detection of Non-Compliance

Countries of origin have unique potential to detect misconduct in recruitment within their borders and to alert concerned states, TNCs, and employers abroad to its occurrence.[179] Countries of origin also have a unique role in detecting misconduct by recruiters that do not have compliance pressures from counterparts abroad. Such pressures may not exist either because the recruiter or employer is not part of a supply chain that is subject to public scrutiny and/or the country of employment does not have, or does not enforce, recruitment restrictions. In all cases, detection of non-compliance is critical to the imposition of accountability measures against non-compliant agencies, and the provision of remedies for workers, both by countries of origin and actors abroad. It is also essential to the gatekeeping functions of states and businesses in

goods in the United States exceeds the capacity of domestic production. Sarah A. Altshuller, *U.S. Congress Finally Eliminates the Consumptive Demand Exception*, CORPORATE SOCIAL RESPONSIBILITY AND THE LAW (Feb. 16, 2016), http://www.csrandthelaw.com/2016/02/16/u-s-congress-finally-eliminates-the-consumptive-demand-exception/ [https://perma.cc/85MY-PZN2]. With the elimination of the exception, civil society organizations are likely to petition U.S. customs authorities to halt the import of a range of products. *Id.*

179. *See generally* Farbenblum, *supra* note 31 (discussing the full range of ways in which origin countries can improve their detection of misconduct).

determining which entities may be involved in the recruitment of migrant workers in the future.

Systematic detection of abuses has proven particularly challenging to origin countries.[180] A recent global study of national laws governing private recruitment agencies found that they rarely introduced comprehensive monitoring or enforcement mechanisms.[181] Though countries of origin are making significant efforts to improve oversight of migrant worker recruitment agencies, systematic detection of abusive recruitment practices will not be possible until those countries develop and resource institutional infrastructure capable of conducting routine monitoring as well as investigations in response to complaints.[182] These are highly resource-intensive functions that could potentially be supported in part by states or private actors abroad that are committed to ensuring fair recruitment in supply chains.[183] Detection of abuses is also perennially undermined by corruption and collusion at various levels of government and the recruitment industry,[184] often compounded by the absence of robust judiciaries, government transparency, and entrenched rule of law principles.[185]

Technology may be able to assist countries of origin to prevent and detect non-compliance with relevant laws and standards and reduce opportunities for corruption. For example, countries of origin can better oversee fees paid by migrant workers by prohibiting cash payments and requiring that any fees or costs for recruitment services be paid electronically, a requirement recently introduced in Indonesia.[186] But technology can be manipulated and cannot entirely replace origin countries' investigative functions. To comprehensively address the problem of improper fee-charging, for example, countries of origin must find methods for establishing what migrant workers actually paid and create a realistic expectation among recruiters that improper charges will be detected. States could require recruitment agency attestation regarding charges actually paid by the worker to the recruitment agency *and* subagent, potentially as a condition of licensing, in addition to developing accessible mechanisms through which workers can report impermissible charging by either party. These mechanisms may include, for example, a hotline to which workers could report anonymously or routine questioning of prospective migrant workers at the point of departure in the airport regarding their fee payment. Findings of repeated impermissible charging should result in license suspension or cancellation and should act as an impediment to license renewal. This feedback loop can operate in concert with, and be supported by, due diligence efforts by businesses and states abroad to

180. *See* ANDREES ET AL., *supra* note 58, at 82–83 (calling for further research to identify innovative monitoring and enforcement mechanisms to prevent recruitment abuses).

181. *Id.* at 82.

182. *Id.*

183. *See id.* at 83–84 (discussing measures to improve fair recruitment laws, policies, and enforcement).

184. *See* VERITÉ, AN EXPLORATORY STUDY ON THE ROLE OF CORRUPTION IN INTERNATIONAL LABOR MIGRATION 2–3 (2016), https://www.verite.org/sites/default/files/images/Verite-Report-Intl-Labour-Recruitment_0.pdf [https://perma.cc/T8QL-HMVF] (examining three illustrative transnational migrant worker recruitment corridors to identify the points where corruption and collusion exists); Farbenblum, *supra* note 31, at nn.167–68 and accompanying text.

185. While the pervasive role of corruption in migrant recruitment warrants careful consideration and further study, a detailed discussion of the issue is beyond the scope of the present Article.

186. PELAKSANAAN PENEMPATAN DAN PERLINDUNGAN TENAGA KERJA INDONESIA DI LUAR NEGERI [Placement and Protection of Indonesian Workers Abroad] 22/2014, art. 46 (Indon.).

detect impermissible fee charging, and to deny business to recruitment agencies that charge impermissible fees or engage subagents who do so. To tackle corruption by government officials, use of innovative technologies must also sit alongside general national anti-corruption programs and specific regulatory measures such as laws prohibiting government officials and their relatives from holding financial interests in recruitment agencies and ancillary businesses, as has been done in the Philippines.[187]

b. Deploying Intelligence on Non-Compliance: Licensing and Information-Sharing Among Stakeholders

Countries of origin can share the intelligence they obtain on non-compliance to exert leverage over the conduct of recruiters in several ways. For example, they can use information on general trends to support reform of their own laws and policies, and those of private and state actors abroad, in a manner that is evidence-driven and responds to evolving business practices that adapt to circumvent regulatory reforms.[188] They can also disseminate information online regarding worker complaints and non-compliance by individual recruitment agencies as a basis for decision-making by prospective workers and state and business partners abroad concerning their choice of recruiter.

The greatest leverage that countries of origin could wield in this area would be to link together the granting and periodic renewal of recruitment agency licenses and agencies' compliance with their worker protection responsibilities, including fulfillment of contractual responsibilities to remedy worker losses.[189] Across Asia and other regions, the predominant approach to recruitment regulation is the establishment of licensing schemes.[190] However, these schemes are primarily directed towards establishing agencies' commercial stability[191] and not to compliance with worker protection obligations.[192] Countries of origin could make their licensing process far

187. Philippine Overseas Employment Administration, POEA Rules and Regulations Governing the Recruitment and Employment of Land-based Overseas Workers, Pt. II, r. I § 2(e) (2002) [hereinafter POEA Rules and Regulations]; Migrant Workers and Overseas Filipinos Act of 1995, Rep. Act No. 8042, § 6(j) (1995) (Phil.).

188. *See* IOM, *supra* note 7, at 4, 110 (stating that for detection of misconduct to feed into policy formulation, origin countries also need to engage in more effective data collection and analysis); Farbenblum, *supra* note 31, at 171–72 (discussing data collection on recruitment by countries of origin and related obligations under international law); FARBENBLUM ET AL., *supra* note 24, at 85, 91, 157 (regarding data collection on recruitment-related harms and access to justice in practice).

189. *See* General Comment No. 1 on Migrant Domestic Workers, *supra* note 61, para. 35 ("States parties should establish, in consultations with migrant workers' organizations, NGOs and workers' and employers' organizations, specific criteria relating to migrant domestic workers' rights and ensure only agencies observing these criteria and codes can continue to operate."); General Recommendation No. 26 on Women Migrant Workers, *supra* note 62, para. 24(c)(ii) (recommending that countries of origin implement accreditation programs to ensure good practices among recruitment agencies).

190. ANDREES ET AL., *supra* note 58, at 81.

191. For example, the schemes generally require agencies to demonstrate their financial solvency, facilities and corporate governance, and to pay fees and in some countries, a deposit. *See, e.g.*, Nepal's Foreign Employment Act, (Act. No 18/2007) (Nepal) (requiring an institution to pay fees and a deposit to acquire a license).

192. *See id.* (listing fees and deposits as requirements to obtaining licenses but neglecting to include

more useful to businesses and states that require fair recruitment by linking licensing with migrant worker complaints made through diplomatic missions and through domestic mediation and insurance claims processes. They can also establish mechanisms through which workers and their advocates, and indeed employers, can inform licensing decision-makers about an agency's non-compliance with its protection obligations—a process which rarely occurs in countries of origin.[193] Using information gathered through investigations and migrant worker input, general corporate regulators could also play a greater role in preventing de-registered agencies and their officers and directors from involvement in a reconstituted "phoenix" agency under a different name—a common practice that is very difficult for states and businesses abroad to detect.

Collaboration among countries of origin, and the sharing of information among their diplomatic missions, is also crucial to better identify exploitative recruitment agencies and employers in a particular destination country and to refuse approval for the recruitment of migrant workers for particular job orders. Countries of origin would also be assisted by structured intelligence sharing on the part of destination countries concerning recruitment agency partners in those countries. Synchronization of this sort will work most effectively if countries of employment and origin integrate aspects their labor migration regulatory frameworks, particularly in areas such as recruitment fees and standardized employment contracts.[194] In regard to fees, compliance and detection of misconduct can be significantly enhanced by joint efforts between countries of origin, countries of employment, and other stakeholders abroad to clarify the limited services for which recruitment agencies may charge reasonable costs (e.g., costs of obtaining personal identification documents such as a passport) as distinct from costs that should be borne by the employer, and by setting clear and reasonable limits on the amount that may be charged for these and other ancillary services that recruiters organize, such as money-lending and transportation.[195]

c. Incentivizing Compliance

Countries of origin can adopt measures that incentivize fair practices by recruitment agencies to prevent compliance requirements from becoming too onerous, particularly for less well-resourced recruitment agencies. Such incentives can be achieved through regulation, in tandem with industry self-regulation initiatives of the type discussed above, or independent monitoring efforts that incorporate input from workers and their advocates. For example, agencies that are found to comply with industry codes, independent monitoring standards or regulatory protections can be

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worker protection obligations).

193. Farbenblum, *supra* note 31, Part II.A.1.

194. For example, a number of key destination countries in the Middle East including Jordan, Qatar, Saudi Arabia, and the U.A.E. have enacted laws banning recruitment fees for migrant workers. ANDREES ET AL., *supra* note 58, at 64. However, these laws are in conflict with the laws in key countries of origin, including Bangladesh, Indonesia, and the Philippines, which allow agencies to charge recruitment fees and other costs to workers, with actual costs often exceeding the prescribed limits. *Id.*

195. A new recruitment regulation introduced in December 2014 in Indonesia prohibits recruitment agencies from charging any fees other than those associated with an itemized list of expenses with maximum caps. Placement and Protection of Indonesian Workers Abroad 22/2014, art. 42 (Indon.).

offered rewards such as streamlined "license extensions, the waiving of certain [compliance] requirements, tax incentives, expedited processing of employment contracts, public listing as a recommended agency, reduced monitoring supervision [after a period, and] offers to fill the quotas for bilateral agreements."[196] Compliant agencies can also be rewarded financially, for example, by paying lower bank deposits, as is now the case under a new Jordanian rating system for private employment agencies.[197]

d. Oversight and Regulation of Subagents

One of the greatest impediments to detecting misconduct and enforcing recruitment regulations is the pervasive role that individual subagents play in the deception and overcharging of migrant workers during recruitment. These practices are especially difficult for employers, TNCs, foreign states, and other beneficiaries of migrant labor to detect. In the absence of effective governance by countries of origin, subagents may operate with impunity.[198] In most Asian countries subagents are not independently regulated, and recruitment agencies are rarely held accountable for subagents' abuses through any formal or other relationship.[199] Indeed, a 2013 study found that nearly half of returned Nepali migrant workers did not even know whether the individual subagent who sent them abroad worked for a recruitment agency.[200]

In its General Comment on migrant domestic workers, the U.N. Migrant Workers' Committee explicitly underscores that states' regulatory responsibilities regarding recruitment agencies[201] extend to the effective regulation and monitoring of subagents, to ensure that they respect workers' rights.[202] Some states such as Indonesia have sought to address abuses by subagents by banning them and/or criminalizing their operation.[203]

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196. INT'L LABOUR ORG., REGULATING RECRUITMENT OF MIGRANT WORKERS: AN ASSESSMENT OF COMPLAINT MECHANISMS IN THAILAND 16 (2013), http://apmigration.ilo.org/resources/regulating-recruitment-of-migrant-workers-an-assessment-of-complaint-mechanisms-in-thailand [https://perma.cc/RL6D-UR86].

197. *See* ANDREES ET AL., *supra* note 58, at 65 n.248 (discussing Jordan's recently enacted framework for a three-tiered rating system for private employment agencies in which higher ratings will translate into lower bank deposit requirements).

198. *Id.* at 71.

199. *See id.* ("[T]he actions of sub-agents or other intermediaries may fall outside of government's regulatory authority.").

200. THE ASIA FOUNDATION, LABOUR MIGRATION TRENDS AND PATTERNS: BANGLADESH, INDIA, AND NEPAL 18 (2013), https://asiafoundation.org/resources/pdfs/LabourMigrationTrendsandPatterns BangladeshIndiaandNepal2013.pdf [https://perma.cc/8CQU-FTTX].

201. *See* Migrant Workers Convention, *supra* note 60, art. 66(2) (allowing recruitment to be performed by "agencies, prospective employers or persons acting on their behalf" only if those actors are subject to authorization, approval and supervision by the relevant state).

202. General Comment No. 1 on Migrant Domestic Workers, *supra* note 61, para. 33.

203. *See* Placement and Protection of Indonesian Workers Abroad 39/2004, art. 4 (Indon.) (forbidding the placement of workers abroad by individuals); *see also* ANDREES ET AL., *supra* note 58, at 71. A December 2014 Indonesian recruitment regulation goes further and requires that local-level recruitment be undertaken only by a verified employee of the recruitment agency in conjunction with government officials at the city or district level. Placement and Protection of Indonesian Workers Abroad 22/2014, art. 13 (Indon.). It is not yet clear how this provision will be implemented and enforced or whether it will have an impact on the

This has met with little success as misconduct by individual subagents is difficult for authorities to detect and, to the limited extent that workers might be able to pursue claims against subagents directly, communal relationships between workers and subagents commonly deter them from enforcing their rights or reporting fraud or other unlawful conduct to authorities.[204] As a result, subagents are rarely, if ever, prosecuted.[205]

Abuses by subagents could be more effectively addressed by establishing conditions under which recruitment agencies are accountable for the conduct of subagents they use. As the gatekeepers to business opportunities for subagents, recruitment agencies have significant capacity and leverage to influence the conduct of subagents, which has not yet been systematically engaged as a locus of power for addressing misconduct. One view is that the best way to do this is via legislation requiring recruitment agencies to establish formal business arrangements with subagents and other subcontractors that articulate a clear structure of accountability and liability for business practices.[206] Given that implementation of these requirements will be challenging, it may be more effective for recruitment agencies to be held legally responsible for the conduct and representations of subagents if certain agency relationship criteria are met—regardless of whether or not a formal business arrangement has been established. Nepal, for example, introduced a regulatory requirement for recruitment agencies to register subagents they use.[207] The promise of this ground-breaking law has failed to materialize because agencies are not subject to any penalty for using unregistered subagents. As of June 2013, only 290 of Nepal's estimated 80,000 subagents had been registered.[208]

As with recruitment agencies, fairer practices on the part of subagents can be promoted by creating financial incentives at the state level and within the supply chain for subagents who comply with relevant laws and standards. For example, an independent accreditation system for individual agents could be established by states, industry bodies, and/or other respected entities that could serve a range of functions.[209] In its simplest form, it could be a "preferred supplier" scheme under which recruitment agencies would be driven to use only preferred subagents by the demands of employers, TNCs, and states seeking to eliminate fee charging and abusive recruitment practices from their supply chain. Such a scheme could go some way to addressing challenges that these entities encounter in attempting to conduct robust due diligence on recruitment businesses in migrant workers' home countries, down to the village level.[210]

e. Preventing Deception and Ensuring Migrants Make Informed

widespread and entrenched use of independent brokers.

204. PAOLETTI ET AL., *supra* note 24, at 155.

205. FARBENBLUM ET AL., *supra* note 24, at 104–05.

206. Crépeau, *supra* note 18, at 19.

207. Foreign Employment Act, 2064 (2007), § 74 (1) (Nepal).

208. PAOLETTI ET AL., *supra* note 24, at 55. It is possible, however, that if diligently enforced with penalties for using unregistered agents, Nepal's registration requirement could be a more effective model.

209. Farbenblum, *supra* note 31, at 180 n.166.

210. Such a scheme, if overseen by government, could also serve a legal function. If states were to implement laws under which recruitment agencies are automatically liable for subagents' misconduct, agencies that use licensed subagents could receive immunity from liability under certain conditions and the subagent could lose its accredited status. *Id.*

Decision to Migrate

Much of the scholarly and industry discussions on abusive recruitment and forced labor prevention reasonably center on recruitment fees. However, it is often the deception perpetrated by recruiters regarding salary and other conditions of employment that makes the payment of recruitment fees so problematic, for reasons discussed in Part (II)(B) above. When employers, TNCs, state procurers, and other end users seek to eliminate forced labor and trafficking from their supply chain, it is therefore essential that they consider not only whether fees were paid, but also whether the worker received her contract of employment in a timely manner, whether the contracts reflected the true and complete conditions of employment, and whether she had its terms explained to her before she paid fees and committed to migrating. This is a difficult form of due diligence to undertake, and would benefit substantially from efforts by country of origin governments. Such due diligence should be a key condition of maintaining a recruitment agency license, and one that origin country governments could audit through interviews with current or returned migrant workers, and through complaints made by migrant workers to embassies or hotlines. It can similarly be audited by TNCs, suppliers and employers through the same auditing processes used to detect fee payment (though these currently need improvement).

As in the case of fees, technology could play an important interventionist function between workers and employers by enabling migrant workers to access job information and services directly online, alongside investigation and enforcement initiatives such as those described above.[211] Migrant workers' access to technology may also reduce fraud and corruption issues related to the withholding or falsification of migrant workers' contracts and identity documents. For example, if origin country governments were to maintain copies of workers' key identity documents and contracts in an electronic form that is accessible to the worker and her family, recruiters would no longer be able to retain workers' documents as a means of control or in order to extract bribes for access to the documents. It also reduces opportunities for the common practice of contract substitution upon the worker's arrival in the country of employment, particularly if the electronic documentation system is accessible to relevant government agencies in both countries of origin and employment.[212]

There are a number of examples of emerging good practice in this respect. For example, some states are beginning to transnationally address overcharging, deception, and disempowerment of workers through the use of technology and "e-government" initiatives to limit or better oversee the intermediating role played by the private recruitment industry.[213] India's eMigrate system, for example, requires employers, including those hiring domestic workers, to register with the Indian Mission and upload all details of the relevant position in order to receive a job code required for

211. *See Planet of the Phones*, ECONOMIST (Feb. 28, 2015), http://www.economist.com/news/leaders/21645180-smartphone-ubiquitous-addictive-and-transformative-planet-phones [https://perma.cc/H7D4-4EQZ] (estimating that by 2020, 80 percent of the adult population in the world will own a smartphone).

212. Farbenblum, *supra* note 31, at 181–82.

213. *See, e.g.*, *About eMigrate Project*, EMIGRATE, https://emigrate.gov.in/ext/about.action (last visited July 25, 2016) ("The ministry has undertaken this transformational e-governance program with a vision to transform emigration into a simple, transparent, orderly and humane process.").

recruitment.[214] Workers can apply online for emigration clearance after receiving the attested visa and employment contract signed by the employer,[215] reducing opportunities for deception during recruitment.

Similar initiatives have been instigated by countries of employment. For example, reforms that took effect in the U.A.E. in January 2016 directly tackle the issue of predeparture misinformation by requiring prospective workers to sign a standard employment offer in their home country that must be filed with the U.A.E. Labor Ministry before a work permit is issued.[216] The binding contract cannot be varied within the country of employment unless the new terms are beneficial to and agreed by the worker.[217]

f. Barriers to Action by Countries of Origin

While countries of origin have a critical role to play in preventing unfair recruitment practices, there are significant barriers to the exercise of their leverage. Alongside the pervasive impact of corruption,[218] a lack of political will to address recruitment problems within origin countries may also reflect the expense of establishing and resourcing recruitment governance institutions for a developing country with limited government resources and competing domestic demands.[219] It may also result from states' concerns that they will undermine their competitiveness as a worker-source country if they shift the costs of recruitment from migrant workers to employers or businesses and make recruitment from their country more expensive in the global marketplace for migrant labor. The reality of this concern was clearly demonstrated in the case of Nepal, which introduced new measures to significantly reduce recruitment fee caps and require all employers to cover airfare and visa costs of

214. *Instructions for Employers – Applying for Registration*, EMIGRATE, https://emigrate.gov.in/ext/forms/InstructionsEmp-Regn.pdf [https://perma.cc/N4LW-7QUG] (last visited July 23, 2016).

215. *Guidelines for Emigration Clearance System*, MINISTRY OF EXTERNAL AFFAIRS, http://www.mea.gov.in/emigration-clearance-system.htm [https://perma.cc/46KA-4C3V] (last visited July 24, 2016).

216. SAQR GHOBASH, MINISTRY OF LABOUR, U.A.E., MINISTERIAL OF LABOUR, MINISTERIAL DECREE NO. 764 of 2015 (Sept. 27, 2015); Derek Baldwin, *New UAE Labour Rules Kick in on January 1, 2016*, GULFNEWS (Sept. 28, 2015), http://gulfnews.com/news/uae/government/new-uae-labour-rules-kick-in-on-january-1-2016-1.1591368 [https://perma.cc/9X2B-UEPA].

217. GHOBASH, *supra* note 216, art. 4.

218. *See* IOM, *supra* note 7, at 79 (detailing the effect corruption has on recruitment).

219. *See* Farbenblum, *supra* note 31, at 179–82 (discussing the countervailing macroeconomic incentives for preventing abusive recruitment practices and ensuring migrant workers' access to remedies and drawing attention to "the long-term economic costs to migrant workers, their families, communities and indeed the national economy of inflated fees paid to private recruiters and related high-interest debt, of receiving wages (and remittances) lower than those promised to the worker when she decided to migrate at significant cost, and of having no accessible means for seeking compensation for those losses," in addition to "the social and economic burden of un-remedied physical and psychological injuries sustained abroad as a result of abusive recruitment practices or inadequate preparation for migration, often with long-term consequences for the worker's future earning capacity and social relationships").

migrant workers going to the Gulf[220] and Malaysia.[221] In the four months following the introduction of the measures, job demand from Malaysia dropped almost 80 percent.[222] Recruitment agencies observed that Malaysian employers, mostly small companies, had simply gone elsewhere for their migrant workers and started hiring from Bangladesh, Vietnam, Cambodia, and Indonesia, which provide "cheaper workers" and pay large commissions to destination country agents for providing job quotas.[223]

Ultimately, this brings us full circle to the need for cooperation among TNCs, countries of employment, and states to level the playing field among countries of origin and to establish a market for fair recruiters that economically incentivizes countries of origin to invest resources in enforcing their recruitment regulations.

3. The Role of Civil Society, Unions, and Migrant Workers

Another crucial set of stakeholders with indirect leverage to improve recruitment practices is civil society, trade unions, and migrant workers. Techniques such as naming and shaming, public advocacy campaigns, or litigation, that have long been used by civil society to influence governments, are now commonly directed against businesses to advocate for workers' rights more generally.[224] The role of civil society to "affect change in indirect ways, that is influencing other actors, such as government"[225] and businesses should not be underestimated. In 2015, Human Rights Watch released a set of guidelines[226] to protect migrant construction workers working in the Gulf Cooperation Council countries.[227] The guidelines are aimed at TNCs and domestic companies to

220. *See* Roshan Sedhai, *Govt Decision to Waive Visa Fee, Airfare gets Vote of Confidence from Workers*, KATHMANDU POST (July 10, 2015), http://kathmandupost.ekantipur.com/news/2015-07-10/govt-decision-to-waive-visa-fee-airfare-gets-vote-of-confidence-from-workers.html [https://perma.cc/HP9Y-MZ2M] (stating that the measures cover workers going to Qatar, Saudi Arabia, the U.A.E., Bahrain, Oman, and Kuwait).

221. *See id.* (reporting the claim by Bimal Dhakal, chairman of Nepal Association of Foreign Employment Agencies, that the decision is an attempt to put the agencies out of business). *See also* Om Astha Rai, *Who is Against Zero-cost Migration and Why?*, NEPALI TIMES (July 12, 2015), http://nepalitimes.com/article/nation/manpower-agencies-of-Nepal-are-the-ones-against-zero-cost-migration-policy,2402 [https://perma.cc/433R-ZFPN] (reporting Nepali recruitment agencies' claim that the measures would only be practical when all employers in the Gulf and Malaysia agree to bear the cost of visas and airfares, which is currently the case only for large employers).

222. Roshan Sedhai, *Steep Decline in Nepali Migrants Going to Malaysia*, KATHMANDU POST (Nov. 29, 2015), http://kathmandupost.ekantipur.com/news/2015-11-29/steep-decline-in-nepali-migrants-going-to-malaysia.html [https://perma.cc/TK7D-LJ4K].

223. *See id.* (quoting Bal Bahadur Tamang, former chairperson of Nepal Association of Foreign Employment Agencies). This has not been the experience in the Gulf states, though it may be too early to know whether in fact the employers are absorbing the extra recruitment costs and, if so, the reasons for this absorption.

224. Pittman, *supra* note 11, at 286–89.

225. *Id.* at 288

226. *See generally* HUMAN RIGHTS WATCH, GUIDELINES FOR A BETTER CONSTRUCTION INDUSTRY IN THE GCC: A CODE OF CONDUCT FOR CONSTRUCTION COMPANIES (Dec. 2015), https://www.hrw.org/sites/default/files/supporting_resources/2015.12.21.gcc_brochure_dec_2015.pdf [https://perma.cc/H979-XTZ4] [hereinafter HUMAN RIGHTS WATCH].

227. The Gulf Cooperation Council states are Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the U.A.E. SECRETARIAT GENERAL OF THE GULF COOPERATION COUNCIL, http://www.gcc-sg.org/en-us/Pages/default.aspx [https://perma.cc/L9J4-KZ4X] (last visited July 25, 2016).

ensure that they, and their contractors and subcontractors, respect the rights of migrant workers on their projects and protect workers from serious abuses, including trafficking and forced labor.[228] The challenge for NGO initiatives such as this is enforcement, and Human Rights Watch will likely need to rely on its "watch dog" and reporting functions to keep track of corporate behavior.

Civil society organizations and trade unions are enlisting the participation of migrant workers to establish innovative recruitment data collection and online dissemination programs in relation to particular recruitment agencies. Partnerships between these organizations and states are likely to be fruitful.[229] For example, in 2014 the Centro de los Derechos del Migrante (CDM) (the Center for Migrant Rights), which focuses on Mexico-US migrant worker flows, launched "Contratados," which allows migrant workers to rate their experience of recruiters or employers online, by voicemail or by text message.[230] In essence, this service operates as a "TripAdvisor" for migrant workers and its strength will depend in part on its uptake and dissemination by the workers themselves.[231] States are also enlisting the participation of migrant workers in accountability efforts through the use of social media. For example, since early 2015, the Philippines has required all recruiters of domestic workers to maintain an active Facebook page as a condition of government approval of worker placement.[232] The agency must provide details of the page to the worker and accept friend requests from the worker, her family, and the Philippines Overseas Employment Administration (POEA).[233] The agency is required to regularly monitor the account and respond to requests for information and assistance by migrant domestic workers and their families, and the POEA can refer cases to the agency through its Facebook page.[234]

Worker organization and consumer campaigns, such as the fifteen-year Fair Food campaign initiated by the Coalition of Imokalee Workers (CIW) in the U.S., also illustrate the potential of organized migrant workers and civil society organizations to impact business practices.[235] The CIW is a membership-based human rights organization of farmworkers that emerged to address the recruitment and employment challenges facing tomato pickers (predominantly migrant workers) in Florida.[236] The campaign, driven by farmworkers themselves, relied on strong alliance building with consumer groups and human rights activists to persuade major brands to take steps to end farmworker exploitation.[237] Through an initial boycott of the fast-food company Taco Bell, publicity campaigns, and protests, the campaign was ultimately successful in

228. HUMAN RIGHTS WATCH, *supra* note 226, at 5.

229. *See* GORDON, *supra* note 8, at 47–49 (showing a range of examples); *see also* Pittman, *supra* note 11, at 292–93.

230. CONTRATADOS, http://www.contratados.org/ [https://perma.cc/KU9F-BJMH] (last visited April 30, 2016).

231. *Id.*

232. Memorandum Circular No. 01 from Phil. Overseas Employment Admin. (Feb. 24, 2015), http://www.poea.gov.ph/memorandumcirculars/2015/1.pdf [https://perma.cc/362Q-URTJ].

233. Memorandum Circular No. 03 from Phil. Overseas Employment Admin. § II.c (Mar. 14, 2015), http://poea.gov.ph/memorandumcirculars/2015/3.pdf [https://perma.cc/97QD-SZTF].

234. *Id.*

235. *See* Pittman, *supra* note 11, at 286–93 (discussing non-governmental organization, union, and multi-stakeholder initiatives on migrant worker rights).

236. GORDON, *supra* note 8, at 39–42.

237. *Id.*

gaining the participation of several large companies including McDonalds, Sodexo, Whole Foods, and WalMart in its Fair Food Code of Conduct (Food Code).[238] The Food Code addresses recruitment abuses by prohibiting labor intermediaries and mandates that growers hire all field workers directly.[239] The Food Code is backed by binding agreements between the CIW and the buyer companies that obligate the buyers to suspend purchases from growers who have failed to comply with the Food Code.[240] This places a strong market incentive on growers to comply with the Food Code.

Civil society campaigns tend to focus narrowly on a specific thematic issue, company, or geographic location. Such a targeted approach can be effective, and when combined with binding commitments, like those developed by the CIW, can result in stringent enforcement. A multi-pronged approach that involves workers, incorporates strong civil society campaign techniques, and is underpinned by innovative complaint and monitoring mechanisms, when combined with the oversight of the state, perhaps stands the best chance of instituting fair recruitment practices.

While this section highlights the potential of many individual strategies to impact particular issues, countries, or companies, each of these operating in isolation will only have limited reach. As noted at the outset, what is required is not only a range of initiatives from a multiplicity of stakeholders, but also that they operate with some level of coordination to increase their impact. State regulation, whether emanating from their role as countries of origin, employers, or procurers, can establish a framework for both regulating recruiters and reporting recruitment practices. Businesses and civil society initiatives that design and implement improved supply chain practices can plug the gap between regulatory frameworks and reality regarding improper fee-charging, pre-departure deception, and recruiters' failures to provide migrant workers with the information and documents they need before they leave home.

For example, inroads can be made towards rights protection in relation to fee payment if, at the same time, TNCs demand that recruitment fees are paid by employers and not by migrant workers as a condition for supply chain participation; states regulate fee limitation and detect and systematically penalize non-compliance by recruitment agencies, while making available to employers an industry of licensed non-fee charging fair recruiters; migrant workers provide information to states and businesses on improper recruitment agency fee-charging that informs licensing and supply-chain participation decisions; and by civil society monitoring fee payment and facilitating consumer support for TNCs that prevent migrant worker fee-charging. It is the mutually reinforcing nature of these strategies that will have a greater impact on rights protection than the sum of their individual efforts.

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238. *See id.* (detailing the origins and activities of the CIW); *see also Participating Buyers*, FAIR FOOD STANDARDS COUNCIL, http://www.fairfoodstandards.org/resources/participating-buyers/ [https://perma.cc/MH56-5F6P] (last visited April 30, 2016).

239. *Fair Food Code of Conduct* § I.5 (2016), http://www.fairfoodstandards.org/resources/fair-food-code-of-conduct/ [https://perma.cc/PV93-836T]; GORDON, *supra* note 8, at 40.

240. *About the Fair Food Program, Market Enforcement*, FAIR FOOD PROGRAM, http://www.fairfoodprogram.org/about-the-fair-food-program/ [https://perma.cc/A7LL-FUMH] (last visited May 1, 2016).

IV. ENSURING MIGRANT WORKERS' ACCESS TO REMEDY FOR ABUSIVE RECRUITMENT PRACTICES: THE ROLES OF STATES AND BUSINESS

Ensuring access to remedy is a necessary adjunct in efforts to prevent unfair and exploitative recruitment practices. It is a fundamental state obligation under a range of human rights treaties, including the Migrant Workers Convention.[241] It is also the responsibility of businesses under the Guiding Principles.[242] Through the establishment and resourcing of effective redress mechanisms, states and businesses can limit the economic harm that abusive recruitment practices cause to migrant workers and their families by ensuring, at a minimum, compensation to workers for their resulting financial losses. As with prevention responsibilities, responsibility for ensuring that a worker is compensated for recruitment-related harms rests with a number of actors, including: Recruitment agencies (and subagents); employers, TNCs, and other businesses within a supply chain; countries of origin; and countries of employment and states globally.

The responsibility to remedy recruitment-related harms rests first and foremost with the recruitment agency. Indeed, it is often mandated under the contract that the migrant worker enters into with the recruitment agency.[243] Countries of origin have significant leverage to ensure recruiter accountability for misconduct through consistent imposition of penalties (ranging from fines to deregistration). This ought to go beyond accountability for improper fee-charging to also include accountability for deception, non-provision of contracts and other key documents and information, as well as for other forms of misconduct such as intimidation, violence, confinement pre-departure, and deliberate retention of a worker's identity or other documents. In addition to punishing the recruitment agency, countries of origin can use their institutional leverage to ensure migrant workers' access to remedies by establishing accessible mechanisms through which workers can obtain compensation for losses that they suffer as a result of recruiter misconduct. In order to prevent workers from feeling compelled to remain in exploitative employment due to mounting high-interest debt or the risk of falling into poverty upon their return home, remedial processes must be swift, straightforward, and accessible by a worker or a worker's family.

Recent studies have found that although remedies against recruitment agencies might in theory be available to migrant workers in their countries of origin, they are rarely accessible in practice; when they are accessible, the outcomes are generally unjust because the processes through which they are obtained are not grounded in migrant workers' legal rights or recruitment agencies' contractual and statutory obligations.[244] The studies found that current redress mechanisms are generally inaccessible due to

241. Migrant Workers Convention, *supra* note 60, art. 83; *see also* Farbenblum, *supra* note 33, Part III.A.2 (discussing access to remedy and related international obligations).

242. John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, para. 22, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

243. *See* Farbenblum, *supra* note 31, Part II.B (discussing the contractual relationship between recruitment agencies and migrant workers).

244. *See generally* PAOLETTI ET AL., *supra* note 24; FARBENBLUM ET AL., *supra* note 24.

factors such as cost, geography (centralization of institutions in capital cities), and lack of legal assistance.[245] For the most part, existing mechanisms do not enable workers to obtain timely payment from recruitment agencies or insurers, typically due to skewed power relationships between workers and recruitment agencies, poor institutional processes, inadequate resourcing, lack of decision-maker expertise, and a lack of government enforcement capacity, among other factors.[246] Moreover, migrant workers commonly lack awareness and understanding of procedures for accessing remedies.[247] This lacuna could be addressed through government dissemination of information to workers before departure, as well as when workers make complaints to diplomatic missions abroad, regarding their legal rights and procedures for invoking formal and informal redress mechanisms in their country of origin.[248]

Access to remedy is another area that may benefit from innovative use of technology. For example, in February 2016, Pakistan's Ministry of Overseas Pakistanis and Human Resource Development announced the establishment of an online complaint management system that allows migrant workers to submit legal complaints about issues they faced in recruitment or employment.[249] The system will increase the ability of migrant workers to at least lodge and track the status of their complaints while abroad and at home, hopefully increasing the efficiency of the current complaints modality and introducing a measure of transparency in order to safeguard the interests of migrant workers.[250]

Though the obligation to remedy recruitment-related losses is primarily the responsibility of the recruitment agency, it is clear that TNCs and other businesses that benefit from migrant labor also bear responsibility for ensuring migrant workers have access to remedy—whether this involves ensuring that compensation is paid by the recruitment agency, or by the business itself. The need for provision of remedies for wrongs suffered by migrant workers is noted in the Dhaka Principles, but no detail is provided as to their potential implementation.[251] A specific provision concerning remedy is made in the Qatar Foundation's Mandatory Standards, which provides that "[t]he Employer shall have an effective and efficient grievance procedure that Workers may utilize to lodge complaints against Recruitment Agencies Local or Recruitment Agencies Abroad," but no further details as to the content or operation of such a

245. PAOLETTI ET AL., *supra* note 24, at 145–48; FARBENBLUM ET AL., *supra* note 24, at 123–33.

246. PAOLETTI ET AL., *supra* note 24, at 119–26; FARBENBLUM ET AL., *supra* note 24, at 92–99.

247. *See* PAOLETTI ET AL., *supra* note 24, at 145 (explaining that Nepali migrant workers commonly complain of knowing neither their rights under Nepali law nor the mechanisms established and services available to enforce their rights); FARBENBLUM ET AL., *supra* note 24, at 127 (explaining that Indonesian migrant workers had little understanding of their rights under Indonesian law, and little awareness of redress mechanisms available to them).

248. *See* PAOLETTI ET AL., *supra* note 24, at 178 (recommending that the DoFE and FEPB should cooperate to increase access to pre-arrival orientation programs and information regarding legal rights and seeking redress); FARBENBLUM ET AL., *supra* note 24, at 155–57 (recommending strengthened embassy oversight and consular assistance, and improved access to information on migrant worker rights and redress).

249. *Online Complaint System for Overseas Pakistanis*, SAMAA (Feb. 8, 2016), http://www.samaa.tv/pakistan/2016/02/online-complaint-system-for-overseas-pakistanis/ [https://perma.cc/XD79-F8JJ].

250. *Id.*

251. *Dhaka Principles*, *supra* note 89, at 5–9.

process are provided.[252] With respect to remedying the payment of a recruitment fee by workers, the Mandatory Standards note that contractors and subcontractors are liable for reimbursement to the worker.[253] However, there is no guidance around implementation and enforcement.

Joint responsibility on the part of an employer and a supplier to provide redress for recruitment violations is one possibility for improving access to remedy. It is a strategy that has been adopted by states ranging from the Philippines[254] to several Canadian provinces.[255] However, in many countries, particularly in the Middle East, the enforcement of such joint-liability schemes is difficult, if not impossible, for the average low-wage migrant worker to achieve in practice.[256] This is due to the general barriers to accessing remedies described earlier, including a need for significant legal advice and representation and coordination between origin and destination countries.

The transnational nature of labor migration also raises a host of jurisdictional and practical impediments to the enforcement of contracts concluded between recruitment agencies in countries of origin and their counterparts (placement agencies or employers) in destination countries, which are now required in origin countries such as Indonesia.[257] Regulation and oversight of this transnational business relationship has received very limited attention by researchers and policymakers to date, despite the fact that inflated recruitment fees paid by migrant workers are partially the result of fees, bribes, and kickbacks that destination country recruiters and employers demand from origin country recruitment agencies, which are then passed down to workers.[258] Transnational enforcement of labor migration contracts is an area that would particularly benefit from further study and pilot projects, possibly drawing on lessons learned from other areas of the law that operate transnationally.

The Guiding Principles provide that both states and corporations should offer access to judicial and non-judicial grievance mechanisms for those harmed by corporate conduct.[259] Ideally, non-judicial grievance mechanisms supplement judicial

252. *See* MANDATORY STANDARDS, *supra* note 119, paras. 11.4.5, 11.4.8 (detailing that employers must reimburse workers for recruitment, processing, or placement fees and must have an effective and efficient grievance procedure for workers to lodge complaints against recruitment agencies).

253. *Id.* para. 11.4.5.

254. In the Philippines, migrant workers enter into a single multi-party contract with origin and destination country recruiters as well as the employer, under which all of the parties are jointly and severally liable for contractual breaches by any of the parties. Migrant Workers and Overseas Filipinos Act of 1995, Rep. Act No. 8042, § 10, 91:32 O.G. 4994 (June 7, 1995); POEA Rules and Regulations, *supra* note 187, Part II, r. 2, § 1(f)(3).

255. FARADAY, *supra* note 143, at 61; GORDON, *supra* note 8, at 22–25; ANDREES ET AL., *supra* note 60, at 46–50.

256. *See* GORDON, *supra* note 8, at 29, 31–32 (explaining that the negative effects of joint-liability schemes include increased recruitment fees, slow government enforcement processes, and increased necessity of legal assistance).

257. *See* Placement and Protection of Indonesian Workers Abroad 22/2014, art. 3, (Indon.) (requiring recruitment agencies to present to the relevant diplomatic mission and the Indonesian migrant protection agency a copy of the contract between the Indonesian recruitment agency and its counterpart in the destination country related to the position).

258. *See, e.g.*, JUREIDINI, *supra* note 29, at 44–45 (explaining that large differences in recruitment charges are due to kickback payments to personnel of employment companies in Qatar).

259. *Guiding Principles*, *supra* note 78, at 22–23.

mechanisms. However, in many jurisdictions judicial remedies are inaccessible, ineffective, or non-existent, meaning that non-judicial grievance mechanisms may, in theory, offer greater promise for those affected by business-related human rights abuse.[260] However, although a few non-judicial grievance mechanisms are beginning to show potential in providing remedies for worker rights violations, they are generally not yet up to the task of providing victims with remedy. As the Guiding Principles note, the concept of access to remedy is multi-pronged and ideally includes both state and non-state based mechanisms, but as one commentator observed back in 1999, "only a selected few among private corporations are likely to willingly submit to new responsibilities without being legally compelled to do so."[261] An under-explored issue is the question of how companies might be incentivized (through consumer or market pressure or perhaps the threat of regulation) to provide access to non-judicial remedies for human rights violations in their supply chain.

Finally, although the OECD Guidelines have been criticized (for example, for their lack of "hard" enforcement power and the inconsistent manner in which they have been applied), they do contain a potential mechanism for "remedying" corporate rights violations.[262] OECD members and adhering states are obliged to set up a National Contact Point (NCP) to promote the OECD Guidelines, and this can be used by individuals and communities to make a complaint regarding the global activities of any company as long as that company is domiciled in an OECD member or adhering country.[263] The mandate of these NCPs is to "further the effectiveness of the *Guidelines* by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the *Guidelines* in specific instances."[264]

For example, in May 2015 the Swiss NCP accepted a complaint from Building and Wood Workers' International (BWI) regarding human rights violations of migrant workers related to the construction of facilities for the FIFA 2022 World Cup in Qatar.[265] The complaint related to: The confiscation of passports; discrimination and unequal remuneration; non-payment of wages; charging of recruitment fees; occupational health and safety issues; restrictions on the freedom of association; alteration of employment contracts; detention of migrant workers; a lack of safe and decent accommodation; and issues related to access to remedy.[266] The initial assessment

260. GWYNNE SKINNER ET AL., THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL BUSINESS 66–67 (2013).

261. M.K. Addo, *Human Rights and Transnational Corporations – An Introduction, in* HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS 11 (M.K. Addo ed., 2001).

262. JORIS OLDENZIEL ET AL., 10 YEARS ON: ASSESSING THE CONTRIBUTION OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES TO RESPONSIBLE BUSINESS CONDUCT 6 (2010).

263. *Eligibility of a Complaint*, OECD WATCH, http://www.oecdwatch.org/filing-complaints/Eligibility%20of%20a%20complaint [https://perma.cc/U29A-BCYL] (last visited Oct. 17, 2016).

264. OECD GUIDELINES, *supra* note 82, at 68.

265. NATIONAL CONTACT POINT OF SWITZERLAND, INITIAL ASSESSMENT: SPECIFIC INSTANCE REGARDING THE FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION (FIFA) SUBMITTED BY THE BUILDING AND WOOD WORKERS' INTERNATIONAL (BWI) 1–2 (2015), https://www.wiltonpark.org.uk/wp-content/uploads/WP1428-Swiss-National-Contact-Point-Initial-Assessment-FIFA.pdf [https://perma.cc/HU2Z-XSX2].

266. *Id.* at 2.

of the Swiss NCP in December 2015 concluded that the issues raised merit further consideration, and the Swiss NCP accepted the complaint and the investigation is ongoing.[267] The next step would first require the Swiss NCP to obtain the assent of all relevant parties to meet and mediate the issue and then possibly, if warranted, draw up recommendations for implementation of the OECD Guidelines by FIFA in Qatar.[268] While this complaint serves to highlight the plight of migrant workers in Qatar, it is unclear whether it will lead to real improvements on the ground. Following 15 years of operation, a review of the NCP system was conducted by the OECD Watch, an NGO, which highlighted significant limitations with the NCP system.[269] It documented that significant barriers exist to bring a complaint to the mechanism and, for those cases that are filed, only one percent of the 250 NCP complaints resulted in an outcome that directly improved conditions for the victims.[270] This track record does not bear much promise for the plight of migrant workers.

It appears that the best prospects for ensuring access to remedy for recruitment related harms are through the operation of multiple channels with multiple actors. These include origin countries' establishment of effective and accessible mechanisms through which migrant workers can obtain compensation directly from recruitment agencies, with licensing consequences and other penalties for recruitment agency non-compliance. Also important is the absorption of responsibility (ideally contractual) by TNCs and other supply chain businesses for ensuring migrant workers are compensated (either directly or by exercising their leverage down their supply chain to require compensation by recruitment agencies), along with easily accessible judicial and non-judicial processes that enable migrant workers to realize their rights in this respect. To these measures, initiatives may be added by NGOs and international organizations to support migrant workers in filing claims, such as the IOM's indication that its recruitment accreditation framework, IRIS, will in the future administer complaints and a referral mechanism to assist victims of unethical or illegal recruiters in filing grievances with the appropriate authorities.[271]

CONCLUSION

The business of recruiting low-wage migrant workers requires a revolutionary transformation of current social, political, commercial, and legal practices to reduce the ongoing harms to low-wage migrant workers. Media reports concerning, for instance, enslaved Thai fisherman,[272] or the abusive conditions encountered by migrant workers building stadiums for mega sporting events,[273] have placed, and will continue to place, pressure on states and businesses to accept their human rights responsibilities concerning these workers. Such transformation can be best achieved if states, businesses, and civil society exert their particular leverage in concert.

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267. *Id.* at 5–8.

268. *Id.* at 8.

269. CAITLIN DANIEL ET AL., REMEDY REMAINS RARE 19 (2015).

270. *Id.*

271. IRIS, *supra* note 129.

272. Associated Press, *Indonesia Jails 5 Thai Captains for Enslaving Fishermen*, BANGKOK POST (Mar. 11, 2016, 10:43 AM), http://www.bangkokpost.com/news/asean/894492/indonesia-jails-5-thai-captains-for-enslaving-fishermen [https://perma.cc/SS3K-NHRD].

273. *See, e.g.*, THE DARK SIDE OF MIGRATION, *supra* note 5.

For this transformation to be realized, the economic drivers of abusive recruitment practices and barriers to reformative action for each stakeholder must be addressed. Some of these drivers arise from the complex transnational web of actors involved in recruitment and employment of migrant workers, in which opportunistic deception and overcharging by middlemen is routine and goes undetected and unpunished by states. Other drivers are structural, such as TNCs and other entities at the top of global goods and service supply chains that demand cheap workers with low recruitment-related costs.

At its core, transformation of the migrant recruitment business requires TNCs, state procurers, and other businesses to exert their economic leverage to create a market that commercially incentivizes fair recruiters and suppliers that engage them. At the same time, it requires countries of migrant worker origin and employment to further enable and incentivize businesses to adopt fair recruitment practices, and to identify and sanction those that do not. The devil of this approach will lie in the detail, and in the willingness of states and businesses to address the economic implications of their demands for fair recruitment.

For a start, TNCs, state procurers, and other businesses that are willing to demand fair recruitment of migrant workers must directly confront the allocation of costs involved in establishing and maintaining fair recruitment practices. If migrant workers are to pay no recruitment fees under a fair recruitment system, those costs must be allocated elsewhere. Recruitment agencies are, after all, businesses that charge for their services. The obvious response is to allocate those costs to the employer, which is standard practice for recruitment of higher-waged workers.[274] Alternately, the employer could directly recruit workers, though this would involve similar costs to that employer.

In any event, simply allocating costs to employers will not in itself result in broad reforms unless entities at the top of goods and services supply chains recognize and address these costs. Most employers will be unwilling to absorb recruitment costs if it means accepting significantly reduced profits or becoming uncompetitive in relation to other supplier businesses that are not absorbing recruitment costs. Accepting these recruitment costs means TNCs will pay for more expensive goods or services from suppliers, and that TNCs and state procurers will require suppliers to itemize recruitment-related costs as part of any tendering process. It must also be recognized that the costs of fair recruitment go beyond simply absorbing recruitment fees. This includes allocating resources to continuous monitoring of a recruitment agency and remedying breaches, such as paying compensation to migrant workers for abusive recruitment practices. As noted earlier, businesses (and states) will likely need to offer suppliers a longer-term commitment to using their goods and services if they expect suppliers to invest resources in compliance with fair recruitment standards.

Similarly, countries of origin and employment can play significant roles in detecting and penalizing misconduct by all private actors involved in recruitment and in establishing an industry of fair recruiters. However, a transformed recruitment system will need to address the significant economic implications for origin and

274. JUREIDINI, *supra* note 27, at 36 (stating that three contractors in Qatar confirmed that whether or not they pay recruitment fees for a migrant worker depends on the worker's skills level).

destination countries of strengthening recruitment regulation in the ways proposed in this Article. For instance, countries of employment, and in turn, the businesses at the top of the supply chain that rely on suppliers in those countries, will need to address the legitimate concerns of countries of origin that competitiveness as a worker source country will be undermined if they shift the costs of recruitment from migrant workers to employers or suppliers and make recruitment from their country more expensive in the global marketplace for migrant labor.

Indeed, countries of employment also have legitimate concerns that requiring employers to bear the costs of recruitment will make those suppliers less competitive in the global marketplace. One way to address this is by levelling the playing field among countries of origin through multilateral agreements that establish common fair recruitment standards. In the meantime, states, employers, and businesses at the top of supply chains can address these concerns by rewarding countries of origin that reliably supply them with workers sourced by fair recruiters, and by investing in effective enforcement institutions by providing those countries with increased recruitment opportunities. The disintermediating potential of technology can also be powerfully engaged to reduce opportunities for abusive recruitment practices and reduce oversight and compliance costs, as demonstrated by the various examples discussed in this Article.[275]

Finally, civil society can play a critical role in monitoring, supplementing, and extending traditional governance models to both highlight abusive recruitment practices and propose alternatives. Civil society can also harness the power of consumers to pressure businesses to monitor and report on their supply chains to improve transparency, creating increased accountability. Some of the initiatives discussed in this Article have been driven in part by campaigns involving unions, NGOs, consumers, and workers pushing from the ground up; and these campaigns have caught the attention of some legislators who have developed legal frameworks to impose varied responsibilities on businesses regarding their supply chains. In a manner analogous to the way in which states and businesses might reward their supply chain procurer with contract longevity, consumers can reward companies by increased patronage, recognizing not only the quality of the product but also the treatment of its workforce.

Achieving a wholesale shift to a fair recruitment system is challenging, and it is apparent that such a shift cannot be achieved by any single actor or initiative. States and corporate actors bear responsibility for ensuring that migrant workers' human rights are protected within recruitment, and that rights violations are addressed. States, corporations, civil society, and migrant workers each have unique forms of leverage to prevent abuses and drive fair recruitment. The best chance for progress towards fair recruitment practices for migrant workers lies in simultaneously harnessing the leverage of this multiplicity of stakeholders and combining public and private regulatory techniques to address the root causes and economic drivers underlying current practices.

275. *See, e.g.*, *supra* Part III.A.1.

Nagorno-Karabakh and the Minsk Group: The Imperfect Appeal of Soft Law in an Overlapping Neighborhood

CHRISTOPHER R. ROSSI*

ABSTRACT

For more than two decades, the Minsk Group, co-chaired by Russia, the United States, and France, has served as a steward over the dispute resolution process involving Nagorno-Karabakh, a tiny enclave of ethnic Armenians belonging to Azerbaijan. Although described as a frozen conflict, the conflict is fluid, dangerous, and increasingly complicated by overlapping interests and spheres of influence. This Article concentrates on the power-shifting attempts to facilitate a solution via use of the soft law forum of the Minsk Group, problematizing the perceived theoretical advantages found in the literature that instantiate soft law's superior potential for solutions. That powerful countries may utilize informal processes and forums to pursue parochial interests while forestalling peaceful settlement suggests a need to examine critically efforts to use soft law as an expedient to norm development.

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The European Union's association projects, envisioned to reintegrate the economies and politics of the continent,[1] face serious challenges in Eastern Europe. The European Union's 2004 enlargement campaign, hailed as "the single most effective foreign policy strategy in the Union's history,"[2] opened Europe's door to ten new members.[3] It set into motion the European Neighbourhood Policy[4] to promote democratic convergence without crossing the Union's threshold of membership.[5] Where Euro-Atlantic structures were thought stable, the European Union projected policies of conditionality eastward; where the political climate appeared more difficult, democratic socialization policies took precedence.[6] A joint declaration in 2009 established the European Neighbourhood Policy's Eastern Partnership, forging additional relationships with six eastern European countries: Armenia, Azerbaijan, Belarus, Georgia, the Republic of Moldova, and Ukraine.[7] The implosion of the Soviet Union in 1991 and a relative period of postwar stability in terms of state succession bolstered prospects of orderly engagement, integration, and the expansion of the rule of law eastward.[8] But the period was also marked by a tendentious precedent:

1. ALAN MAYHEW, RECREATING EUROPE: THE EUROPEAN UNION'S POLICY TOWARDS CENTRAL AND EASTERN EUROPE xiii (1998).

2. Giselle Bosse & Elena Korosteleva-Polglase, *Changing Belarus? The Limits of EU Governance in Eastern Europe and the Promise of Partnership*, 44 COOPERATION & CONFLICT 143, 144 (2009).

3. *Member Countries of the EU (Year of Entry)*, EUR. COMM'N, https://europa.eu/european-union/about-eu/countries_en#goto_4 [https://perma.cc/RJ84-WJ64] (last updated Feb. 17, 2017) (listing the following new European Union member states in 2004: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia).

4. *See* High Representative of the European Union for Foreign Affairs and Security Policy, European Commission, *Implementation of the European Neighbourhood Policy in 2011, Regional Report: Eastern Partnership*, at 2, SWD(2012) 112 final (May 15, 2012), http://eeas.europa.eu/enp/pdf/docs/2012_enp_pack/e_pship_regional_report_en.pdf [http://perma.cc/7VJB-FXJX] (defining the Policy as supporting Eastern European countries' reformation and economic integration with the E.U.).

5. Sandra Lavenex & Frank Schimmelfennig, *EU Democracy Promotion in the Neighbourhood: From Leverage to Governance?*, *in* DEMOCRACY PROMOTION IN THE EU'S NEIGHBOURHOOD: FROM LEVERAGE TO GOVERNANCE? 1, 2 (Sandra Lavenex & Frank Schimmelfennig eds., 2013) (ebook).

6. *See* Licínia Simão, *Forging a Wider European Security Community? Dilemmas of ENP in the South Caucasus*, *in* THE EU AND ITS NEIGHBOURS: VALUES VERSUS SECURITY IN EUROPEAN FOREIGN POLICY 103, 107 (Gergana Noutcheva, Karolina Pomorska, & Giselle Bosse eds., 2013) (explaining that Euro-Atlantic structures are the best options for stability for countries in which the incentive to comply with EU regulations is high, whereas socialization may be a better option for contentious countries).

7. Council of the European Union, *Joint Declaration of the Prague Eastern Partnership Summit*, at 5, 8425/09 (Presse 78) (May 7, 2009), http://europa.eu/rapid/press-release_PRES-09-78_en.htm [http://perma.cc.7SKP-WJ7C].

8. *See, e.g.*, Clifton van der Linden, *Secession: Final Frontier for International Law or Site of Realpolitik Revival?*, 5 J. INT'L L. & INT'L REL. 1, 10 (2009) (discussing how multiple secessions have incited further conversations about secession); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 395 (2d ed. 2006) (discussing the Russian Federation's inheritance of the Soviet Union's "legal personality" and its support of former Soviet territories' bids for independence and admission to the U.N.).

Kosovo.[9] Kosovo's unilateral declaration of independence from Serbia in 2008[10] generated widespread support, but there was notable opposition from Russia, China, India, Brazil, and four NATO members.[11] Each of these countries objected to the disputed doctrine of remedial secession and has separatist problems of its own.[12] Since that declaration, five of the European Union's association partners have been wracked by self-determination issues and violence.[13] Only Belarus, a paragon of human rights

9. *See, e.g.*, Vladimir Putin, President of Russia, Address by President of the Russian Federation to State Duma Deputies, Federation Council Members, Heads of Russian Regions, and Civil Society Representatives in the Kremlin (Mar. 18, 2014), http://en.kremlin.ru/events/president/news/20603 [https://perma.cc/Y6JN-HUX8] (citing Kosovo's unilateral separation from Serbia as a precedent for Crimea's separation from Ukraine); Eric Posner, *The Kosovo Precedent*, ERIC POSNER (Mar. 21, 2014), http://ericposner.com/the-kosovo-precedent/ [https://perma.cc/A492-4GBH] (discussing how Kosovo opened doors to other countries intervening with any "humanitarian" justifications); Anne Peters, *Does Kosovo Lie in the Lotus-Land of Freedom?*, 24 LEIDEN J. INT'L L. 95, 100 (2011) (analyzing the Lotus principle that was evoked by many states after Kosovo's secession); Martti Koskenniemi, *'The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159, 161 (2002) (generalizing the Kosovo incident to the state of discipline involving foreign policy choices).

10. *See generally Kosovo Declaration of Independence*, REP. OF KOSOVO (Feb. 17, 2008), http://www.assembly-kosova.org/?cid=2,128,1635 [https://perma.cc/UR3M-SNTD].

11. *See* STEVEN WOEHREL, CONG. RESEARCH SERV., KOSOVO: CURRENT ISSUES AND U.S. POLICY 1 (2013) (noting that by 2010, 65 countries had recognized Kosovo, including 22 of the then 27 European Union countries—except for Greece, Cyprus, Slovakia, Romania, and Spain); Jessica Almqvist, *The Politics of Recognition: The Question about the Final Status of Kosovo, in* STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW 165, 177–78 (Duncan French ed. 2013) (listing the nations that assert the illegality of the Kosovo Declaration, the nations, such as Brazil, that request further negotiations, and the nations, including Russia and China, that are concerned about the Act's potential negative effects on surrounding regions).

12. *See* Mansur Mirovalev, *Chechnya, Russia and 20 Years of Conflict*, AL JAZEERA (Dec. 11, 2014), http://www.aljazeera.com/indepth/features/2014/12/chechnya-russia-20-years-conflict-2014121161310580523.html [https://perma.cc/K3PG-AQAN] (discussing the Chechen separatist movement from the Russian Federation); Edward Wong, *China Sees Separatist Threats*, N.Y. TIMES (Jan. 20, 2009), http://www.nytimes.com/2009/01/21/world/asia/21china.html?_r=0 [https://perma.cc/G6AK-93DW] (discussing the Uighar Muslim and Tibetan separatist movements in China); James Bennett, *Violence Flares in Indian-Controlled Kashmir After Killing of Young Separatist Leader*, ABC (Jul. 10, 2016, 4:29 PM), http://www.abc.net.au/news/2016-07-11/violence-flares-in-indian-kashmir-after-separatist-killed/7585000 [https://perma.cc/4HJK-U588] (discussing the Kashmiri separatist movement); Akshat Kaushal, *Punjab on the Boil as Discontent Brews*, BUS. STANDARD (Oct. 31, 2015), http://www.business-standard.com/article/current-affairs/punjab-on-the-boil-as-discontent-brews-115103101159_1.html [https://perma.cc/L3AB-ALEE] (referencing the separatist movement in the Punjab region of India); *Cyprus Country Profile*, BBC (Feb. 23, 2016), http://www.bbc.com/news/world-europe-17217956 [https://perma.cc/5KDY-EX9N] (discussing the Greek/Cypriot-Turkish dispute over Cyprus); *Slovaks Retaliate over Hungarian Citizenship Law*, BBC (Mar. 12, 2012), http://www.bbc.com/news/10166610 [https://perma.cc/AM6X-B9G2] (referencing the Hungarian national minority question in Slovakia); Esther Webber, *Scottish Independence: Europeans with an Eye on Edinburgh*, BBC (July 24, 2014), http://www.bbc.com/news/world-europe-28365453 [https://perma.cc/QJU6-LRQT] (discussing the Transylvanian separatist movement in western Romania); Eliza Gray, *What Catalonia's Vote for Independence Means for Europe*, TIME (Nov. 7, 2015), http://time.com/4102619/what-catalonias-vote-for-independence-means-for-europe/ [https://perma.cc/9RXG-7LE3] (discussing the Catalan and Basque Land independence movements in Spain).

13. *See infra* text accompanying notes 16–20 (regarding violence in Ukraine, Georgia, Moldova (Transnistria), and between Azerbaijan and Armenia over Nagorno-Karabakh).

abuse,[14] weathers the separatist storms of the Eastern Partnership as Europe's "ultimate 'outsider.'"[15]

Diasporic communities of the former Soviet Union have rekindled nationality questions in Georgia, Moldova, and Ukraine, producing self-proclaimed, short-lived, or disputed republics in Abkhazia, South Ossetia, Transnistria, Donetsk, Luhansk, and Crimea.[16] Russia quickly defeated Georgia in the latter's 2008 attempt to reclaim Abkhazia and South Ossetia and recognized both as independent states.[17] Russia then facilitated Crimea's 2014 secession from Ukraine, promptly recognized its independence, and acceded to its request for absorption into the Russian Federation following a much criticized plebiscite.[18] These events underscored Russia's flat-out rejection of Europe's Neighbourhood Policy[19] and evidenced Russia's own neighborhood policy around the Black Sea and Transcaucasia. In April 2016, Nagorno-Karabakh, a self-declared independent region disputed by Armenia and Azerbaijan, witnessed "unprecedented violence."[20]

This Article concentrates on the Nagorno-Karabakh conflict and power-shifting attempts to facilitate a solution using the soft law forum of the Minsk Group. The Minsk Group has directed the efforts of the Organization for Security & Co-operation in Europe ("OSCE") to negotiate a peaceful solution to the conflict for more than two decades.[21] Direct attempts to forge a negotiated solution have proven fruitless. The perception of a low-intensity conflict removes the issue from multilateralism's agenda, engagements of western international civil society organizations encounter suspicions of a *mission civilisatrice* for the South Caucasus,[22] OSCE attempts to keep the peace

14. *See generally World Report 2015: Belarus*, HUM. RTS. WATCH, https://www.hrw.org/world-report/2015/country-chapters/belarus [https://perma.cc/6B6C-MKNB] (last visited Nov. 11, 2016).

15. Bosse & Korosteleva-Polglase, *supra* note 2, at 144.

16. *See* Christopher R. Rossi, *Ex Injuria Jus Non Oritur, Ex Factis Jus Oritur, and the Elusive Search for Equilibrium After Ukraine*, 24 TULANE J. INT'L & COMP. L. 143, 145–46 (2015) (noting the relocation of 25 million Russians to newly created territories outside the former USSR's territorial contours).

17. Damien McElroy, *Russia Recognizes Independence of Georgian Enclaves South Ossetia and Abkhazia*, TELEGRAPH (Aug. 26, 2008, 12:50 PM), http://www.telegraph.co.uk/news/worldnews/europe/russia/2625270/Russia-recognises-independence-of-Georgian-enclaves-South-Ossetia-and-Abkhazia.html [https://perma.cc/4UGQ-VS29].

18. *See* G.A. Res. 68/262, Territorial Integrity of Ukraine, at 2 (Mar. 27, 2014) (calling upon Russia to refrain from unilateral action with respect to Crimea and noting that the Crimean plebiscite was invalid).

19. *See* Susan Stewart, *Russia and the Eastern Partnership: Loud Criticism, Quiet Interest in Cooperation*, STIFTUNG WISSENSCHAFT UND POLITIK (May 2009), at 2, 4 (discussing how Russian Foreign Minister Sergei Lavrov denounced the E.U.'s Eastern Partnership as a "sphere of influence"); Valentina Pop, *EU Expanding Its 'Sphere of Influence,' Russia Says*, EUOBSERVER (Mar. 21, 2009, 4:17 PM), https://euobserver.com/foreign/27827 [https://perma.cc/X3AH-Q9WB] (quoting the comments of Sergei Lavrov, Russia's foreign minister, on the Eastern Partnership). For a more detailed discussion of Russia's rejection of any normative convergence with the E.U.'s Neighbourhood Policy, see generally Hiski Haukkala, *Explaining Russian Reactions to the European Neighbourhood Policy*, *in* THE EUROPEAN NEIGHBOURHOOD POLICY IN PERSPECTIVE: CONTEXT, IMPLEMENTATION AND IMPACT 161 (Richard G. Whitman & Stefan Wolff eds., 2010).

20. *See Statement by Representatives of the OSCE Minsk Group Countries*, ORG. FOR SECURITY & CO-OPERATION IN EUR. (Apr. 5, 2016), http://www.osce.org/mg/231386 [https://perma.cc/R435-DGV2] (discussing the "Line of Contact," referring to Nagorno-Karabakh).

21. *Who We Are*, ORG. FOR SECURITY & CO-OPERATION IN EUR. (2016), http://www.osce.org/mg/108306 [https://perma.cc/WW6B-VCKZ] (last visited Oct. 28, 2016).

22. *See* Gallia Lindenstrauss, *Nagorno-Karabakh: The Frozen Conflict Awakens*, 18 STRATEGIC ASSESSMENT 97, 104 (2015) (noting Armenia's and Azerbaijan's suspicions of western civil society organizations).

fall short of establishing an enforcement or prevention mechanism, the European Neighbourhood Policy remains poorly framed for purposes of conflict management, and memories of the failed United Nations mission to protect civilians in Srebrenica reinforce self-help as the reliable option for both warring factions.[23] A lack of direct engagement between Armenia and Azerbaijan, in part exacerbated by disputes between Yerevan and Baku about involving Karabakhi factions in discussions,[24] accent, almost by default, the informal dispute management option of the Minsk Group.

And yet cross-cutting energy, security, and trade interests among the principals heading up the Minsk Group—the United States, France, and Russia—foster criticisms that the members individually and the forum itself contribute to the impasse[25] while maintaining appearances of "ceremonial routine."[26] Russia, acting separately from the Minsk Group, brokered the ceasefire agreement ending the April 2016 violence, prompting 44 members of the Parliamentary Assembly of the Council of Europe ("PACE") to remind the Minsk Group not to undermine and complicate its own mandate through such strategic circumventions.[27] When PACE considered earlier separate efforts to find a solution to the conflict, the Co-Chairs of the Minsk Group reminded PACE that it "remains the only accepted format for negotiations" and urged PACE not to undermine the Minsk Group's mandate.[28] Criticism of the Minsk Group's professed monopoly over mediation efforts,[29] as well as intramural concerns that Moscow is diplomatically outmaneuvering the other principals,[30] adds layers of complexity to the norm-socializing effects of this soft law forum. Indeed, between 2008 and 2012, Russia organized a dozen meetings between Armenia and

23. Thomas de Waal, *Remaking the Nagorno-Karabakh Peace Process*, 52 SURVIVAL 159, 166–69 (2010).

24. *Id.* at 170–72.

25. *See id.* at 165 (noting that the U.S., France, and Russia may not be impartial in negotiations). *See generally* Sabine Freizer, *Twenty Years After the Nagorny Karabakh Ceasefire: An Opportunity to Move Forward Towards More Inclusive Conflict Resolution*, 1 CAUCASUS SURVEY 109 (2015).

26. Timur Saitov & Gallia Lindenstrauss, *The Ongoing Conflict in Nagorno-Karabakh: Can Iran Succeed Where 'The Minsk Group' Failed?*, ALLIANCE CTR. IRANIAN STUD. (Jul. 17, 2013), http://www.academia.edu/7075663/Gallia_Lindenstrauss_Timur_Saitov_The_Ongoing_Conflict_in_Nagorno-Karabakh_Can_Iran_Succeed_Where_The_Minsk_Group_Failed_Iran_Pulse_Number_59_17_July_2013 [https://perma.cc/UYG6-P2DX].

27. *See Peaceful Resolution of the Nagorno-Karabakh Conflict*, EUR. PARL. DOC. 14030 (2016), (stating that the written declaration commits only signatories and showing that a representative from Minsk Group Co-Chair, Russia, did not sign the declaration).

28. *Press Release by the Co-Chairs of the OSCE Minsk Group, Vienna*, ORG. FOR SECURITY & CO-OPERATION IN EUR. (Jan. 22, 2016), http://www.osce.org/mg/217732 [https://perma.cc/6LTJ-ECMD] (last visited Oct. 28, 2016).

29. *See, e.g.*, Hikmat Hajiyev, *Comments by Hikmat Hajiyev, Spokesperson of the Ministry of Foreign Affairs, to the Press-Release Issued by OSCE's Minsk Group Co-Chairs dated January 22, 2016*, REP. OF AZER. MINISTRY OF FOREIGN AFF. (Jan. 25, 2016), http://www.mfa.gov.az/en/news/909/3733 [https://perma.cc/W2P5-EU8K] (objecting to the Minsk Group Co-Chairs "presenting themselves as a monopolist of the negotiation process").

30. Matthew Bryza, *Putin Fills Another U.S. Leadership Void in Nagorno-Karabakh*, WASH. POST (Apr. 11, 2016), https://www.washingtonpost.com/opinions/nagorno-karabakh-conflict-is-too-dangerous-to-ignore/2016/04/11/1e32fc44-ff23-11e5-9d36-33d198ea26c5_story.html [https://perma.cc/XZF3-F5P5].

Azerbaijan, one of which resulted in the Meiendorf Declaration, which acknowledged the Minsk Group while also seeming to circumvent it.[31]

A substantial debate surrounds the meaning and utility of the soft law concept.[32] Soft law definitions emphasize those nonbinding rules or instruments that contribute to an understanding of legal rules and expectations of future conduct.[33] Soft law institutions present arrangements to which international actors choose to remit substantive and political problems for resolution because, in nuanced ways, they purport to offer superior institutional solutions.[34] This Article problematizes these common understandings of soft law, suggesting that the structure of soft law arrangements may encourage another outcome—stasis, which is an outcome that forestalls resolution where no second-best solution can override a zero-sum outcome. It has been suggested that "Russia has more interest in the conflict than in its resolution,"[35] "the U.S. has little motivating interest in either,"[36] and France, with perceived allegiance to the Armenian diaspora and interests in Azerbaijan's energy resources, has been the least involved of the three in the mediation process.[37] But all principals refuse to give up their special position. Given this mixture of interests, soft law forums—such as the Minsk Group—may protract conflict by monopolizing the process, maintaining the status quo, and servicing, by proxy, the embedded interests of key participants. They may not always provide the superior solutions for which they are purportedly created. But they still remain useful: Prolongation of this conflict, as long as it remains at low intensity, pays dividends to parties using this apparatus of soft law as a placeholder mechanism while maneuvering to increase influence in the region.[38]

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31. *See* Elizabeth Fuller, *Azerbaijan's Foreign Policy and the Nagorno-Karabakh Conflict* 5 (Istituto Affari Internazionali, Working Paper No. 1312, 2013) (noting Russia's two-track engagement on the Karabakh conflict).

32. *See* D. Thürer, *Soft Law, in* IV ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 454 (Rudolf Bernhardt ed., 2000) (concluding the term has no clearly defined content). *See also* László Blutman, *In the Trap of a Legal Metaphor: International Soft Law*, 59 INT'L & COMP. L. Q. 605, 606 (2010) (citing the work of Thürer and Aust and separating the concept of soft law into norms that do not take the shape of a recognized international law, but have legal relevance, and norms that are recognized by international law, but are not enforceable due to their generality).

33. *See, e.g.*, Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 174 (2010) (discussing the majority and minority interpretations of soft law and ultimately prescribing to the doctrinal, nonbinding rules that affect our understanding of the binding legal rules).

34. *See* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421 (2000) (arguing that international actors choose soft forms of legalized governance when doing so leads to superior institutional solutions). *See generally* Dinah L. Shelton, *Introduction: Law, Non-Law, and the Problem of 'Soft Law,' in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton, ed. 2000).

35. I. William Zartman, *Introduction: Nagorno Karaback Report, in* NAGORNO KARABAKH: UNDERSTANDING CONFLICT 2013, at 3 (P. Terrence Hopmann & I William Zartman eds., 2013) [*hereinafter* HOPMANN & ZARTMAN].

36. *Id.*

37. *See* Kaelyn G. Lowmaster & Jonas Brown, *Regaining Momentum: Current Perceptions of the Minsk Group Process and Recommendations for* Reform, *in* HOPMANN & ZARTMAN, *supra* note 35, at 221 (calling for a more engaged EU-representative country as France has, in recent years, been disengaged).

38. *See* Lindenstrauss, *supra* note 22, at 101 (finding that neighboring states and some mediators benefit from the prolonged, but low-intensity, conflict).

However, the situation is more dangerous and less frozen than the 1994 ceasefire agreement suggests.[39] Both the Armenian and Azerbaijan armies now employ heavy weaponry along the Line of Contact.[40] Azerbaijan military upgrades over the past decade have transformed its capabilities, and its military budget far surpasses Armenia's annual expenditure.[41] During the period before 2014, the Minsk Group Co-Chair, Russia, supplied 85 percent of Azerbaijani weapons imports[42] and also sold weapons to its ally Armenia,[43] which, ironically is both a member of Moscow's Collective Security Treaty Organization and its financial analog, the Eurasian Economic Union.[44] Russia has undertaken its own military buildup in the Caucasus, maintaining military bases in Armenia,[45] and patrolling Armenia's eastern closed-border with Turkey.[46] Turkey's tense relations with Russia over Syria that led to Turkey's downing of a Russian warplane over a disputed airspace infraction,[47] reverberates geopolitically in the South Caucasus. Turkey's President Recep Tayyip Erdoğan publicly supported Azerbaijan in the Four-Day War in April 2016, although Turkey abruptly found more common ground with Russia following the failed coup against Erdoğan's regime in July and insinuations of the United States' tacit support for the rebels.[48] Additionally, Western powers have engaged Azerbaijan and its

39. *See* Dov Lynch, *Separatist States and Post-Soviet Conflicts*, 78 INT'L AFF. 831, 835 (2002) (objecting to the conventional and oft-repeated view that Nagorno-Karabakh and other post-Soviet conflicts are frozen conflicts).

40. *See* Shahla Sultanova & Yekaterina Poghosyan, *Neighbourhood Watches as Azerbaijan Arms Up*, INST. FOR WAR & PEACE REPORTING (July 25, 2013), https://iwpr.net/global-voices/neighbourhood-watches-azerbaijan-arms [https://perma.cc/P4RP-TGY9] (discussing the arms build-up on both sides of the conflict).

41. *See id.* (noting that the Azeri military budget alone is twice the size of Armenia's state government budget). *See also* ANDREW C. KUCHINS ET. AL., AZERBAIJAN IN A RECONNECTING EURASIA: FOREIGN ECONOMIC AND SECURITY INTERESTS 7–8 (2016) (noting Azerbaijan's increasing military expenditures and prospects of a shifting and destabilizing balance of military power).

42. *See* PIETER D. WEZEMAN & SIEMON T. WEZEMAN, TRENDS IN INTERNATIONAL ARMS TRANSFERS, 2014, at 7 (2015), http://books.sipri.org/files/FS/SIPRIFS1503.pdf [https://perma.cc/JS2Z-8YHT] (noting that Russia accounted for 85 percent of Azerbaijan's arms imports).

43. *See International Arms Transfers*, STOCKHOLM INT'L PEACE RES. INST., http://www.sipri.org/yearbook/2012/06 [https://perma.cc/32CL-MM4E] (last visited Dec. 15, 2016) (discussing Armenia's overreliance on Russia to supply weapons).

44. Magdalena Grono, *The Shifting Dangers of Nagorno-Karabakh*, INT'L CRISIS GRP. (Feb. 26, 2016), http://blog.crisisgroup.org/europe-central-asia/2016/02/26/the-shifting-dangers-of-nagorno-karabakh/ [https://perma.cc/XT4H-G7H4] (noting that Armenia is both a member of the Collective Security Treaty Organization and the Eurasian Economic Union).

45. *See Russia Strengthens Erebuni Airbase in Armenia With Fighter Jets, Helicopter*, SPUTNIKNEWS (Feb. 20, 2016, 12:08 PM), http://sputniknews.com/russia/201602201035082339-airbase-russia-armenia-helicopters/ [https://perma.cc/DAU5-VCKV] (discussing the two Russian military bases in Armenia, Gyumir and Erebuni, in the modern context).

46. Joshua Kucera, *Russian Soldiers Kill Turkish Shepherd on Armenian Border*, EURASIANET (Aug. 2, 2013, 2:18 PM), http://www.eurasianet.org/node/67340 [https://perma.cc/6G2N-6ND2].

47. *Turkey Shoots Down Russian Warplane on Syria Border*, BBC NEWS (Nov. 24, 2015), http://www.bbc.com/news/world-middle-east-34907983 [https://perma.cc/SZB2-7P52].

48. *Nagorno-Karabakh Clash: Turkey Backs Azeris 'to the End' Against Armenia*, BBC NEWS (Apr. 3, 2016), http://www.bbc.com/news/world-europe-35953358 [https://perma.cc/H8A4-W8KU] (quoting Turkey's President Erdoğan on his support of Azerbaijan during the Four-Day War). For a discussion of the failed coup d'état attempt against Erdoğan's regime and Erdoğan's realpolitik rapprochement with Russia, see Mike Eckel, *Erdoğan Goes To Russia: Turkish Leader Seeks to Mend Fences with Kremlin*, RADIO FREE EUROPE/RADIO LIBERTY (Aug. 8, 2016), http://www.rferl.org/content/russia-turkey-erdogan-

Caspian Sea energy exports through Turkish terminals that bypass Russian control.[49] Iran has repeatedly offered to mediate, an offer viewed by other states as an insinuation of Persian energy and security designs in Azerbaijan.[50] Violent encounters along the disputed Line of Contact produce significant casualties every year,[51] and the April 2016 violence marked coordinated attacks along the entire disputed frontier. The worldwide decline in oil prices has put Azerbaijan's economy at risk, prompting consideration that the April attacks were designed by Azerbaijan to direct domestic attention away from destabilizing internal affairs.[52] Increased frustrations with the Minsk process and the (mis)calculations that Azerbaijan's decade-long armament campaign had resulted in the achievement of military superiority were additional contributing factors.[53] Armenia, now the de facto suzerain over Nagorno-Karabakh and additional lands seized from Azerbaijan before the 1994 ceasefire,[54] capitalizes on the temporal stalemate by pursuing a policy of normalization in order to institutionalize its territorial claim.[55] Yet the decades-long occupation scars Azerbaijani identity, fuels its distrust concerning the Armenian diaspora's penetration

visit-putin-petersburg/27908642.html [https://perma.cc/K9NY-MKXB] (noting views among Turkish authorities that the U.S. "had a hand" in the coup attempt).

49. *See South Caucasus Pipeline*, BP AZERBAIJAN, http://www.bp.com/en_az/caspian/operationsprojects/pipelines/SCP.html [https://perma.cc/3FJJ-VKML] (last visited Oct. 28, 2016) (describing the Baku-Tbilsi-Cehyan pipeline, which is operated by British Petroleum and the State Oil Company of Azerbaijan Republic (SOCAR)); Ilham Shaban, *SOCAR, Total Co-Operation Enters New Stage*, NAT. GAS WORLD (Sep. 29, 2015, 11:54 PM), http://www.naturalgaseurope.com/socar-total-absheron-cooperation-enters-new-stage-25657 [https://perma.cc/A2MN-YXGZ] (discussing the French energy conglomerate, Total, which holds a 40 percent stake in the development of the massive Absheron gas condensate field in the Caspian Sea; an additional 20 percent stake is held by Gaz De France Suez).

50. *See* STEPHEN BLANK, AZERBAIJAN'S SECURITY AND U.S. INTERESTS: TIME FOR A REASSESSMENT 40–44 (2013) (discussing Iran's distrust of and threats against Azerbaijan).

51. *See* Freizer, *supra* note 25, at 2 (noting the frequency and intensity of clashes along the Line of Contact and in places far from the disputed territory).

52. Inside Story, *What Triggered the Conflict in Nagorno-Karabakh?* AL JAZEERA 7:22 (Apr. 3, 2016, 9:17 PM) (opinion of Daniel Hamilton), http://www.aljazeera.com/programmes/insidestory/2016/04/triggered-conflict-nagorno-karabakh-160403183955173.html [https://perma.cc/5SF5-WLLF]. *See* KUCHINS ET. AL., *supra* note 41, at 7 (noting that cross-border incidents precipitated the Azerbaijani offensive).

53. For recognition of Azerbaijani frustration with the Minsk Group process, see Confidential U.S. Cable from [Derse], *Forum on Karabakh Advocates Setting a Deadline for Minsk Group Peace Process*, WIKILEAKS (Sept. 4, 2007, 12:59 PM), https://wikileaks.org/plusd/cables/07BAKU1099_a.html [https://perma.cc/9XLV-XXQQ] (discussing the problematic creation of the nascent Forum on Karabakh, which advocates retaking Nagorno-Karabakh, as a counter to the Minsk Group). *See also* Confidential U.S. Diplomatic Cable from [Derse], *Azerbaijan's NK UNGA Resolution Underscores Distrust of Minsk Group Process*, WIKILEAKS para. 11 (Mar. 19, 2008, 1:44 PM), https://wikileaks.org/plusd/cables/08BAKU275_a.html [https://perma.cc/B67T-MQCC] (citing "[g]rowing Frustration with the Minsk Group").

54. *See* Chiragov and Others v. Armenia, App. No. 13216/05, Eur. Ct. H.R. para. 186 (2015) (concluding that the Republic of Armenia "exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin"). *See also* Razmik Panossian, *The Irony of Nagorno-Karabakh: Formal Institutions Versus Informal Politics*, *in* ETHNICITY AND TERRITORY IN THE FORMER SOVIET UNION: REGIONS IN CONFLICT 143, 143 (James Hughes & Gwendolyn Sasse eds., 2002) (noting that although wholly dependent on Armenia, a case has been made that Karabakh's elites "have come to control key elements" of Armenia's national political agenda).

55. *Cf.* Confidential U.S. Diplomatic Cable from U.S. Ambassador Marie L. Yovanovitch, *Nagorno-Karabakh: Forces Align Behind the Status Quo* para. 4 WIKILEAKS (Sept. 23, 2009), https://wikileaks.org/plusd/cables/09YEREVAN662_a.html [https://perma.cc/K93N-9WWB] (summarizing views that Armenia is uninterested in a negotiated settlement because "[a]s the winners of the [1994] war, [Armenia] hold[s] the upper hand [and sees] little reason for flexibility").

of the Minsk Group countries,[56] presents additional opportunities for Iran, with its huge ethnic Azeri minority population,[57] and contributes to Azerbaijan's isolation of Armenia (in conjunction with Turkey), which has had punishing effects on Armenia's landlocked economy[58] and population.[59] Nagorno-Karabakh presents a problem of overlapping neighborhoods involving historical, regional, and international powers, making it a locus of resolute conflict.

To discuss the soft law predicament of the Minsk Group, this Article will first place the conflict in historical context. Tethering the normative discussion of soft law and its development to its historical context provides a necessary mooring line to guard against doctrinal drift, as well as a better understanding of the factual circumstances, akin to *effectivités* in relation to *uti possidetis*, that inform of disputed positions. The post-colonial borders of Nagorno-Karabakh are not so much disputed as to whether Armenia or Azerbaijan presents better title to the enclave. But the turbulent history of the disputed territory conditions the workings of international law in the arena of soft law. Following a review of this context, this Article will discuss the ontological development of soft law and diachronic interpretations of sovereignty that began to inform international legal thinking in the late 19th and early 20th centuries. These sociological additives to the study of international law, not wholly received as beneficial, nevertheless had a profound effect on international law and the international law-making process, particularly as pathways to norm development began to find expression other than through the well-charted course presented by multilateralism. In this context, the appropriateness of the Minsk Group process will be explored, followed by conclusions that mute the significance of soft law forums, particularly when powerful states use those forums to pursue parochial interests rather than the superior solutions thought to result through intentional recourse to non-binding dispute resolution instruments.

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56. *See* Fariz Ismailzade, *Azerbaijan's Relations with Minsk Group Hit New Low*, JAMESTOWN FOUND. (Mar. 26, 2008, 4:00 AM), http://www.jamestown.org/program/azerbaijans-relations-with-Minsk-Group-hit-new-low/ [https://perma.cc/TH5K-Y96S] (discussing Azerbaijani distrust of the Minsk Group in negotiations over occupied territories).

57. *See Iran Offers to Mediate Between Armenia, Azerbaijan*, IRAN FRONT PAGE (Apr. 5, 2016), http://ifpnews.com/news/politics/security/2016/04/iran-offers-to-mediate-between-armenia-azerbaijan [https://perma.cc/4UEC-7BW2] (discussing Iranian willingness to play a role in settlement of crisis). *See also* Saitov & Lindenstrauss, *supra* note 26 (noting that Azerbaijanis are an ethnic minority in Iran); Bijan DaBell, *Iran Minorities 2: Ethnic Diversity*, U.S. INST. OF PEACE (Sept. 3, 2013), http://iranprimer.usip.org/blog/2013/sep/03/iran-minorities-2-ethnic-diversity [https://perma.cc/FY6J-LWD6] (listing that between 12 and 20 million ethnic Azerbaijanis live in Iran).

58. *See* Confidential U.S. Diplomatic cable from [Wilson], *Turkey/Armenia: Armenia Coming out on Economic Development; Nagorno-Karabakh Going Nowhere*41, WIKILEAKS paras. 1–2 (Sept. 21, 2006), https://wikileaks.org/plusd/cables/06ANKARA5515_a.html [https://perma.cc/9BEB-944E] (summarizing Turkish Ambassador Karslioglu's opinion that Armenia is losing out economically because of its isolated geographic and economic station).

59. *See* Mushvig Mehdiyev, *Natural Population Growth Declining in Armenia*, AZERNEWS (Nov. 17, 2014, 6:05 PM), http://www.azernews.az/aggression/73346.html [https://perma.cc/2UUM-A3VS] (noting that approximately 2.8 million people live in Armenia, down from 3.5 million during the Soviet period).

I. A BRIEF HISTORY OF THE REGION

The Transcaucasus is an historical hub of commingled biota, culture, and geopolitical competition. Its location between Asia and Europe has made this rugged southern region a land bridge connecting the historically crisscrossing paths of Persian, Roman, Byzantine, Mongolian, Arab, Ottoman, British, and Russian empires.[60] Overlapping imperial life cycles contributed to multiple destabilizing calamities, which spread peoples and created numerous pockets of homogeneous and heterogeneous ethnicity over the centuries.[61] Diasporas mark an important history of the South Caucasus region. Perhaps no diaspora has been more geographically diffuse or multi-generational than the waves of migrations that make up the Armenian Diaspora.[62]

Nagorno-Karabakh is a mountainous, 1,700 square mile enclave[63] located inside the South Caucasus country of Azerbaijan. Armenia lies five miles west at its nearest point;[64] Iran is less than fifteen miles to the south.[65] Armenians have maintained a majority population in the territory for centuries.[66] Their ethnic identity endures through a connection to Christianity, established in the early fourth century,[67] and the crystallization of the Armenian alphabet, dating back to the fifth century.[68] Arab conquest in the early eighth century introduced Islam, and epochal changes brought the region under the rule of Caucasian Albania (9–10th century), Seljuk Turks (11th century), and Mongols (early 13th century), which named the land "Karabakh,"[69] a combination of Turkish and Persian linguistic influences[70] that evolved into the Azerbaijani language.[71] Persians and Turks warred over the region in the seventeenth

60. *See generally* Vahid Rashidvash, *The Caucasus, Its Peoples, and Its History*, 1 INT'L RES. J. INTERDISCIPLINARY & MULTIDISCIPLINARY STUD. 30 (2015); Besik Urigashvili, *The Transcaucasus: Blood Ties*, 50 BULL. OF THE ATOMIC SCIENTISTS 18 (1994).

61. *See* HEIKO KRÜGER, THE NAGORNO-KARABAKH CONFLICT: A LEGAL ANALYSIS 1–2 (2010) (noting the Caucasus is now home to 50 different ethnic groups).

62. *See* DENISE AGHANIAN, THE ARMENIAN DIASPORA: COHESION AND FRACTURE 4 (2007) (discussing the demographics that made up the migration waves of the Armenian Diaspora).

63. *Nagorno-Karabakh*, BRITANNICA (Apr. 25, 2013), http://global.britannica.com/place/Nagorno-Karabakh [https://perma.cc/YLH9-VKND]. *See* Lionel Beehner, *Nagorno-Karabakh: The Crisis in the Caucasus*, COUNCIL ON FOREIGN REL. (Nov. 3, 2005), http://www.cfr.org/armenia/nagorno-karabakh-crisis-caucasus/p9148#p0 [https://perma.cc/AKK6-W2GF] (noting that the enclave is about the size of Delaware).

64. *See* CONCILIATION RESOURCES, NEGOTIATING ACCESS AND SECURITY: SCENARIOS FOR CORRIDORS AND MOVEMENT IN LACHIN AND BEYOND 4 (2015), http://www.epnk.org/sites/default/files/page-files/Lachin_Discussion_Paper_Web_English.pdf [https://perma.cc/ZS9G-ERZ4] (noting nearness of Armenia and Azerbaijan, as connected by the strategic "Lachin Corridor").

65. AGHANIAN, *supra* note 62, at 110.

66. *See* MICHAEL P. CROISSANT, THE ARMENIA-AZERBAIJAN CONFLICT: CAUSES AND IMPLICATIONS 10–11 (1998) (describing the Armenian presence in the area from the 7th century B.C.E. onwards).

67. *See* SIMON PAYASLIAN, THE HISTORY OF ARMENIA: FROM THE ORIGINS TO THE PRESENT 35 (2007) (discussing King Trdat's conversion to Christianity in 301 or 314 C.E.).

68. *See* GEORGE A. BOURNOUTIAN, A CONCISE HISTORY OF THE ARMENIAN PEOPLE 54–55 (2006) (discussing development of the Armenian alphabet).

69. TIM POTIER, CONFLICT IN NAGORNO-KARABAKH, ABKHAZIA AND SOUTH OSSETIA: A LEGAL APPRAISAL 1 (2001).

70. *See* SVANTE E. CORNELL, THE NAGORNO-KARABAKH CONFLICT 3 (1999) (noting that the Russification of the region added the word "nagorno," meaning "mountainous" in Russian).

71. TADEUSZ SWIETOCHOWSKI, RUSSIAN AZERBAIJAN, 1905–1920: THE SHAPING OF NATIONAL IDENTITY IN A MUSLIM COMMUNITY 1 (1985).

and eighteenth centuries.[72] In the early nineteenth century, the Russian empire expanded into the region.[73]

Following the first Russo-Persian War of 1804–13, a mass influx of Armenians from neighboring territories took place, along with an exodus of Azeris, Kurds, Lezgins, and nomads.[74] Azerbaijanis identify this displacement as a root cause of the enduring conflict.[75] The war incorporated eastern Transcaucasia—Armenia and northern Azerbaijan—into the Russian empire.[76] Russian colonial rule fitfully, but gradually, replaced kinship-based khanates and sultanates across the southern region with viceroys, who attempted to install uniform civil administration.[77] Russia's reorganization of Iran's former Transcaucasian possessions dissolved five long-established Armenian highland communities, a consolidation that later would become a rallying cry for Armenian nationalism in defense of the remaining autonomy of the Nagorno-Karabakh region.[78] Economic and social divisions grew along class lines during Tsarist rule, with disproportionate benefits advancing Armenian entrepreneurial and merchant interests through transportation networks.[79] Russian economic penetration connected western Armenia and the highlands of Karabakh with the eastern plains of Azerbaijan, leading to Russia and the oil-rich Baku region on the Caspian Sea.[80] More rural and less-favored Azeris began embracing pan-Turkism, and an entrenched and semi-feudal landed aristocracy fueled Azeri nationalism in the region.[81] Faced with the disintegration of their own rule in the

72. *See generally Background Paper on the Nagorno-Karabakh Conflict*, CONSEIL DE L'EUROPE (2003), http://www.coe.int/t/f/com/dossiers/evenements/2003-04-(discussing issues with Persian domination over the area).

73. *See* RAZMIK PANOSSIAN, THE ARMENIANS: FROM KINGS AND PRIESTS TO MERCHANTS AND COMMISSARS 119–27 (2006) (discussing the Russian conquest of eastern Armenia during the time of Peter the Great, Catherine the Great, and the success against the Persians following the Russian-Persian War of 1804–1813 with the treaty of Turkmanchai). *See also* BOURNOUTIAN, *supra* note 68, at 240–41 (stating that "by 1805 half of eastern Armenia was in Russian hands").

74. *See* POTIER, *supra* note 69, at 1–2.

75. Murad Gassanly, *Nagorno-Karabakh: Contested Narratives*, AL JAZEERA (Apr. 6, 2016), http://www.aljazeera.com/indepth/opinion/2016/04/nagorno-karabakh-contested-narratives-160405132828126.html [https://perma.cc/GMS7-WLQG].

76. *See* Alexander Mikaberidze, *Russo-Iranian War (1804–1813), in* 2 RUSSIA AT WAR: FROM THE MONGOL CONQUEST TO AFGHANISTAN, CHECHNYA AND BEYOND 728, 728–30 (Timothy C. Dowling ed., 2014) (discussing Russia's victory and extension of authority over Karbagh, Shakki, and Shirvan, as well as Russia's claims to all territories north of the Aras River, including Dahestan, Georgia, and parts of Armenia and Azerbaijan).

77. *See* SWIETOCHOWSKI, *supra* note 71, at 10–17 (discussing political development of Azerbaijan under Russian imperial rule); MICHAEL KHODARKOVSKY, BITTER CHOICES: LOYALTY AND BETRAYAL IN THE RUSSIAN CONQUEST OF THE NORTH CAUCASUS 17–21 (2011) (discussing Russian methods of conquest and colonization).

78. CROISSANT, *supra* note 66, at 13. *See* CHARLOTTE HILLE, STATE BUILDING AND CONFLICT RESOLUTION IN THE CAUCASUS 65 (2010) (noting that Russian administration of the Karabakh region took the form of a khanate (1805); a military province (1822); an Autonomous Oblast as part of Shusha District in the Caspian Oblast (1840); and later became part of Shamakha Province (1846), renamed Baku Province (1859), followed by its division between Shusha and Zangezur districts with the formation of Elisavetpol Province (1868)).

79. *See* CROISSANT, *supra* note 66, at 12 (contrasting semi-feudal and predominately pastoral Azeri class structure with Armenian interests).

80. *Id.*

81. *See id* at 13 (noting how Russian expansion in the region led to a rise in Azeri nationalism).

Balkans, the Middle East, and Africa, the Ottomans increasingly became concerned with the Armenian national and political awakening, resulting in pogroms against Armenians in 1895–96, 1909, and the 1915 genocide,[82] involving the mass deportation and deaths of more than one million Armenians.[83] The enmity between these indigenous populations, stoked by clashing imperial interests over the entire nineteenth century, created an intractable legal and geopolitical legacy. Now, disputes over the tiny Nagorno-Karabakh region implicate Armenia, Azerbaijan, diasporic communities associated with both countries (principally in the United States and France), the European Union, Russia, Iran, Turkey, and Nagorno-Karabakh's NATO allies, particularly the United States.

II. THE FIRST ARMENIAN REPUBLIC AND THE FIRST ARMENIAN ASSEMBLY OF NAGORNO-KARABAKH

Following the Russian Revolution and collapse of Tsarist Transcaucasian rule in 1917, many survivors of the genocide returned, bolstered by Allied Power promises to establish an Armenian state.[84] Three South Caucasian nations—Armenia, Azerbaijan, and Georgia—declared independence in May 1918,[85] only to be Sovietized two years later.[86] The brief imperial retreat produced a power vacuum, facilitated in part by the disinclination of the Allied Powers to occupy interior provinces of the South Caucasus region.[87] The void allowed the Ottomans entry into eastern Armenia,[88] prompting Armenian revenge attacks against Azerbaijanis in Baku.[89] Between fifteen and twenty thousand Azerbaijani civilians were murdered, imprinting indelibly the event onto Azerbaijan's national consciousness.[90] In August 1918, the First Armenian Assembly

82. BOURNOUTIAN, *supra* note 68, at 268–69, 271–79. *See* PANOSSIAN, *supra* note 73, at 220, 224 (noting that an estimated 100,000 to 200,000 Armenians died in Turkish attacks in 1895–1896, and 20,000 Armenians died in a massacre in Cilicia in 1909).

83. *See* BOURNOUTIAN, *supra* note 68, at 276–79 (discussing the disputed death toll and Turkish denials of genocide). *See generally* Sir Martin Gilbert, *Twentieth-Century Genocides, in* AMERICA AND THE ARMENIAN GENOCIDE OF 1915 (Jay Winter ed., 2003); Christopher J. Walker, *World War I and the Armenian Genocide, in* 2 THE ARMENIAN PEOPLE FROM ANCIENT TO MODERN TIMES, FOREIGN DOMINION TO STATEHOOD: THE FIFTEENTH CENTURY TO THE TWENTIETH CENTURY 239–274 (Richard G. Hovannisian ed., 1997).

84. *See* R. Hrair Dekmejian, *The Armenian Diaspora, in* 2 THE ARMENIAN PEOPLE FROM ANCIENT TO MODERN TIMES, FOREIGN DOMINION TO STATEHOOD: FIFTEENTH CENTURY TO THE TWENTIETH CENTURY, *supra* note 83, at 413–14 ("The defeat of Ottoman Turkey in October 1918 and the promises of the Allied Powers to establish an Armenian state prompted the return home of many survivors of the 1915 massacres.").

85. *See* Svante E. Cornell, *Autonomy as a Source of Conflict: Caucasian Conflicts in Theoretical Perspective*, 54 WORLD POL. 245, 269 (2002) (noting the short-lived Armenian, Georgian, and Azerbaijani Democratic Republics of 1918–1920).

86. *See* ALEC NOVE & J.A. NEWTH, THE SOVIET MIDDLE EAST: A MODEL FOR DEVELOPMENT? 21 (1967) (noting the establishment of Soviet governments in Azerbaijan and Armenia in April and December 1920, followed by Georgia in February 1921).

87. *See* Dekmejian, *supra* note 84, at 414 (noting that "the failure of the Allies to occupy the interior provinces of the empire prevented the demobilization of a substantial portion of paramilitary and regular military units, some of which continued to victimize the remnants of the Armenian population").

88. CROISSANT, *supra* note 66, at 13–14.

89. *See* SWIETOCHOWSKI, *supra* note 71, at 135 (noting that the Armenian nationalists were supported by the Bolshevik contingent that remained in Baku to protect oil interests).

90. *See id* (explaining that due to this mass murder of Azerbaijani civilians, the "bloody march" became a powerful trigger for "solidifying the consciousness of national solidarity").

of Nagorno-Karabakh formed, establishing the Karabakh National Council, which declared the region self-governing.[91] But a pan-Turkic "Army of Islam" already had penetrated Nagorno-Karabakh.[92] In "the bitterest blow"[93] to Armenia, the British Mission at Yerevan, with a garrison stationed at Baku,[94] sided with Azerbaijan's jurisdictional claim over Karabakh.[95] Deprived of key political support, the encircled Karabakh National Assembly agreed to provisional concessions with neighboring Azerbaijan, which were signed in August 1919.[96] The agreement intended to forestall further eruptions over Karabakh[97] and two other territorial flashpoints—Zangezur and Nakhichevan.[98] But a downward spiral of violations and reprisals resulted in an Azerbaijani attack against Karabakh's historical capital of Shushi,[99] resulting in twenty thousand Armenian deaths.[100] The Ninth Karabakh Assembly nullified the treaty by pronouncing a union with Armenia in April 1920.[101]

The defeat of the Central Powers put the question of the region's status on the agenda at the 1919 Paris Peace Conference.[102] Despite considerable Allied Power sympathy for the Armenian position and some discussion of Armenia, or possibly Armenia and Cilicia, as an American protectorate, the issue was not prioritized, and Armenia left the conference with unresolved territorial issues that it had hoped to advance.[103] In 1920, the Soviets absorbed Armenia, Azerbaijan, and Georgia, ending

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91. Claude Mutafian, *Karabagh in the Twentieth Century, in* THE CAUCASIAN KNOT: THE HISTORY AND GEO-POLITICS OF NAGORNO-KARABAGH 109, 115–16 (Levon Chorbajian, Patrick Donabedian & Claude Mutafian, eds., 1994); CHRISTOPHER J. WALKER, ARMENIA AND KARABAGH: THE STRUGGLE FOR UNITY 91 (1991).

92. CROISSANT, *supra* note 66, at 15.

93. *See* WALKER, *supra* note 91, at 97 (quoting Col. J. C. Plowden, the 1919 British military representative in Yerevan) (explaining that "[I]t is no exaggeration to say that the present . . . problem of Karabagh is due largely to British diplomacy in the first half of the year 1919, the effect of which was to prevent Mountainous Karabagh from being permanently attached to Armenia.").

94. SWIETOCHOWSKI, *supra* note 71, at 143 (explaining that the British maintained a garrison in Baku where they imposed martial law, controlling the railways and, thus, oil exports).

95. Balance of power politics (*vis-à-vis* pan-Turkism and the Bolsheviks, who maintained a presence in Baku notwithstanding withdrawal elsewhere in Transcaucasia after the fall of the Romanovs), oil, and maintaining trade routes to India explain why Britain, soon to retreat from the Caucasus in 1919, curried favor with the Azerbaijanis. *See* Mutafian, *supra* note 91, at 118–24 (describing the British involvement with Azerbaijan in Baku and surrounding disputed territories); WALKER, *supra* note 91, at 93 (describing British assistance to the Azeris).

96. *See* OHANNES GEUKJIAN, POST-SOVIET POLITICS: ETHNICITY, NATIONALISM AND CONFLICT IN THE SOUTH CAUCASUS: NAGORNO-KARABAKH AND THE LEGACY OF SOVIET NATIONALITIES POLICY 58–59 (2012) (summarizing the Assembly's provisional concessions with Azerbaijan made on August 22, 1919).

97. *See* Hovannisian, *The Republic of Armenia, in* 2 THE ARMENIAN PEOPLE FROM ANCIENT TO MODERN TIMES, *supra* note 83, at 303, 318 (detailing how the provisional concessions were made in view of the massacre and razing of four Armenian villages in June 1919).

98. *See* EMIL SOULEIMANOV, UNDERSTANDING ETHNOPOLITICAL CONFLICT: KARABAKH, SOUTH OSSETIA AND ABKHAZIA RECONSIDERED 100 (2013) (discussing problems in the regions of Nakhichevan, Zangezur, and Karabakh).

99. Hovannisian, *supra* note 97, at 318.

100. *See* NIKOLAY HOVHANNISYAN, THE KARABAKH PROBLEM: THE THORNY ROAD TO FREEDOM AND INDEPENDENCE 26 (2nd ed. 2004) (discussing the siege of Shushi).

101. GEUKJIAN, *supra* note 96, at 63.

102. *See* Hovannisian, *supra* note 97, at 319 (noting that after the defeat of the Central Powers, world leaders gathered at the Paris Peace Conference, at which the Armenians were to present their case).

103. *Id.* at 319–21.

the short-lived republics in Armenia and Nagorno-Karabakh.[104] "Henceforth eastern Armenians had a Soviet republic as their state and western Armenian existence was confined to the diaspora."[105]

III. SOVIET RULE: 1920–1988

Under Joseph Stalin, then the Soviet Commissar of Nationalities, title to Karabakh and the two other contested regions, Nakhichevan and Zangezur, transferred to Armenia, but Moscow reversed that decision several days later in pursuit of a Soviet-Turkish Friendship Treaty (the Treaty of Moscow),[106] placing Karabakh in the control of the newly created Azerbaijan Soviet Socialist Republic in July 1921.[107] At the same time, the Azeri enclave of Nakhichevan, situated on the border between Armenia and Turkey, became part of Azerbaijan by the Treaty of Kars, signed between Turkey and Russia in 1921.[108] Thus, an Armenian enclave within Azerbaijan and an Azerbaijani enclave bordering Turkey and Armenia were born, but both were under the authority of the Soviet Azerbaijan. Stalin's theoretical solution to the nationalities question gerrymandered Transcaucasia[109] in an attempt to balance regional autonomy and national rule.[110] In July 1923, the Soviets declared Nagorno-Karabakh an Autonomous Region (*oblast*) within Azerbaijan,[111] but separated the northern tip of the enclave (the Shaumyan district) from the newly created Autonomous Region, effectively integrating the northern tip within the Soviet Socialist Republic (SSR) of Azerbaijan.[112]

After WWII, Armenia fruitlessly petitioned Moscow to redraw the borders of the South Caucasus to connect the Nagorno-Karabakh Autonomous Oblast to Armenia.[113] Mikhail Gorbachev's twin policies of *perestroika* (restructuring) and *glasnost* (openness) stirred nationalistic and diasporic Armenian calls for unification.[114] In 1988, dramatic street protests turned violent against Armenians in the third largest city of Azerbaijan, Sumgait.[115] The Supreme Soviet also affirmed the decision of the

104. *See* ALFRED J. RIEBER, STALIN AND THE STRUGGLE FOR SUPREMACY IN EURASIA 58–65 (2015) (discussing the Soviet absorption of the Caucasus).

105. PANOSSIAN, *supra* note 73, at 388.

106. *See* SOULEIMANOV, *supra* note 98, at 100–01 (describing the setting in which the Treaty of Moscow was written).

107. PANOSSIAN, *supra* note 73, at 250.

108. *See* J.H.M. Cornwall, *The Russo-Turkish Boundary and the Territory of Nakhchivan*, 61 GEOGRAPHICAL J. 445 (1923) (describing the Treaty of Kars).

109. PUBLIC INT'L LAW & POLICY GRP. & NEW ENGLAND CTR. FOR INT'L LAW & POLICY, THE NAGORNO-KARABAGH CRISIS: A BLUEPRINT FOR RESOLUTION 1, 4 (2000), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2033347 [https://perma.cc/4VG8-HVTG].

110. *See* JOSEF STALIN, MARXISM AND THE NATIONAL QUESTION (1913), *reprinted in* THE ESSENTIAL STALIN: MAJOR THEORETICAL WRITINGS 1905–1932, at 80 (Bruce Franklin ed., 1972) (naming regional autonomy as "an essential element in the solution of the national question").

111. PANOSSIAN, *supra* note 73, at 250.

112. AGHANIAN, *supra* note 62, at 110.

113. *See* CROISSANT, *supra* note 66, at 26 (noting seventy-five thousand Armenian signatures on the petition to reattach the Karabakh region to Socialist Armenia).

114. See AGHANIAN, *supra* note 62, at 110–11 (noting the public street protest of one million Armenians).

115. *See* STUART J. KAUFMAN, MODERN HATREDS: THE SYMBOLIC POLITICS OF ETHNIC WAR 63–67 (2001) (discussing the Sumgait street violence).

Azerbaijani SSR to deny the unification application of the Nagorno-Karabakh Autonomous Oblast Assembly, on grounds that Article 78 of the Soviet Constitution prohibited territorial changes to a Union republic without its consent.[116]

In 1988, a bloody civil war broke out. Twenty to thirty thousand people died.[117] Karabakh and the bordering Shaumyan district joined and declared themselves a republic in late 1991, following the break-up of the Soviet Union.[118] A full-scale war ensued with Azerbaijan. More than one million persons were displaced on both sides.[119] Ethnic Armenians seized the Lachin corridor connecting Armenia to Nagorno-Karabakh, and seven Azerbaijani regions outside the Nagorno-Karabakh Autonomous Region—territory adjacent to Armenia and amounting to almost fourteen percent of Azerbaijan's internationally recognized territory.[120] Attempts to reincorporate the Shaumyan district failed. Russia brokered a 1994 truce, unaccompanied by a peace agreement, effectively halting the conflict along contours currently maintained.[121] Despite calls from the United Nations Security Council, the General Assembly, and the European Parliament for an immediate withdrawal from occupied territories,[122] the Nagorno-Karabakh Republic is now a de facto part of Armenia, although its status has not been recognized elsewhere, not even in Armenia.[123]

116. *See* CROISSANT, *supra* note 66, at 28 (quoting the Soviet Constitution: "The territory of a union republic may not be altered without its consent").

117. *Nagorno-Karabakh Profile*, BBC NEWS (Apr. 6, 2016), http://www.bbc.com/news/world-europe-18270325 [https://perma.cc/8E7G-SPKE].

118. *Declaration of Independence*, OFFICE OF THE NAGORNO-KARABAKH REP. (Jan. 6, 1992), http://www.nkrusa.org/nk_conflict/declaration_independence.shtml [https://perma.cc/NAV5-Q7M8]; *See Armenian Enclave Declares Itself a Republic in a Bid for Separation*, L.A. TIMES (Sept. 3, 1991), http://articles.latimes.com/1991-09-03/news/mn-2067_1_armenian-enclave [https://perma.cc/G7ER-9YL8] (reporting on the governing councils of Nagorno-Karabakh and of Shaumyan's declaration of the Nagorno-Karabakh Republic).

119. de Waal, *supra* note 23, at 159.

120. *See id.* at 159–61 (describing the seizing of areas in the region and then explaining the inclusion of the seven Azerbaijani regions).

121. Sonni Efron, *Armenia, Azerbaijan Agree to a Cease-Fire: Caucasus: Moscow Brokers Truce in Former Soviet Union's Longest-Running Conflict. But Fighting Continues*, L.A. TIMES (May 17, 1994), http://articles.latimes.com/1994-05-17/news/mn-58811_1_soviet-union [https://perma.cc/3MY3-52P3]; Sabine Freizer, *A Twenty-Year Truce has Brought No Peace in Nagorno-Karabakh*, ATL. COUNCIL (May 12, 2014), http://www.atlanticcouncil.org/publications/articles/a-twenty-year-truce-has-brought-no-peace-in-nagorno-karabakh [https://perma.cc/8MF4-V655].

122. S.C. Res. 822 para. 1 (Apr. 30, 1993); S.C. Res. 853 para. 3 (July 29, 1993); U.N. S.C. Res. 874 para. 5 (Oct. 14, 1993); S.C. Res. 884 para. 4 (Nov. 12, 1993); G.A. Res. 62/243 para. 2 (Mar. 14, 2008); The Need for an EU Strategy for the South Caucasus, EUR. PARL. DOC. P7_TA(2010)0193 (May 20, 2010); Negotiations of the EU-Armenia Association Agreement, EUR. PARL. DOC. P7_TA(2012)0128 (Apr.18, 2012).

123. *See* Najiba Mustafayeva, *Why Armenia Wants to Recognize Nagorno-Karabakh*, NAT'L INT. (May 19, 2016), http://nationalinterest.org/blog/the-buzz/why-armenia-wants-recognize-nagorno-karabakh-16278 [https://perma.cc/4U3B-H84C] (discussing complications associated with some legislative calls in Armenia to recognize diplomatically Nagorno-Karabakh).

IV. *UBI SOCIETAS, IBI JUS*: THE SOFT LAW CONTROVERSY IN INTERNATIONAL LAW

The historical framework of international law allowed Great Powers the ability to project their values on a global scale. Territorial integrity and state-centricity became the hallmark features of the Westphalian system,[124] which maintained tight control over international law-making given the system's documented intimacy with the powerful.[125] Criticisms of the Westphalian system emphasize the diachronic nature of sovereignty[126]—the ways it has changed over time—and the permeability of sovereignty's container of domestic jurisdiction.[127] These criticisms emphasize new transformational constructions of power and authority in the globalizing world. Constructivists and liberal cosmopolitans emphasize sovereignty's transformation, historically misconstrued as a spontaneous yet stable creation of the peace treaties in 1648.[128] From these perspectives, sovereignty's political power has been—and will continue to be—"repositioned, recontextualized and . . . transformed by the growing importance of other less territorially based power systems."[129] These reconfigurations involve the element of status in interstate relations—a type rooted in the Roman law concepts of grandure (*majestas*) and father of the household (*patria potestas*),[130] but distinct from military capability or that status derived from a classically construed will to power (*animus dominandi*).[131] The concept of status now attracts considerable attention as a structural component of power analysis,[132] a component separate from venues of multilateralism.

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124. *See, e.g.*, BENNO TESCHKE, THE MYTH OF 1648: CLASS, GEOPOLITICS, AND THE MAKING OF MODERN INTERNATIONAL RELATIONS 233–36 (2003) (discussing dynastic actors using aggressive foreign policies to maximize territory).

125. SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY 111 (2011).

126. Thomas J. Biersteker & Cynthia Weber, *The Social Construction of State Sovereignty*, *in* STATE SOVEREIGNTY AS SOCIAL CONSTRUCT 1, 3 (Thomas J. Biersteker & Cynthia Weber eds., 1996). *See* Gene M. Lyons & Michael Mastanduno, *Introduction*, *in* BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION 2–5 (Gene M. Lyons & Michael Mastanduno eds., 1995) (emphasizing sovereignty is not absolute and governments must balance the needs of internal governance with the needs of an interdependent world). *See generally* JENS BARTELSON, A GENEALOGY OF SOVEREIGNTY (1995).

127. *See* Gene M. Lyons & Michael Mastanduno, *Introduction*, *in* BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION, *supra* note 126, at 15–17.

128. *See* DEREK CROXTON & ANUSCHKA TISCHER, THE PEACE OF WESTPHALIA: A HISTORICAL DICTIONARY xix–xx, 211 (2001) (stating that the Peace of Westphalia, ending the Thirty Years' War, is comprised of two treaties signed in Münster and Osnabrück in the region of Westphalia).

129. DAVID HELD ET. AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE 447 (1999).

130. *See* JEAN BETHKE ELSHTAIN, SOVEREIGNTY: GOD, STATE, AND SELF 54 (2008) (explaining that state sovereignty can be compared to the traditional power structure of a Roman household).

131. *See* HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 97–98 (7th ed., 1993) (stating that the natural desire for one man to exercise power over another is "a phenomenon to be found whenever human beings live in social contact with one another," but in large nations, few get to experience that power and "find vicarious satisfaction in identification with the power drives of the nation"); Arash Abizadeh, *Hobbes on the Causes of War: A Disagreement Theory*, 105 AM. POL. SCI. REV. 298, 308 (2011) (contesting Morgenthau and the classical realist construction of human nature by pointing out that the urge to dominate—*animus dominandi*—was better expressed by Hobbes' emphasis on human vainglorious frailty (attacks against status) rather than innate aggression).

132. *See* YONG DENG, CHINA'S STRUGGLE FOR STATUS: THE REALIGNMENT OF INTERNATIONAL RELATIONS 8 (2008) (stating that "analysts alike have, since the mid-1990s, evoked 'international status' (*Guoji Diwei*) as if it were the most desirable value, the one that leads to power"); Andrew Hurrell,

Peter van Ham argued that a Great Power estrangement has taken place from the multilateral treaty-making process.[133] This estrangement reveals a postmodern Great Power skepticism about multilateralism, which now privileges flexibility over solidarity and effectiveness over inclusiveness. According to van Ham, multilateralism has lost its force-multiplier effect and "ad hocery seems to have become the new standard."[134] This new standard avoids asymmetries posed by multilateral negotiation regimes[135] and inverts the traditional multilateral rule-making format, which formerly conformed or assigned emerging problems to extant organizations. Instead, "diplomatic coalitions of the willing" form as third-party mechanisms for peacemaking.[136] Troikas, Wise Men, the G8, IGAD, the Arctic 5, the Six-Party Talks, the United Nations Group of Friends, and the subject of this Article—OSCE's Minsk Group—are status-conferring arrangements of "power beneath the surface" of the Westphalian sovereignty system, which represent new forms of social power that have emerged from the "cavities of multilateralism;" they present innovative, flexible, hybrid, and mission-centered coalitions.[137] While they lack institutional fixity and transparency, they maintain legitimacy through effectiveness and credentialed association with a parent organization, or sometimes through a triadic system of discourse offered by think tanks, academia, or foreign-policy actors.[138] Construed as a form of normative standard-setting, status-conferring arrangements extend the understanding of soft power by involving discursive power, advocacy, and agenda-setting to soft power's core concentrations on attraction and persuasion.[139]

The concept of soft law traces to the conceptual history of jurisprudence (*Begriffsjurisprudenz*) and the sociology of law developed in the second part of the nineteenth century and the first quarter of the twentieth century.[140] Soft law directed

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Narratives of Emergence: Rising Powers and the End of the Third World? 33 REVISTA DE ECONOMIA POLITICA 203, 215 (2013) (describing how status has become a "central element of Third World foreign policies"); Reinhard Wolf, *Respect and Disrespect in International Politics: The Significance of Status Recognition*, 3 INT'L THEORY 105, 106–07 (2011) (proposing that a nation's actions are intimately linked with its status, and disrespect of this status "tends to arouse anger and a self-protective urge to re-establish one's 'rightful position.'"). *See generally* Status in World Politics (T.V. Paul et al. eds., 2014).

133. *See generally* PETER VAN HAM, SOCIAL POWER IN INTERNATIONAL POLITICS (2010).

134. *Id.* at 70–71. *But see* Helen V. Milner, *Why Multilateralism? Foreign Aid and Domestic Principal-Agent Problems, in* DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 107, 111–112, 120–122 (Darren G. Hawkins et al. eds., 2006) (arguing that multilateralism satisfies domestic principal-agent problems and governments sometimes prefer multilateral approaches to counter concerns of domestic public opinion).

135. *See* Richard L. Williamson, Jr., *Hard Law, Soft Law, and Non-Law in Multilateral Arms Control: Some Compliance Hypotheses*, 4 CHI. J INT'L L. 59, 65 (2003) (noting severe problems of asymmetry in negotiating multilateral arms limitations regimes).

136. Chester A. Crocker, *Foreword* to TERESA WHITFIELD, FRIENDS INDEED? THE UNITED NATIONS, GROUPS OF FRIENDS, AND THE RESOLUTION OF CONFLICT, at ix (2007).

137. *See* VAN HAM, *supra* note 133, at 3, 70–71 (discussing the trend toward smaller, often informal group formation, such as the G8 and the G20). One could add the G4, G6, G7, G33, and G77.

138. *See id.* at 71. On the creation of soft power within triadic systems of discourse, see generally Yohanan Benhaïm & Kerem Öktem, *The Rise and Fall of Turkey's Soft Power Discourse: Discourse in Foreign Policy under Davutoğlu and Erdoğan*, 21 EUR. J. TURKISH STUD. (2015).

139. Peter van Ham, *The European Union's Social Power in International Politics, in* EUROPEAN PUBLIC DIPLOMACY: SOFT POWER AT WORK 157, 159 (Mai'a K. Davis Cross & Jan Melissen eds., 2013).

140. *See* Georg Schwarzenberger, *Die Glaubwürdigkeit des Völkerrechts, in* FESTSCHRIFT FÜR RUDOLF BINDSCHEDLER, 91, 95 (Emanuel Diez et al., eds., 1980) (noting the development of the distinction between community and society models in the works of Henry Sumner Maine, Ferdinand Tönnies, Max Weber, R.G.

law's center of gravity away from the formalistic or legislative structures of law and toward social relations and processes.[141] Its appearance marked a rediscovery of the Roman law maxim: Wherever there is society, there is law (*ubi societas, ibi jus*).[142]

Arnold McNair drew international law's attention to soft law, but in a backhanded fashion. In his Cambridge University lectures in the 1930s, he framed soft law in terms of the distinction between *lex lata* and *de lege ferenda*,[143] or, alternatively, as the broad ambit of international relations involving non-treaty agreements.[144] In international relations circles, it is defined as "the ability to get what you want through attraction rather than coercion or payments."[145] Soft law redirected the understanding of international influence and power away from the formalities of international law and relations (treaties, military, and economic might), and from the formal sources of law as applied by the International Court of Justice,[146] and instead toward the culture, political ideals, policies,[147] and the corpus of comity.[148] It has become an important

Collingwood and John Macmurray). *See generally* ÉMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (W.D. Halls trans., Macmillan 1984) (1893); 1 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 312–28 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., Bedminster Press 1968) (1921); 2 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 641–901 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., Bedminster Press 1968) (1921).

141. *See* Eugen Ehrlich, *The Sociology of Law*, 36 HARV. L. REV. 129, 144 (Nathan Isaacs trans., 1922) (stating that "sociology, looks upon law as a function of society. It cannot limit itself to the Legal Provision as such. It must consider the whole of law in its social relations and must also fit the Legal Provision into this social setting"). *See generally* EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (Walter L. Moll trans., 1936).

142. EDWIN EGEDE & PETER SUTCH, THE POLITICS OF INTERNATIONAL LAW AND INTERNATIONAL JUSTICE 19 (2013).

143. *See* Robert Y. Jennings, *An International Lawyer Takes Stock*, 39 INT'L & COMP. L. Q. 513, 513–516 (1990) (describing the theory of McNair's student, Robert Jennings, who suggests that McNair's differentiation between 'hard' and 'soft' law derived from McNair's1933 printed syllabus and lecture notes, which McNair distributed to his students at Cambridge). *See also* Georges Abi-Saab, *Cours Général de Droit International Public*, *in* 7 RECUEIL DES COURS 9, 207 (1987) (noting the importance of the threshold of law provided by *lex lato* and *lex ferenda*); Jean d'Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, 19 EUR. J. INT'L L. 1075, 1081 n. 35 (2008) (stating that McNair never used the term soft law, but rather saw the terms "Soft Law and Hard Law as synonymous with the distinction between *lex lata* and *lex ferenda*").

144. Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT'L L. 499, 500 (1999).

145. Joseph S. Nye, Jr., *Soft Power and American Foreign Policy*, 119 POL. SCI. Q. 255, 256 (2004). *See also* Abbott & Snidal, *supra* note 34, at 423 (stating that "soft law facilitates compromise, and thus mutually beneficial cooperation, between actors with different interests and values, different time horizons and discount rates, and different degrees of power").

146. *See* Francesco Francioni, *International 'Soft Law': A Contemporary Assessment*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 167, 167–68 (Vaughn Lowe & Malgosia Fitzmaurice eds., 1996) (stating that the ICJ used "a working definition of soft law as those international norms . . . outside the system of formal sources . . . [that] are nevertheless capable of producing certain legal effects").

147. *Id.*

148. *See* W. Michael Reisman, *A Hard Look at Soft Law*, 82 AM. SOC'Y INT'L L. PROC. 373, 375 (1988) (discussing how an example of soft law in international law is the corpus of comity).

aspect for both constructivist[149] and liberal internationalist[150] approaches to international law. Both approaches emphasize norm socialization through transnational networks, policy professionals, discourse, and institutions.[151] Both approaches construe law-making and forms of commitment in terms broader than the binding formalism of positivism and the consent-driven intentionality that positivism's law-making process implies.[152] McNair, who wrote before these theoretical approaches were retailed as such, generically cautions against redirected courses for international law, implying that soft law approaches lacked coherence.[153] Georg Schwarzenberger warns of the "proliferation of para-international law," meaning non-consensual and non-binding (*unverbindlichen*) approaches, which produce negative overall effects on the credibility of international law.[154] Important contemporary scholars agree. Prosper Weil thinks soft law concepts present destabilizing pathologies for international law because they lack an obligatory character.[155] Kal Raustiala argues that the binary opposite of hard law is no law and that the spectral shading of soft law provides no depth or clarity at all.[156] Others have noted soft law's false and forced dichotomy with

149. *See, e.g.*, Martha Finnemore & Stephen J. Toope, *Alternatives to "Legalization": Richer Views of Law and Politics*, 55 INT'L ORG. 743, 751 (2001) (contending that intersections between soft law and "the growing body of work on transactional norm dynamics . . . has occupied constructivists in recent years"). *See* Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 708 (2010) (stating, "Constructivists often favor soft-law instruments for their capacity to generate shared norms and a sense of common purpose and identity, without the constraints raised by concerns over potential litigation"). *See generally* Christine M. Chinkin, *The Challenge of Soft-Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850 (1989).

150. *See, e.g.*, Anne-Marie Slaughter, *Government Networks: The Heart of the Liberal Democratic Order, in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 199, 201 (Gregory H. Fox & Brad R. Roth eds., 2000) (explaining the critical importance of the growing body of rules and understandings outside traditional international law to the liberal democratic order).

151. *See generally* David M. Trubek, Patrick Cottrell, & Mark Nance, *"Soft Law," "Hard Law," and European Integration: Toward a Theory of Hybridity*, U. OF WIS. LEGAL STUD. RES. PAPER SERIES, Paper No. 1002 (2005), http://jeanmonnetprogram.org/archive/papers/05/050201.pdf [https://perma.cc/H9XV-P4VE].

152. *See* Ilhami Alkan Olsson, *Four Competing Approaches to International Soft Law*, 58 SCANDINAVIAN STUD. L. 177, 188–89 (2013) (discussing positivists' emphasis on hard law and criticisms of soft law).

153. The distinction was not meant to highlight McNair's belief in the nuances of norms, but as a warning to students to distinguish their international legal careers from "dilettante enthusiasts." *See* Jennings, *supra* note 143, at 513–16 (explaining McNair's desire to distinguish "hard law" due to resulting skepticism of international law as a whole).

154. Schwarzenberger, *supra* note 140, at 98–99 (discussing negative consequences for the credibility of international law).

155. *See* Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 423 (1983) (arguing that soft law may destabilize the international normative system and render it useless because of its "ill-defined values").

156. *See* Kal Raustiala, *Form and Substance in International Agreements*, 99 AM J. INT'L L. 581, 586–87 (2005) (questioning the analytic value of the concept of soft law and its expression in state practice).

hard law,[157] or its problematic relation to *pacta de contrahendo* and *negotiando*,[158] concepts that stretch the obligatory character of promises into the future, thereby taxing the understanding of what is a good faith commitment. Some scholars view the hard law/soft law interplay as nuanced options available to states, which then employ them in complementary and antagonistic ways.[159] Jan Klabbers, more boldly, regards soft law as a "smokescreen" that enables states "to strengthen their own position, to the detriment of others."[160]

But soft law has made its way into international legal studies, affecting legally non-binding instruments and agencies that strengthen or reaffirm international norms and institutions. A growing literature discusses the emergence of private locations of such authority in global governance,[161] but its place in rational functionalist and neoliberal institutionalist literature is secure, forwarding the assumption that states rely on soft-law institutions and arrangements to advance their mutual interests by solving collective-action problems.[162]

Typologies of soft law attach to strategic situations that make them useful as analytic categories.[163] Soft law options instantiate compliance and policy coordination, minimize the marginal costs of violations exacted by treaties (loss avoidance theory), hedge against uncertain outcomes or unintended consequences by making undesirable outcomes easier to renounce (delegation theory), and inform the development of an

157. *See* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 81–82 (2005) (labeling it confusing to refer to soft law as law); Richard Bilder, *Beyond Compliance: Helping Nations Cooperate, in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 65, 72 (2000) (calling the concept of soft law "inappropriate and unhelpful" in that it "'depreciate[s] the currency' of law"); Hartmut Hilgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT'L L. 499, 500 (1999) (calling 'soft law' a contradiction in terms); Jan Klabbers, *The Redundancy of Soft Law*, 65 NORDIC J. INT'L L. 167, 167–68 (1996) (referencing the binary distinctions between legal and illegal, binding and non-binding).

158. *See* Hisashi Owada, *Pactum de Contrahendo, Pacum de Negotiando, in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 18–19 (2008) (defining that a *pactum de contrahendo* obligates parties to conclude a future agreement; a *pactum de negotiando* obligates parties to enter into future negotiations). *See also* Melaku Geboye Desta, *Soft Law in International Law: An Overview, in* INTERNATIONAL INVESTMENT LAW AND SOFT LAW 39, 47 (Andrea K. Bjorklund & August Reinisch eds., 2012) (discussing treatments of *soft negotium*). *See generally* Martin A. Rogoff, *The Obligation to Negotiate in International Law: Rules and Realities*, 16 MICH. J. INT'L L. 141 (1994); Ulrich Beyerlin, *Pactum de Contrahendo und Pactum de Negotiando im Völkerrecht*, 36 ZAÖRV (1976) (noting that each *pactum* requires a party to incur future obligations); Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296, 298 (1977) (noting "caution is required in drawing inferences of nonbinding intention from general and imprecise undertakings in agreements which are otherwise treated as binding").

159. *See, e.g.*, Shaffer & Pollack, *supra* note 149, at 708–09 (reframing the hard and soft law interactions in terms of agents).

160. Jan Klabbers, *The Undesirability of Soft Law*, 67 NORDIC J. INT'L 381, 387, 391 (1998). *See also* Shaffer and Pollack, *supra* note 149, at 744 (arguing that "individual states (or other actors) may deliberately use soft-law instruments to undermine hard-law rules to which they object"); d'Aspremont, *supra* note 143, at 1076 (criticizing the underlying agenda of some of soft law's staunchest supporters).

161. *E.g.*, Michael W. Reisman, *The Democratization of Contemporary International Law-making Processes and the Differentiation of Their Application, in* DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 15 (Rüdiger Wolfrum & Röben Volker eds., 2005); Rodney Bruce Hall & Thomas J. Biersteker, *The Emergence of Private Authority in the International System, in* THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE 3 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002).

162. Trubek, Cottrell, & Nance, *supra* note 151, at 8.

163. *See generally* Guzman & Meyer, *supra* note 33.

international common law by providing gloss on the pronouncements of international courts and tribunals, which seep into the taxonomy of international law.[164] Soft law shapes states' expectations "as to what constitutes compliant behavior."[165] Soft law structures constitute a device for minimizing impediments to cooperation.[166] They form part of the "complex architecture of international agreements,"[167] where states may prefer informal institutions to avoid formal, visible pledges of fully "legalized" institutions.[168] They may be created intentionally to promote "calculated ambiguity,"[169] or take on "creative or generative" capacities that inform of a richer view of international law.[170] Soft law structures are portrayed as more flexible[171]—and more adaptable—to modification; they may make fewer informational demands on parties; and they are "pre-eminently suitable" for avoiding adjudication and promoting self-regulation,[172] while conferring a problem-solving or problem-involving status on structural associates. Because of their lower profile, soft law structures are less exposed to outsider "intrusions;" they can be controlled more tightly by governments;[173] and they may be more available or open to non-state and sub-state actors.[174] International actors "often deliberately choose softer forms of legalization as superior institutional arrangements," particularly when they are "jealous of their autonomy"[175] or when dealing with conditions of uncertainty or rapidly changing circumstance.[176] Calculated ambiguity presents an important *modus operandi* for the cross-cutting intentions of the Minsk Group, Armenia, and Azerbaijan,[177] but the embedded belief that soft law solutions are always constructed and maintained to advance superior solutions may reflect Panglossian thinking. Soft law solutions

164. *Id.* at 176–78; *see also* Anthony D'Amato, *Softness in International Law: A Self-Serving Quest for New Legal Materials: A Reply to Jean d'Aspremont*, 20 EUR. J. INT'L L. 897, 902 (2009) (gesturing towards the loss avoidance theory by observing that soft law permits cost-effective violations whereas hard law strives to make every violation cost-ineffective).

165. Guzman & Meyer, *supra* note 33, at 175.

166. Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495, 500 (1991).

167. Raustiala, *supra* note 156, at 581–82.

168. *See* Judith Goldstein et al., *Legalization and World Politics*, 54 INT'L ORG. 396 (2000) (associating fully legalized institutions with high levels of obligation, precision, and delegation); *see also* Raustiala, *supra* note 156, at 581 (differentiating contracts from pledges and binding from nonbinding accords).

169. Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296, 297 (1977).

170. Finnemore & Toope, *supra* note 149, at 744–45 (discussing limited views of law based on formal notions of legalization).

171. Chinkin, *supra* note 149, at 852.

172. *Id.* at 862.

173. Lipson, *supra* note 166, at 500–01.

174. Shaffer & Pollack, *supra* note 149, at 719.

175. Abbott & Snidal, *supra* note 34, at 423.

176. *See id.* at 441–44 (discussing how soft power arrangements can provide a rational adaptation to uncertainty and incomplete knowledge). *See also* Chinkin, *supra* note 149, at 852–53 (facilitating flexibility and freedom to maneuver where changing circumstances require).

177. Confidential U.S. Diplomatic Cable from Donald Lu, U.S. Chargé d'Affaires to Azerbaijan, *Azerbaijan's Intentional Ambiguity Toward NATO*, WIKILEAKS (Jan. 17, 2008), https://wikileaks.org/plusd/cables/08BAKU44_a.html [https://perma.cc/F35X-6GZE] (summarizing Azerbaijan's intentional ambiguity toward its preferred Euro-Atlantic integration while maintaining good relations with Russia and Iran and recognizing the public sentiment in Azerbaijan that the Minsk Group "holds Azerbaijan to a double standard").

sometimes promote a precarious kind of stasis as the best of all possible (temporary) solutions.

V. THE MINSK GROUP

The 1994 OSCE Budapest Summit established the so-called Minsk Group, which took its name from a forum proposed in Minsk and created by the then-Conference on Security and Cooperation in Europe ("CSCE") in Helsinki in 1992.[178] Where the parent organization served as a multilateral forum for dialog, the off-shoot organization had the issue-specific tasks of facilitating consensus-building, quiet diplomacy, and mediation.[179] Its mission drew from an OSCE Mandate, which established the Minsk Group as an "impartial" confidence-building agent of the OSCE Chairperson-in-Office.[180] More pragmatically, concerns arose that it was better to keep Russia more closely engaged, as the CSCE Minsk Group began competing with parallel Russian proposals for peaceful settlement.[181]

The main mission of the Minsk Group remains to facilitate negotiations for a peaceful and comprehensive settlement to the Nagorno-Karabakh conflict, to maintain regular consultations, and to jointly inform the Chairperson-in-Office, the UN Security Council, the UN Secretary General, and international humanitarian aid organizations of developments. A major objective was to develop a plan for the establishment, composition, and operation of a multinational OSCE peacekeeping force.[182] While this would be OSCE's first peacekeeping force,[183] it has not materialized other than in the form of small conflict-monitoring groups.[184] In March 1995, the

178. *See* de Waal, *supra* note 23, at 161 (noting that fighting between Armenia and Azerbaijan in May 1992, including the seizure of the Lachin corridor, called off the meeting, which "was never formally cancelled," but the name "Minsk" lingers in ghostly fashion).

179. *See* Volker Jacoby, *The Role of the OSCE: An Assessment of International Mediation Efforts*, 17 ACCORD 30, 30–31 (2005) (discussing the Minsk Process and its tasks in support of a peaceful settlement of the Nagorno-Karabakh conflict).

180. *Mandate for the Co-Chairman of the Minsk Process*, ORG. FOR SEC. & CO-OPERATION IN EUR. art. 9 (Mar. 23, 1995), http://www.osce.org/mg/70125?download=true [https://perma.cc/85ZS-REK7]. *See also Renewing Dialogue, Rebuilding Trust, Restoring Security: The Priorities of the German OSCE Chairmanship in 2016*, ORG. FOR SEC. & CO-OPERATION IN EUR. 3–4 (Jan. 14, 2016), http://www.osce.org/cio/215791?download=true [https://perma.cc/K69K-QE4T] (discussing how the OSCE maintains other negotiating formats and mechanisms, including those dealing with problems in Transdniestria and the Geneva International Discussions on the conflict in Georgia; OSCE also maintains instruments for conflict management in Ukraine, including the Special Representative of the OSCE Chairperson-in-Office in Ukraine, the Trilateral Contact Group, the Special Monitoring Mission to Ukraine, the Observer Mission at the Russian Checkpoints Gukovo and Donetsk, and the OSCE Project Coordinator in Ukraine).

181. *See* Nicholas W. Miller, *Nagorno Karabakh: A War without Peace, in* STOPPING WARS AND MAKING PEACE: STUDIES IN INTERNATIONAL INTERVENTION 43, 65–66 (Kristen Eichensehr & W. Michael Reisman eds., 2009) (discussing competing mediations between Russia and Minsk Group chairman Jan Eliasson).

182. *See Mandate for the Co-Chairman of the Minsk Process*, *supra* note 180, pts. 6–7 (mentioning as part of its mandate assisting with plans for peacekeeping); CAROL WEAVER, THE POLITICS OF THE BLACK SEA REGION: EU NEIGHBOURHOOD, CONFLICT ZONE OR FUTURE SECURITY COMMUNITY? 95 (2013) (noting that one of the Minsk Group's objectives is "to promote the peace process by deploying OSCE multinational peacekeeping forces").

183. de Waal, *supra* note 23, at 162.

184. *See* Emma Klever, *The Nagorno-Karabakh Conflict Between Armenia and Azerbaijan: An Overview of the Current Situation*, EUR. MOVEMENT INT'L 19 (Sept. 24, 2013), http://europeanmovement.eu/wp-content/uploads/2015/05/2013.09-Current-situation-Nagorno-

Group established a co-chair mandate for administration,[185] currently held by Ambassadors Igor Popov of the Russian Federation, Pierre André of France, and James Warlick of the United States.[186] Other permanent members include Belarus, Germany, Italy, Sweden, Finland, Turkey, Armenia, and Azerbaijan.[187] The OSCE Troika is a permanent member on a rotating basis.[188]

The Minsk Group worked well to establish a roadmap for peaceful settlement. It produced the Madrid Principles, established in 2007, and reaffirmed in joint statements in L'Aquila in 2009[189] and Muskoka in 2010.[190] The principles call for, *inter alia*:

- Return of the territories surrounding Nagorno-Karabakh to Azerbaijani control;
- An interim status for Nagorno-Karabakh providing guarantees for security and self-governance;
- A corridor linking Armenia to Nagorno-Karabakh;
- Future determination of the final legal status of Nagorno-Karabakh through a legally binding expression of will;
- The right of all internally displaced persons and refugees to return to their former places of residence; and
- International security guarantees that would include a peacekeeping operation.[191]

But the Group's inability to implement this roadmap calls into question its effectiveness; now, its general course of dealing generates complaints about its structural and procedural idiosyncrasies, which produce stasis.[192] Its genesis was based

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Karabakh.pdf [https://perma.cc/2T8N-2GTJ] (noting that the Office of the Personal Representative of the OSCE assigned only five field officers to monitor the ceasefire).

185. *See Renewing Dialogue, Rebuilding Trust, Restoring Security, supra* note 180 (establishing co-chair mandate).

186. Minsk Group: Who We Are, ORG. FOR SEC. & CO-OPERATION IN EUR., http://www.osce.org/mg/108306 [https://perma.cc/2V9E-L7TY] (last visited Feb. 1, 2017).

187. *Id.*

188. *Id. See also* Mia Ilić, *The OSCE Troika*, ORG. FOR SEC. AND CO-OPERATION IN EUR., http://www.osce.org/magazine/171776 [https://perma.cc/HN46-EM2R] (last visited Oct. 7, 2016) (explaining that the OSCE chair rotates on a yearly basis, but the OSCE Troika was created at the Helsinki Summit in 1992 to provide continuity "between the present previous and succeeding Chairmanships," and demonstrating that as of 2016, the Troika included Switzerland (2014 OSCE Chair), Serbia (current OSCE Chair), and Germany (2016 OSCE Chair)).

189. *Statement by the OSCE Minsk Group Co-Chair Countries*, ORG. FOR SEC. & CO-OPERATION IN EUR. (July 10, 2009), http://www.osce.org/mg/51152 [https://perma.cc/PW3T-GZAS].

190. *Statement by the OSCE Minsk Group Co-Chair Countries*, ORG. FOR SEC. & CO-OPERATION IN EUR. (June 26, 2010), http://www.osce.org/mg/69515 [https://perma.cc/BS4M-YHEE].

191. *Statement by the OSCE Minsk Group Co-Chair Countries* (2009), *supra* note 189.

192. *See, e.g.*, Klever, *supra* note 184, at 18 (explaining that because only six of the fourteen Madrid Principles have been made public, the confidentiality involved in the Minsk process and procedure has led to a lack of public awareness, misinformation, insecurity, and mutual distrust).

on odd circumstances:[193] Its negotiations are conducted secretly, stimulating "misinformation, insecurity and mutual distrust" between the public and the Minsk Group.[194] This "pathological secrecy" extends to the Madrid Principles themselves, which have never been officially or fully disclosed.[195] The principles generate disputes as to the sequence of implementation[196] and reflect a "constructive vagueness"[197] that creates the appearance of agreement while masking critical differences.[198] "Perhaps the strangest feature of the process is that it has no spokesman and virtually no public profile."[199] At various times, all Co-Chairs have been accused of a pro-Armenian bias.[200] In 2003, the European Union created the Special Representatives for the South Caucasus,[201] but France refused to Europeanize its Co-Chair position by ceding its place to the European Special Representative.[202] Europe's regard for the Minsk process contributes to a sense of ambivalence and overlap,[203] if not disunity. France maintains that it represents European Union interests, but it has been criticized for rarely consulting with other European Union member states and institutions in Brussels.[204] Like France, the United States has been criticized for using its position as an out-of-region mediator to its own advantage. With little leverage in terms of direct military influence, complaints arise that it uses the forum in a divide-and-rule manner to secure geopolitical benefit.[205] Although ambivalently aligned with Armenia,

193. *See* de Waal, *supra* note 23, at 162 ("[T]he Minsk Process consists of a conference which was only occasionally convened, a group which never meets as a group and a co-chairmanship functioning under a barely known mandate, all named after a city where the mediators never meet.").

194. Klever, *supra* note 184, at 18.

195. Murad Gassanly, *What Do Madrid Principles Say on Karabakh?* AZERIREPORT, http://azerireport.com/index2.php?option=com_content&do_pdf=1&id=2226 [https://perma.cc/M3VN-TZZF] (last visited Feb. 2, 2017).

196. *See* Mark Dietzen, *A New Look at Old Principles: Making the Madrid Document Work*, CAUCASUS EDITION (Apr. 1, 2011), http://caucasusedition.net/analysis/why-nagorno-karabakh%e2%80%99s-status-must-be-addressed-first/ [https://perma.cc/57JF-BGL6] (noting that the current sequence is favored by Azerbaijan but deemed unfair by Armenia and could lead to issues when establishing the legal status of Nagorno-Karabakh).

197. Lindenstrauss, *supra* note 22, at 102.

198. Cory Welt, *Turkish-Armenian Normalisation and the Karabakh Conflict*, PERCEPTIONS, Spring 2013, at 207, 214 ("The main problem lies with what originally must have seemed [the Madrid Principles'] greatest strength: a 'constructive ambiguity' that creates the appearance of agreement by papering over critical differences between Azerbaijan and Armenia.").

199. de Waal, *supra* note 23, at 163; *see also* Freizer, *supra* note 25, at 2 (describing the tightly controlled negotiating culture of the Minsk Group).

200. WEAVER, *supra* note 182, at 89.

201. European Commission Press Release C/03/196, Council Appoints and EU Special Representative for the South Caucasus (July 7, 2003), http://europa.eu/rapid/press-release_PRES-03-196_en.htm [https://perma.cc/47XG-5A4R] ("The Council decided today to appoint a European Union Special Representative (EUSR) for the South Caucasus . . . .").

202. NICU POPESCU, EU FOREIGN POLICY AND THE POST-SOVIET CONFLICTS: STEALTH INTERVENTION 104 (2011).

203. *See* Nicu Popescu, *EU and the Eastern Neighbourhood: Reluctant Involvement in Conflict Resolution*, 14 EUR. FOREIGN AFF. REV. 457, 471 (2009) (discussing the EU's ambiguous position on Nagorno-Karabakh).

204. *Cf.* ZAUR SHIRIYEV, EUROPEAN POLICY CENTRE, CHALLENGES FOR THE EU IN THE RESOLUTION OF THE NAGORNO-KARABAKH CONFLICT: AN AZERBAIJANI PERSPECTIVE 2 (2013) (attributing "the EU's low level of involvement in Nagorno-Karabakh . . . to it being *de facto* represented by France" and describing a proposal to replace France with an EU representative).

205. Andrew Korybko, *Nagorno-Karabakh Conflict: The OSCE Minsk Group Is Obsolete*, ORIENTAL REVIEW (Apr. 28, 2015), http://orientalreview.org/2015/04/28/nagorno-karabakh-conflict-the-osce-minsk-

Russia's intervention in Chechnya complicates any support for a secessionist movement in the Caucasus.[206]

The U.S. representative maintains that "[t]he co-chairs of the Minsk Group share a common interest in helping the sides reach a peaceful resolution,"[207] but this conclusion has been labeled "wishful thinking."[208] Criticisms arise that the Co-Chairs prefer the status quo:[209] "[A]s long as President Putin see[s] no personal benefits for him and his government in the Nagorno-Karabakh conflict resolution, Moscow will maintain the policy of status quo, which is best for its own interests .... France and the US—will do nothing to change the situation as long as it cannot change in their favor."[210] The geographic station of Nagorno-Karabakh on Europe's eastern perimeter, the West's preoccupation with ongoing Middle Eastern and North African diasporas, and challenges presented by engaging the authoritarian regimes of Armenia, Azerbaijan, and Russia within the Minsk process limit prospects for progress. Upending a perceived stalemate in the Nagorno-Karabakh conflict invites repercussions for Georgia, where NATO's addled resolve on extending membership belies an ambivalence well understood by Moscow. Russia's annexation of Crimea serves as a sharp reminder of its long-term reclamation project (which began with Ossetia and Abkhazia). The West's inability to define Transcaucasian security interests and the parameters of its eastern neighborhood contribute to regional, if not continental, insecurity. Ironically, the Kosovo precedent, with its unilateral declaration of independence and the West's reluctant, but necessary, embrace of remedial secession as an exceptional circumstance, presents itself in a most unwelcome way yet again. It first appeared as part of Russia's legal justification for the annexation of Crimea in 2014.[211] It now feeds insecurity in Azerbaijan, which has expressed interest in enhanced political cooperation with the European Union.[212] This insecurity feeds into Russia's reassertion of hegemony, making stasis an attractive second-best policy objective of the soft law environment of the Minsk Group.

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group-is-obsolete/ [https://perma.cc/XA39-93UR].

206. *Id.*

207. Ambassador James Warlick, Nagorny Karabakh: Keys to a Settlement, Remarks at the Carnegie Endowment for International Peace (May 7, 2014), http://carnegieendowment.org/2014/05/07/nagorny-karabakh-keys-to-settlement-event-4429 [https://perma.cc/YL3X-M932].

208. Stephen Blank, *US Policy, Azerbaijan, and the Nagorno-Karabakh Conflict*, 26 MEDITERRANEAN Q. 99, 103 (2015).

209. *Id.* at 106.

210. Eugene Kogan, CTR. INT'L EUR. STUD., *The South Caucasus Countries and Their Security Dimension*, NEIGHBOURHOOD POL'Y PAPER 1, 4–5 (Nov. 5, 2013), https://www.files.ethz.ch/isn/165850/NeighbourhoodPolicyPaper(11)(1).pdf [https://perma.cc/Q7U5-69H2].

211. *See* President Vladimir Putin, Address by President of the Russian Federation (Mar. 18, 2014), http://en.kremlin.ru/events/president/news/20603 [https://perma.cc/DJ4D-Z9K5] (citing the Kosovo precedent in relation to Crimea's separation from Ukraine).

212. *See generally* European Comm'n, Programming of the European Neighbourhood Instrument (ENI—2014–2020): Single Support Framework for EU Support to Azerbaijan (2014–2017) (2013), http://eeas.europa.eu/enp/pdf/financing-the-enp/azerbaijan_2014_2017_programming_document_en.pdf [https://perma.cc/D6ZU-XBXF].

CONCLUSION

A broadening of international law to incorporate social process has generated considerable discussion about soft legalization. An array of factors, including a turn from multilateralism, indicates that benefits, including status benefits, accrue to states through channels that deviate from explicit commitments suggested by binding agreements. Despite objections and criticisms, which ultimately reduce to differing views about the costs of sovereignty and whether sovereignty is better conceived of as a diachronic rather than synchronic concept, international law and relations have moved markedly in the direction of soft law. This movement shapes the normative development and institutional framework of international law.

This Article embraces diachronic constructions of sovereignty and the deeply intertwined connections to the fields of international law and international relations. It is sympathetic to constructivist orientations that interpret this evolution as an intentional and often unselfconscious process, with important teachings about the nature of the international legal process. This Article agrees with much scholarship on the subject indicating that states pursue and realize their objectives through a delegation of decision-making authority to softer fora. But a deeper study of the interlocking historical, political, legal, and processual knots that bind up a solution to the Nagorno-Karabakh conflict adds texture to much of the soft law literature. This literature, when it does not abjectly reject the value of soft law, tends to support positive rational-functional and neoliberal outcomes through the employment of soft law. Such understandings of this soft legalization process advance interpretations of international law that are meant to broaden stylized frameworks. Soft law is meant to supplement formal rule-based interpretations of law with richer, more nuanced, and interstitial additives that, taken together, paint a broader picture of the workings of law-making.

The machinations of the Minsk Group reflect important features of soft legalization, chiefly a preferred and united opinion among the principal co-chairs to monopolize stewardship over the process, a preference for calculated ambiguity to preserve flexibility, and the avoidance of visible pledges to minimize the marginal costs of violating international law and jump-starting diplomatic and track II conversations in the wake of periodic ruptures, such as the recent outbreak of violence in April 2016. But cross-cutting and divergent interests within the Minsk Group suggest that the perceived deadlock relating to this misperceived frozen conflict also generates from the principals' internal co-optations of that soft law process. Although constituted to facilitate peaceful resolution among the disputants, the Minsk Group has been co-opted as a forum for management of the interests of the principals. This conclusion suggests that the Minsk Group specifically, and other soft law forums generally, may present imperfect artifices of stewardship and norm development, which allow powerful or well positioned states to jostle over future interests while unconvincingly maintaining a fragile condition of stasis.

States' Rights and Refugee Resettlement

KEVIN J. FANDL*

ABSTRACT

In the wake of the November 2015 Paris attacks, in which links were made between Syrian refugees and terrorists, calls for a suspension or enhancement of the U.S. refugee program rang out from a number of states. Proposed legislation in the U.S. Congress and state houses have attempted to withdraw support for then President Obama's commitment of accepting 10,000 Syrian refugees in 2016. Some states have taken aggressive steps to block the placement of refugees in their communities on the basis of their national origin. What legal authority do states have to question the authority of the Executive in the screening, acceptance, and placement of refugees in their communities? And in the name of security, do states have the legal right to prevent refugees, on the basis of their origin, from residing within their states? This Article attempts to answer these questions.

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INTRODUCTION

A false Syrian passport was found near the body of one of the perpetrators of a 2015 terrorist attack in France.[1] The implication that one of the thousands of refugees rapidly flowing into Europe following humanitarian crises in nearby countries was a terrorist caused panic among residents and spurred calls for stronger controls on the flow of migrants.[2] Despite the revelation shortly thereafter that the attackers in France, as well as those in a later attack in Belgium, were European citizens and not Syrian refugees, the damage to the reputation of the refugee program was done.[3] This fear spread across the Atlantic Ocean to the United States, where a much more modest Syrian refugee program was just beginning.[4] Many American governors began to pursue protection against the alleged threat that might accompany the arrival of Syrian refugees.[5]

In response, nearly 30 state governors released statements indicating that they would not allow refugees to be placed within their communities.[6] Similarly, candidates for the Presidency took positions ranging from an outright refusal to accept non-Christian Syrian refugees[7] and a moratorium on visas for refugees[8] to, at the other extreme, an expansion of the refugee program.[9] Yet despite all of the rhetoric, what

1. Ishaan Tharoor, *Were Syrian Refugees Involved in the Paris Attacks? What We Know and Don't Know.*, WASH. POST (Nov. 17, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/11/17/were-syrian-refugees-involved-in-the-paris-attacks-what-we-know-and-dont-know/ [https://perma.cc/JQ85-XAKX] [hereinafter *Syrian Refugees*].

2. Steven Erlanger, *Brussels Attacks Fuel Debate over Migrants in a Fractured Europe*, N.Y. TIMES (Mar. 22, 2016), http://www.nytimes.com/2016/03/23/world/europe/belgium-attacks-migrants.html [https://perma.cc/K43A-5C8F].

3. *Id.*; *see also* Erlanger, *supra* note 2 (discussing the impact attacks in Brussels were having on treatment of refugees).

4. *Syrian Refugees*, *supra* note 1.

5. Halima & Abigail Williams, *U.S. House Votes to Halt Syrian Refugee Resettlement Program*, NBC NEWS (NOV. 20, 2015, 11:00 AM), www.nbcnews.com/storyline/paris-terror-attacks/u-s-house-votes-halt-syrian-refugee-resettlement-program-n466456 [https://perma.cc/2AUL-BDVA].

6. Joshua Barajas & Gretchen Frazee, *Which States are Saying No to Resettlement of Syrian Refugees?*, PBS NEWSHOUR (Nov. 17, 2015), http://www.pbs.org/newshour/rundown/u-s-governors-dont-have-power-to-refuse-refugees-access-to-their-states/ [https://perma.cc/MR39-NXSR].

7. *See, e.g.*, Amy Davidson, *Ted Cruz's Religious Test for Syrian Refugees*, NEW YORKER (Nov. 16, 2015), http://www.newyorker.com/news/amy-davidson/ted-cruzs-religious-test-for-syrian-refugees [https://perma.cc/4X8N-8K5F] (reporting presidential candidate Ted Cruz's statement that the U.S. should only accept Christian Syrian refugees).

8. *See, e.g.*, Daniel Strauss, *Rand Paul Calls for Moratorium on Issuing Visas to Citizens of Countries with a 'Jihadist Movement'*, POLITICO (Nov. 16, 2015, 3:42 PM), http://www.politico.com/story/2015/11/rand-paul-visas-countries-jihadis-215940 [https://perma.cc/M5WT-JUEQ] (reporting presidential candidate Rand Paul's call for a moratorium on issuing visas to citizens of countries with a "jihadist movement").

9. *See, e.g.*, Hannah Fraser-Chanpong, *Hillary Clinton Weighs in on Syrian Refugee Crisis*, CBS NEWS (Nov. 17, 2015, 5:50 PM), http://www.cbsnews.com/news/in-dallas-hillary-clinton-weighs-in-on-syrian-refugee-crisis/ [https://perma.cc/T74C-DJGV] (explaining Hillary Clinton and Martin O'Malley's desire to

can states actually do with respect to the placement of refugees within their communities by the federal government? Surprisingly little.

This Article will present the current state of the law as it relates to the acceptance and placement of refugees in the states. It will then examine the arguments made by state governors to limit the placement of refugees in their jurisdictions. Finally, it will discuss the options that states have to regulate refugees within their borders. The analysis begins by revisiting the Syrian crisis that led to the massive increase in the number of refugees in need of placement.

I. THE SYRIAN REFUGEE CRISIS

It is important to fully understand the context in which the problem of refugee placement first arose, including the history of refugee admissions to the United States. The United States has taken in refugees each year since 1948, when it took in 250,000 Europeans displaced during World War II.[10] Between 1948 and 1980, when the Refugee Act was enacted, the United States promulgated various specific laws to admit refugees from Europe, China, Cuba, former Soviet republics, and so forth.[11]

The Refugee Act of 1980 was motivated in large part by the end of the Vietnam War. The end of that war in 1975 resulted in hundreds of thousands of refugees fleeing from Vietnam.[12] This led Congress to provide a comprehensive scheme for the admission of refugees, including the provision of adequate funding to place those individuals within local communities.[13] Following enactment, refugee admissions briefly surged to levels as high as 207,116 refugees in a single fiscal year, but then returned to levels below 100,000 in 1982.[14] Admissions surged again following the end of the Cold War in 1989, climbing as high as 122,066 in 1990.[15] Since 1995, levels have not surpassed 100,000 again, and they fell below 70,000 in 2015.[16]

The Refugee Act does not specify how many refugees the United States will admit, nor does the U.N. Refugee Convention require that any country take in a particular number of refugees—this is a decision made annually by each individual country.[17] Yet historical data reflects that in the United States, refugee admissions arise from regions in which U.S. actions have directly or indirectly created a refugee crisis.[18] Some authors have contended that if a country causes the crisis forcing

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expand the Syrian refugee program from 10,000 to 65,000).

10. *History: Annual Refugee Arrival Data by Resettlement State and Country of Origin*, OFF. OF REFUGEE RESETTLEMENT, https://www.acf.hhs.gov/orr/about/history [https://perma.cc/JAB7-BQ35] (last visited Feb. 22, 2017).

11. *Id.*

12. *Id.*

13. Edward M. Kennedy, *Refugee Act of 1980*, 15 INT'L MIGRATION REV. 141, 142–43, 145 (1981).

14. BUREAU OF POPULATION, REFUGEES, AND MIGRATION, CUMULATIVE SUMMARY OF REFUGEE ADMISSIONS, U.S. DEP'T OF STATE (2015), https://2009-2017.state.gov/j/prm/releases/statistics251288.htm [https://perma.cc/99VJ-5Y4F] [hereinafter Refugee Data].

15. *Id.*

16. *Id.*

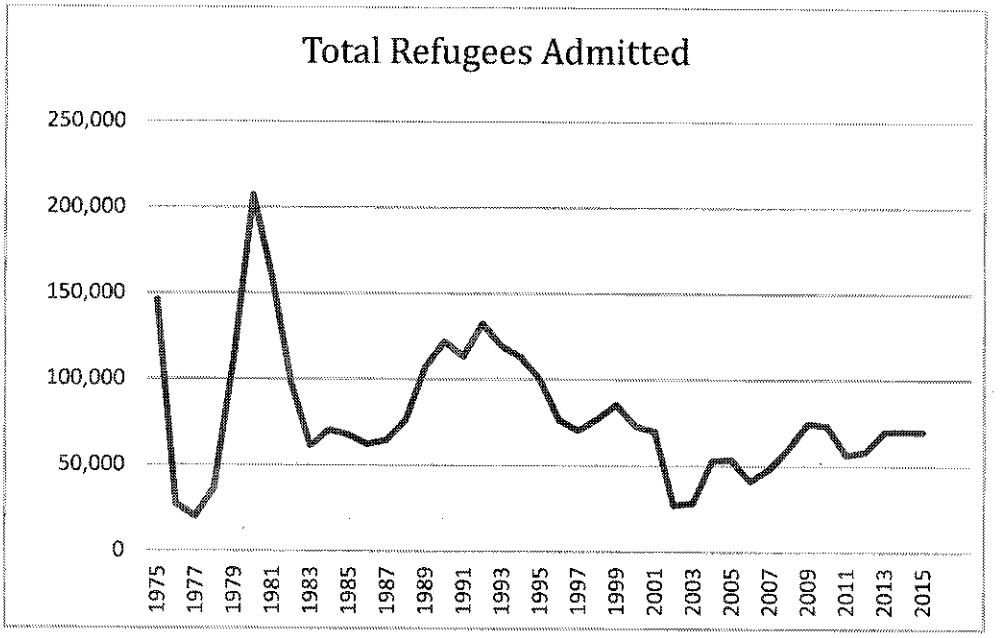
17. *See, e.g.*, James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 144–45 (1997) (discussing states' differing capacities to receive refugees and meet their protective needs).

18. *See, e.g.*, Refugee Data, *supra* note 14 (showing surges of admissions from Asia (Indochina)

refugees to flee, then that country should take in those refugees.[19] In practice, however, the majority of refugees are taken in by neighboring countries and not by distant interlocutors in foreign affairs.[20]

The same is true in Syria, from which over 4.9 million refugees have fled since 2011.[21] The vast majority of those refugees are being hosted by neighboring countries, including Turkey, which has admitted 2.8 million Syrian refugees, and Lebanon, Egypt, Iraq, and Jordan, which cumulatively have admitted 2 million Syrian refugees.[22] The United States and Europe, which played a substantial role in worsening the Syrian civil war, have taken in approximately 18,000[23] and 884,400[24] refugees, respectively, since the war began.

Figure 1. Total Refugees Admitted to the United States (1975–2015).



Source: U.S. Dept. of State; Author's calculations.

The United Nations High Commissioner for Refugees ("UNHCR") reported that there were 16.8 million refugees living in less economically developed countries

following the end of the Vietnam War and admissions from Kosovo following the breakup of Yugoslavia).

19. *E.g.*, E. Tendayi Achiume, *Syria, Cost-sharing, and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687, 690–91 (2015) (arguing for cost-sharing by countries that have a hand in causing a crisis).

20. *See, e.g.*, *id.* at 700 (stating that Syrian refugees flee to neighboring countries).

21. *Syria Regional Refugee Response*, UNITED NATIONS HIGH COMM'R. FOR REFUGEES, http://data.unhcr.org/syrianrefugees/regional.php [https://perma.cc/XW8a-CL7W] (last visited Feb. 22, 2017).

22. *Id.*

23. Jie Zong & Jeanne Batalova, *Syrian Refugees in the United States*, MIGRATION POL'Y INST. (Jan. 12, 2017), www.migrationpolicy.org/article/syrian-refugees-united-states [https://perma.cc/YZ3L-HF7D].

24. *Syria Regional Refugee Response*, UNITED NATIONS HIGH COMM'R. FOR REFUGEES, http://data.unhcr.org/syrianrefugees/asylum.php [https://perma.cc/JK59-N9EN] (last visited Feb. 22, 2017).

as of 2015, with another 38.2 million internally displaced.[25] This is a substantial increase from previous years, and UNHCR attributes that increase to the civil war in Syria, which displaced 42,500 persons daily in 2014.[26] This has tremendously increased the pressure on countries to take in additional refugees, especially as the number continues to grow.

The Syrian civil war began with anti-government street protests in 2011, and the Syrian government, under the leadership of Bashar al-Assad, responded with force.[27] Following the killing of more than 100 protestors and the alleged artillery fire on the protestors by government forces, the conflict in Syria spun out of control.[28] The Syrian Center for Policy Research reported in February 2016 that over 470,000 individuals had been killed since the conflict began in 2011.[29] UNHCR reports that roughly three-quarters of the refugees fleeing the conflict are women and children.[30]

Most of the refugees from Syria initially fled to neighboring countries, which maintained relatively open policies toward those refugees.[31] However, the magnitude of the crisis and the limited abilities to coordinate refugees in those neighboring countries has led to saturation, overwhelming these countries' public resources.[32] Due to limited access to resettlement benefits in those countries, many refugees sought resettlement in nearby European countries, often accessed through Turkey.[33] When Turkey, which had already accepted two million refugees by the end of 2015, made little effort to stop the flow of Syrian refugees into Europe, neighboring European countries such as Greece began to face their own crises.[34]

By the end of 2015, European countries had accepted a million refugees from Syria.[35] However, amid concerns over security in the face of terrorist attacks in Paris and Brussels, and concerns over the ability to integrate hundreds of thousands of Syrian refugees within Europe, the European Union ("EU") negotiated a deal with

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25. *See Worldwide Displacement Hits All-time High as War and Persecution Increase*, UNITED NATIONS HIGH COMM'R. FOR REFUGEES (June 18, 2015), http://www.unhcr.org/558193896.html [https://perma.cc/JS63-HDCB] (reporting that 86% of the 19.5 million refugees are in regions considered economically less developed).

26. *Id.*

27. Achiume, *supra* note 19, at 695.

28. *Id.* at 695–96.

29. Priyanka Boghani, *A Staggering New Death Toll for Syria's War—470,000*, PBS FRONTLINE (Feb. 11, 2016), http://www.pbs.org/wgbh/frontline/article/a-staggering-new-death-toll-for-syrias-war-470000/ [https://perma.cc/4PVS-VFGU].

30. *Syria Regional Refugee Response*, *supra* note 21.

31. *See* Karen Leigh, et al., *Syria's Neighbors, Strained by Influx of Refugees, Pare Support*, WALL ST. J. (Sept. 9, 2015), http://www.wsj.com/articles/syrias-neighbors-strained-by-influx-of-refugees-pare-back-support-1441825530 [https://perma.cc/P6F7-7CNC] (noting Jordan's initial open-border policy that allowed up to 4,000 Syrian refugees a day in 2013).

32. *Id.*

33. *See id.* (explaining how the initial hosts of many Syrian refugees are looking the other way as the refugees attempt to cross into Europe).

34. *Id.*

35. *See Germany Expects up to 300,000 Refugees in 2016, Official Says*, THE GUARDIAN (Aug. 28, 2016), http://www.theguardian.com/world/2016/aug/28/Germany-3000000-refugrees-2016-bamf [https://perma.cc/V3Z6-2S6F] (noting that Germany accepted almost 1.1 million Syrian refugees in 2015); *Refugee Crisis in Europe*, EUR. COMM'N (June 20, 2016), http://ec.europa.eu/echo/refugee-crisis-en.

Turkey in November 2015.[36] In this deal, Turkey agreed to take back some Syrian refugees and increase its efforts to stop refugees from departing Turkey for the EU, in exchange for approximately three billion euros and a reopening of talks on Turkey's EU accession.[37] This controversial deal took effect with the first Syrian migrants being deported from Europe to Turkey in April 2016.[38]

Outside of Europe and Syria's neighboring countries, participation in the refugee relocation program has been far less dramatic and controversial. Because there is no legal requirement for any country to accept refugees, some countries have chosen to accept none.[39] Other countries have made commitments to resettle refugees, including Canada, which resettled 25,000 refugees between November 2015 and March 2016,[40] Australia, which promised to resettle 12,000,[41] and even countries in Latin America such as Venezuela, which promised to resettle 20,000 refugees.[42]

As of November 2015, the United States has accepted just over 2,000 Syrian refugees since the conflict began.[43] The Obama Administration intended to resettle 10,000 additional refugees from Iraq and Syria in the 2016 fiscal year.[44] That plan was reaffirmed following the Paris attacks, which led to outcry from a number of Republican governors and ultimately to the legislation discussed above.[45] The strong opposition to the resettlement of these refugees in the United States has brought together concerns over national security and federal power. To fully understand the legal underpinnings of the conflict, this Article will delve into the relevant legal authorities.

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36. Laurence Norman & Emre Peker, *European Union Reaches Deal With Turkey on Migration*, WALL ST. J. (Nov. 29, 2015), http://www.wsj.com/articles/eu-turkey-strike-deal-to-stem-flow-of-refugees-1448803008 [https://perma.cc/AB2F-JFYN].

37. *Id.*

38. Liz Alderman, *Greece Starts Deporting Migrants to Turkey as E.U. Deal Takes Effect*, N.Y. TIMES (April 4, 2016) http://www.nytimes.com/2016/04/05/world/europe/greece-turkey-refugees.html?_r=0 [https://perma.cc/V8XN-FSR8].

39. *See, e.g., Syria's Refugee Crisis in Numbers*, AMNESTY INT'L (Feb. 3, 2016), https://www.amnesty.org/en/latest/news/2016/02/syrias-refugee-crisis-in-numbers/ [https://perma.cc/627Q-GT8X] (noting that Qatar, United Arab Emirates, Saudi Arabia, Kuwait, Bahrain, Russia, Singapore, and South Korea have not pledged to accept any Syrian refugees).

40. *#WelcomeRefugees: Key Figures*, GOV'T CAN. (Jan. 29, 2017), http://www.cic.gc.ca/english/refugees/welcome/milestones.asp [https://perma.cc/SGA6-MVTT].

41. *Australia's Response to the Syrian and Iraqi Humanitarian Crisis*, AUSTL. GOV'T, https://www.border.gov.au/Trav/Refu/response-syrian-humanitarian-crisis [https://perma.cc/5FPM-DXNG]. *But see* Matt Siegel, *Australia Accused of Dragging Feet on Syria Refugee Intake*, REUTERS (Feb. 18, 2016, 12:07 AM), http://www.reuters.com/article/us-mideastcrisis-australia-idUSKCN0VR0EJ [https://perma.cc/8LBL-LM6N] (explaining that Australia has thus far resettled only 26 Syrian refugees).

42. Sibylla Brodzinsky, *Latin American Countries Welcome Syrian Refugees*, THE GUARDIAN (Sept. 9, 2015, 11:25 AM), http://www.theguardian.com/world/2015/sep/09/latin-american-countries-welcome-syrian-refugees [https://perma.cc/JU2M-6XPA].

43. Lauren Gambino, et al., *Syrian Refugees in America: Separating Fact from Fiction in the Debate*, GUARDIAN (Nov. 19, 2015, 2:21 PM), https://www.theguardian.com/us-news/2015/nov/19/syrian-refugees-in-america-fact-from-fiction-congress [https://perma.cc/V49B-TDMF].

44. Eric Lichtblau, *White House Affirms Syrian Refugee Plan Despite Paris Attacks*, N.Y. TIMES (Nov. 18, 2015), https://www.nytimes.com/2015/11/18/us/politics/white-house-affirms-syrian-refugee-plan-despite-paris-attacks.html [https://perma.cc/H8WT-MVJ8].

45. *Id.*

II. WHAT DOES THE LAW SAY?

The United States has a very generous refugee program that has admitted over 2.5 million refugees since its inception in 1975.[46] This program is unlike the programs of many other developed nations in that the United States accepts a large portion, if not the majority, of refugees selected for placement each year.[47] Additionally, the principal guiding legislation, the Refugee Act of 1980, ensures that refugees are accepted from anywhere in the world from which they are fleeing persecution.[48]

A refugee, according to the Immigration and Nationality Act, is defined as:

> [A]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .[49]

This language largely mirrors the 1951 United Nations ("U.N.") Refugee Convention, which the United States previously applied narrowly through crafted statutes for particular cases.[50]

The U.N. Refugee Convention defines a refugee as any person who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . . ."[51] The United States is one of the original signatories of the 1967 Protocol Relating to the Status of Refugees, which incorporated the 1951 U.N. Refugee Convention.[52]

Though by definition a refugee is an immigrant, refugees tend to be in a different class than non-refugee immigrants.[53] Aside from the fact that they become refugees before they become immigrants, a refugee is fleeing persecution without necessarily having a safe haven in mind.[54] An asylee, on the other hand, who is also fleeing persecution, seeks protection within a particular country by requesting such protection within that country upon arrival.[55]

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46. Daniel J. Steinbock, *The Qualities of Mercy: Maximizing the Impact of U.S. Refugee Resettlement*, 36 U. MICH. J. L. REFORM 951, 956 (2003).

47. *Id.* at 953–55.

48. *Id.* at 954.

49. 8 U.S.C. § 1101(a)(42)(A) (2014).

50. Convention relating to the Status of Refugees, art. 4, *opened for signature* July 28, 1951, 189 U.N.T.S. 2545 (entered into force Apr. 22, 1954) [hereinafter 1951 Refugee Convention].

51. *Id.*

52. *State Parties to the 1951 Convention relating to the Statues of Refugees and the 1967 Protocol*, UNITED NATIONS HIGH COMM'R FOR REFUGEES, http://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html [https://perma.cc/A7NZ-F7ZT] (last visited Dec. 4, 2016).

53. *See, e.g.*, Julian Lim, *Immigration, Asylum, and Citizenship: A More Holistic Approach*, 101 CALIF. L. REV. 1013, 1015 (2013) (arguing that scholars have largely disaggregated refugee, asylum, and general immigration law).

54. *Id.* at 1015.

55. *Asylee*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/tools/glossary/asylee [https://perma.cc/K7DQ-STE3] (last visited Feb. 26, 2017).

Refugees also face additional risks not always present in non-refugee cases because they seek protection while still residing within the country that is persecuting them. Consider, for instance, the case of Tutsi refugees in war-torn Rwanda, who were placed into opposition Hutu-led refugee camps that UNHCR officials were unable to protect from violence.[56] Because refugees are commonly sheltered by neighboring countries, where violence often spills across borders and where governments have limited resources available to protect them, they are often placed in precarious circumstances.[57]

A. The Refugee Act of 1980

Refugees are admitted to the United States under the authority of the Refugee Act of 1980, which modified the Immigration and Nationality Act by establishing a yearly admission program for approved refugee applicants.[58] This Act was passed in order to align U.S. domestic laws with international treaty obligations under the 1951 Convention Relating to the Status of Refugees.[59] That Convention arose in the aftermath of World War II in an effort to protect those fleeing persecution and to prevent countries to which they flee from sending them back.[60] The key premise of the Convention is the principle of *non-refoulement*, which prevents a country from sending a refugee back to a country in which they would be persecuted.[61]

One of the goals of the U.S. Refugee Act was to provide adequate federal funding to allow for the placement of refugees within local communities, including the creation of the Office of Refugee Resettlement ("ORR") to coordinate the disbursement of those funds to the state.[62] The Act also removes the previous law's language that limited eligible refugees to those fleeing communism, creating a new non-discriminatory refugee program.[63] The new law consolidated the former patchwork of laws into a single comprehensive program for the screening, admission, and ultimate placement of refugees within the United States.[64]

An article by former Senator Ted Kennedy, the architect of the Refugee Act, described the political environment at the time the Act was passed. Though the Act

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56. Mariano-Florentino Cuellar, *Refugee Security and the Organizational Logic of Legal Mandates*, 37 GEO. J. INT'L L. 583, 593–594 (2006) (describing the Hutu-led refugee camps meant to protect Tutsi refugees).

57. *See id.* at 592–93 (discussing how protracted violence and physical insecurity within Rwandan refugee camps lead to social instability in the surrounding regions).

58. Refugee Act of 1980, 8 U.S.C. § 1521–1522 (1994).

59. *See* Kennedy, *supra* note 13, at 150 ("[The asylum] provision [of the Refugee Act of 1980] explicitly conforms the immigration law to our international treaty obligations under the United Nations convention and Protocol Relating the Status of Refugees.").

60. *See, e.g.*, Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1066–68 (2011) (discussing the evolution of international refugee law through the implementation of various protocols stemming from the 1951 Convention).

61. Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-terror Measures that Threaten Refugee Protection*, 22 GEO. IMMIGR. L. J. 1, 2 (2008).

62. Kennedy, *supra* note 13, at 142–43.

63. *Id.* at 143.

64. *See id.* ("[the new law was] designed to enable the United States to meet any refugee situation, anywhere in the world . . . to end years of *ad hoc* programs and different policies for different refugees by putting the U.S. refugee programs on a firm basis").

had overwhelming support as a cost-saving and humanitarian measure, concerns were raised about the placement of refugees within local communities.[65] However, these concerns focused on the ability of the states to be reimbursed for the expenses associated with receiving refugees.[66] The Act ultimately provided transitional funding for the first 18 months and a three-year limit on reimbursable expenses by states.[67] President Carter signed the Act into law in 1980.[68]

The same year that the Refugee Act was signed, thousands of Cubans fleeing persecution were resettled in the United States.[69] Though the Act was not relied upon directly in the resettlement of the Cubans, it was used for others fleeing persecution around the world.[70] Although Senator Kennedy predicted that Americans would likely only admit refugees for whom they felt a "special concern,"[71] he made clear that the decision to admit refugees is a decision to be made by the Executive and Congress, not by state governments.[72] His concern was perhaps ahead of its time, as discretionary admissions in the subsequent 30 years yielded few state objections.

According to the Refugee Act, the President determines how many refugees will be admitted to the United States each year.[73] From 2013 to 2015, the ceiling on refugee admission was set at 70,000 annually.[74] However, in light of the refugee crisis in Syria and other parts of the Middle East throughout 2015, President Obama expanded this number to 85,000 during the 2016 fiscal year, including 10,000 refugees from Syria.[75] After that decision is made, it is up to U.S. Citizenship and Immigration Services ("USCIS"), part of the Department of Homeland Security, to review applications for refugee status for the Attorney General's Office to determine who qualifies for a refugee visa.[76]

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65. *See id.* at 151 (discussing the "length of time of federal responsibility and the method of its administration" to assist the resettlement of refugees in local communities).

66. *Id.*

67. *Id.*

68. Kennedy, *supra* note 13, at 141.

69. *Id.*

70. *See id.* at 141 (referencing the government's abandonment of the Act in favor of other federal legislation), 155 ("There are over 13 million persons in the world today who meet the . . . definition of a refugee . . . [b]ut how many are to be admitted . . . is still a decision to be made in accordance with the Act.").

71. *Id.* at 155.

72. *Id.* at 156.

73. 8 U.S.C. § 1157(a)(2)–(3) (2016).

74. ANDORRA BRUNO, CONG. RESEARCH SERV., RL31269, REFUGEE ADMISSIONS AND RESETTLEMENT POL'Y 2 (2016).

75. Memorandum from Office of the Press Secretary to the Secretary of State, Presidential Determination on Refugee Admissions for Fiscal Year 2016 (Sept. 29, 2016), https://obamawhitehouse.archives.gov/the-press-office/2015/09/29/presidential-determination-presidential-determination-refugee-admissions [https://perma.cc/DLA2-VWKU].

76. 8 U.S.C. § 1157(c)(1) (2016).

B. Becoming a Refugee

Refugees, unlike asylees, apply for admission while outside the United States.[77] This provides the added benefit of distance during the screening process, eliminating any possibility of the refugee becoming a fugitive within the United States during the review process.[78] The screening process for a prospective refugee is rigorous.[79] The process begins with an application, usually filed with UNHCR, that is subsequently referred to the U.S. Department of State for review.[80] From there, the process follows these steps:

1. Applicants are interviewed by a consular officer of the United States and biometric data is collected.[81] Less than 1% of the total global refugee population move on to step 2.[82]

2. Successful applicants are referred to a Resettlement Support Center, which collects information to begin security checks.[83]

3. Biographic security checks are run through a variety of federal agencies, including FBI, DHS, and the State Department.[84] Syrian refugees undergo an additional layer of review to avert fraudulent applications.[85]

4. Interviews are conducted by USCIS officers.[86]

5. Fingerprints are taken and analyzed by federal agencies.[87]

6. Any necessary medical screenings are performed on the applicant.[88]

7. If no problems arise during the screening process, the applicant is assigned to a resettlement location within the United States.[89] They will be screened again upon entry and once more when applying for a

77. *Refugees: The Refugee Process*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May, 25, 2016), https://www.uscis.gov/humanitarian/refugees-asylum/refugees [http://perma.cc/6DEF-TNZP]; *Asylum*, U.S. CITIZENSHIP & IMMIGR. SERVS. (August 6, 2015), https://www.uscis.gov/humanitarian/refugees-asylum/asylum [https://perma.cc/WG5D-XJBL].

78. *Refugees*, *supra* note 77.

79. *See* Amy Pope, *Infographic: The Screening Process for Refugee Entry into the United States*, WHITE HOUSE (Nov. 20, 2015), https://obamawhitehouse.archives.gov/blog/2015/11/20/infographic-screening-process-refugee-entry-united-states [https://perma.cc/5P9K-R29L] ("Refugees undergo more rigorous screening than anyone else we allow into the United States").

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Pope, *supra* note 79.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

> permanent resident card, which they must do within one year of arrival.[90]

Once a refugee is admitted to the United States, they are placed with a resettlement agency, a non-profit or private organization designated by the president through the ORR, that provides transitional assistance.[91] Currently, there are nine recognized resettlement agencies in the United States.[92] Each refugee is assigned to one of those agencies, which work with local and state agencies to find appropriate placements within communities for the refugee.[93]

The Director of ORR and the State Department's Bureau of Population, Refugees, and Migration ("PRM") are required to consult regularly with state and local governments as well as nonprofit agencies "concerning the sponsorship process and the intended distribution of refugees among the States and localities before their placement in those States and localities."[94] As part of this consultation process, the federal agencies are required to:

> (i) insure that a refugee is not initially placed or resettled in an area highly impacted (as determined under regulations prescribed by the Director after consultation with such agencies and governments) by the presence of refugees or comparable populations unless the refugee has a spouse, parent, sibling, son, or daughter residing in that area,
>
> (ii) provide for a mechanism whereby representatives of local affiliates of voluntary agencies regularly (not less often than quarterly) meet with representatives of State and local governments to plan and coordinate in advance of their arrival the appropriate placement of refugees among the various States and localities, and
>
> (iii) take into account—
>
> (I) the proportion of refugees and comparable entrants in the population in the area,
>
> (II) the availability of employment opportunities, affordable housing, and public and private resources (including educational, health care, and mental health services) for refugees in the area,
>
> (III) the likelihood of refugees placed in the area becoming self-sufficient and free from long-term dependence on public assistance, and

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90. *Id.*

91. *The U.S. Refugee Resettlement Program – an Overview*, OFF. OF REFUGEE RESETTLEMENT (Sept. 14, 2015), http://www.acf.hhs.gov/programs/orr/resource/the-us-refugee-resettlement-program-an-overview [https://perma.cc/MH22-DNCB].

92. *Voluntary Agencies*, OFF. OF REFUGEE RESETTLEMENT (July 17, 2012), http://www.acf.hhs.gov/programs/orr/resource/voluntary-agencies [https://perma.cc/S6R9-6JEK].

93. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-729, REFUGEE RESETTLEMENT: GREATER CONSULTATION WITH COMMUNITY STAKEHOLDERS COULD STRENGTHEN PROGRAM (2012).

94. 8 U.S.C. § 1522(a)(2)(A) (2016).

(IV) the secondary migration of refugees to and from the area that is likely to occur.[95]

States are compensated for the initial costs associated with the placement of refugees within their communities by the federal government.[96] ORR provides compensation through grants that are either given directly to the states or administered through nonprofit agencies.[97] States work with local resettlement agencies within their communities to disburse the funds and to work directly with the refugees.[98] As such, states serve as conduits for the resettlement program, but have little direct oversight over the outcomes of federal decisions regarding community placements.[99]

Prior to the November 2015 attacks in France, little objection to refugee replacement in their communities had been voiced by the states, which receive lawful, often highly qualified, workers supported (temporarily) by federal funding.[100] This changed when states began describing the refugee program as a pathway to the entry of terrorists in the United States.[101] This event and its consequences are described in the next section.

III. STATE RESPONSE TO SYRIAN REFUGEE PLACEMENTS

On November 13, 2015, eight young European nationals savagely attacked civilians in a concert hall and at restaurants outside a stadium in Paris.[102] One hundred and thirty people were killed in the attacks.[103] As one of many criminal acts of terrorism linked to the rise of the "Islamic State," the attack attracted worldwide attention given its location far from the battlegrounds of Syria, Iraq, and Afghanistan.[104] One of the attackers killed by the police was found with a passport that was linked to a Syrian refugee recently admitted into the EU.[105] Not surprisingly,

95. *Id.* § 1522(a)(2)(C)(i–iii).

96. *Id.* § 1522(b)(1)(A).

97. *Id.* § 1522. Note that states are not required to receive direct federal grants and thus local charities receive the federal funds on behalf of the state. *Id.*

98. *Id.* § 1522(a)(1)(B)(iii).

99. *See id.* § 1522(a)(2)(D) (stating that the federal government will take into account recommendations by the state on where to place refugees).

100. *See* Jon Schuppe, *Syrians in America: How Safe is the U.S. Refugee Program?*, NBC NEWS (Nov. 19, 2015), http://www.nbcnews.com/storyline/paris-terror-attacks/how-safe-u-s-refugee-program-n465841 [https://perma.cc/9VLC-K4CP] (stating that since September 11th, 780,000 refugees had entered the United States, but backlash to accept more refugees began after the Paris attack).

101. *See id.* (stating governors do not want to allow Syrian refugees in their state because they believe that terrorists may infiltrate the refugee system, a thought disputed by U.S. intelligence officials who "believe the risk of Islamic terrorists using the refugee crisis to infiltrate the U.S. and carry out a terrorist attack is low").

102. *What We Know about the Paris Attacks and the Hunt for the Attackers*, WASH. POST (March 18, 2016), https://www.washingtonpost.com/graphics/world/paris-attacks/ [https://perma.cc/3WFP-E7YV].

103. *Id.*

104. *See generally id.*

105. Ishaan Tharoor, *Were Syrian Refugees Involved in the Paris Attacks? What We Know and Don't Know*, WASH. POST (Nov. 17, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/11/17/were-syrian-refugees-involved-in-the-paris-attacks-what-we-know-and-don't-know/ [https://perma.cc/6EAR-XUQ9].

this caused alarm among citizens that refugees could be wolves in sheep's clothing.[106] The German Interior Minister at the time noted that this passport may have been placed at the scene by members of the "Islamic State" to create anger toward Syrian refugees.[107] That is precisely what occurred.

States began taking steps to limit Syrian refugee placements immediately following the Paris attacks. Many called for an immediate suspension to the refugee program and, at the very least, a prohibition on refugee placements within these state communities.[108] Yet based on the legal framework set forth in the previous section of this Article, it appears that states are left with very few options in limiting the placement of refugees.[109] The federal government coordinates the refugee selection process, screening program, placement, and support of refugees while in the United States.[110] A state is involved only at the conclusion when the refugee is placed within a community.[111] There is no requirement for the federal government to provide any information from the screening process to the states, leaving them largely as blind recipients of these refugee placements.[112]

Once a refugee has been cleared through extensive screening, PRM determines his or her placement.[113] This determination is made in conjunction with one of the nine domestic refugee resettlement agencies that review case files of refugees to identify family members already in the United States and assess the best match between a refugee and the resources available in given communities.[114] After a placement determination is made, the refugee is given a loan by the U.S. government to fund travel to his or her new home.[115] Repayment for that loan begins shortly after arrival in the United States.[116]

Refugees are placed within approximately 190 communities across the United States, which cover nearly every state.[117] As denoted in Figure 1 below, Texas and California have received the largest number of refugee placements, while several states have received none at all.

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106. *Id.*

107. Patrick Donahue & Rainer Buergin, *Syrian Passport in Paris May Be Planted, German Minister Says*, BLOOMBERG NEWS (Nov. 18, 2015, 4:23 PM), http://www.bloomberg.com/news/articles/2015-11-17/syrian-passport-in-paris-may-be-planted-german-minister-says [https://perma.cc/SV9B-T6NF].

108. Byron Tau & Kristina Peterson, *Republican Governors Object to White House Syrian Migrant Policy*, WALL ST. J. (Nov. 16, 2015, 6:26 PM), http://www.wsj.com/articles/u-s-governors-object-to-white-house-syrian-migrant-policy-1447699052 [https://perma.cc/LYS3-FHD7].

109. *Supra* Part II.

110. Pope, *supra* note 79.

111. *See* 8 U.S.C. § 1522(a) (stating that states can be consulted in the process, but giving them no control over refugees until they have been placed in the state).

112. *See id.* § 1522 (failing to mention any requirement for the federal government to provide states information from the screenings).

113. U.S. DEP'T OF STATE, THE RECEPTION AND PLACEMENT PROGRAM, http://www.state.gov/j/prm/ra/receptionplacement/ [https://perma.cc/J5PW-3RUH] (last visited Mar. 1, 2017).

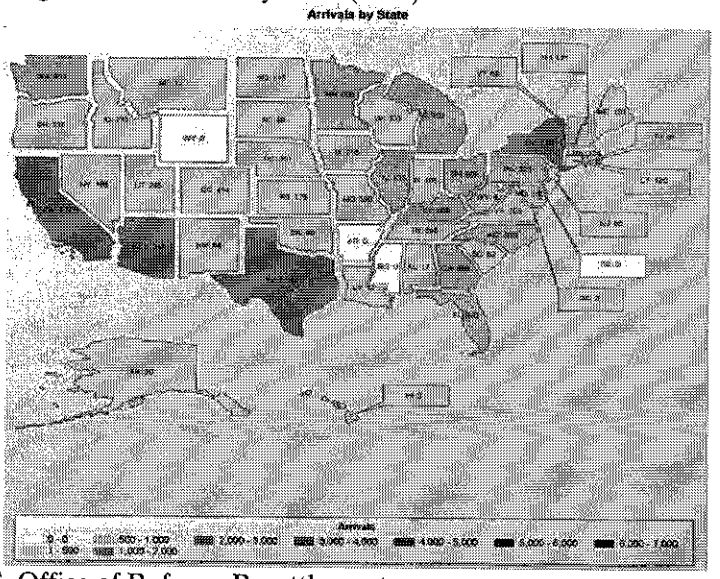
114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*; OFFICE OF ADMISSIONS, REFUGEE PROCESSING CTR., BUREAU OF POPULATION, REFUGEES, AND MIGRATION, DEP'T OF STATE, REFUGEE ARRIVALS BY STATE (2016), https://static1.squarespace.com/static/580e4274e58c624696efadc6/t/58459bb1cd0f68d91269ddd2/1480956849552/Arrivals+by+State+-+Map+12.5.16.pdf [https://perma.cc/W66L-UMJ9].

Figure 1. Refugee Resettlement by State (2016).



Source: U.S. Office of Refugee Resettlement.

The fight for a say in the resettlement of refugees among the states broke out in earnest in November 2015, just after the Paris attacks.[118] Twenty-nine Republicans and one Democratic governor (Maggie Hassan of New Hampshire) raised objections to the admission of refugees absent implementing some sort of an enhanced screening process.[119] Utah and South Dakota were the only two Republican-led states that did not object to the placement of refugees, though South Dakota did not object primarily because they had no refugees and did not expect to receive any.[120] On the contrary, many Democratic-led states issued statements reaffirming their desire to welcome and protect refugees.[121]

Shortly after an outcry from many states, ORR released a letter explaining the rigorous screening process that Syrian refugees currently go through prior to being placed in local communities.[122] In that letter, Director Carey reminded states that they "may not categorically deny ORR-funded benefits and services to Syrian refugees."[123] The letter goes on to remind states that they cannot discriminate against refugees in the provision of any program receiving federal funds, such as Medicaid.[124]

118. Tau & Peterson, *supra* note 108.

119. Arnie Seipel, *30 Governors Call for Halt to U.S. Resettlement of Syrian Refugees,* NAT'L PUBLIC RADIO (Nov. 17, 2015, 3:30 AM), http://www.npr.org/2015/11/17/456336432/more-governors-oppose-u-s-resettlement-of-syrian-refugees [https://perma.cc/H538-JX2E].

120. *Id.*

121. *Id.*

122. ROBERT CAREY, OFFICE OF REFUGEE RESETTLEMENT, DCL-16-02, RESETTLEMENT OF SYRIAN REFUGEES (Nov. 25, 2015), https://www.scribd.com/doc/291171360/Letter-from-federal-Office-of-Refugee-Resettlement-about-Syrian-refugees [https://perma.cc/V85N-3ZCA].

123. *Id.*

124. *See id.* (referring to Title VI of Civil Rights Act of 1964, 42 U.S.C § 2000d).

Despite the history of compliance by states, clear executive guidance, and the judicial precedent set forth in *Truax,*[125] *Davidovitz,*[126] *Toll,*[127] *Plyler,*[128] and others discussed below, states continued to assert their Tenth Amendment right to act in the interest of protecting their citizens and to contest the forced placement of refugees in their communities.[129] Consider a bill introduced by Arkansas representative Rick Crawford in November 2015: The Refugee Relocation Security Act would amend the Immigration and Nationality Act ("INA") to allow any state, through its governor, to reject the placement of refugees within its borders.[130] The Bill, which is in committee as of this writing, was co-sponsored by Florida representative John Mica.[131]

Likewise, in the Senate, Ted Cruz introduced the State Refugee Security Act in December 2015, which would amend the INA to state:

> STATE REJECTION OF REFUGEE RESETTLEMENT.—Notwithstanding any other provision of law, no alien eligible to be admitted to the United States under this section shall be placed or resettled in a State if the Governor of that State certifies to the Director of the Office of Refugee Resettlement that the Director has failed, in the sole determination of the Governor, to provide adequate assurance that the alien does not present a security risk to the State.[132]

The Senator's bill, which is also in committee as of this publication, was co-sponsored by Alabama Senator Richard Shelby.[133] Senator Cruz has been an outspoken opponent of immigration reform and rights for undocumented immigrants.[134] He has supported mass deportation, a border wall with Mexico, and the monitoring of Muslim neighborhoods.[135] Similarly, Senator Shelby has developed a long record of opposing immigration reform and immigrant benefits, including voting

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125. *See* Truax v. Raich, 239 U.S. 33, 43 (1915) (striking down an Arizona law that discriminated against immigrants as a violation of the 14th Amendment's Equal Protection Clause).

126. *See* Hines v. Davidowitz, 312 U.S. 52, 68 (1941) (striking down Pennsylvania law restricting, limiting, regulating, and registering aliens as a distinct group).

127. *See* Toll v. Moreno, 458 U.S. 1, 17 (1981) (holding that the University of Maryland's policy denying in-state status to certain aliens violated the Supremacy Clause).

128. *See* Plyler *v.* Doe, 457 U.S. 202, 202 (1982) (striking down a Texas law withholding state funds from local school districts for education of children who were not legally admitted into the United States).

129. *See generally id.*

130. *See* Refugee Relocation Security Act, H.R. 4033, 114th Cong. § 3 (2015) (by act of the governor or state legislator, "[t]he President may not relocate refugees to any state that explicitly rejects their admission into its respective state territory or tribal land").

131. *All Bill Information (Except Text) for H.R. 4033 - Refugee Relocation Security Act*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/4033/all-info [https://perma.cc/6ZSF-36A6] (last visited Mar. 1, 2017).

132. State Refugee Security Act of 2015, S. 2363, 114th Cong. § 2 (2015).

133. *S. 2363 - State Refugee Security Act of 2015*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/senate-bill/2363/cosponsors [https://perma.cc/VXX3-LKYB] (last visited Mar. 1, 2017).

134. Ted Cruz, *Cruz Immigration Plan*, https://www.tedcruz.org/cruz-immigration-plan/ [https://perma.cc/BC68-VBNK] (last visited August 29, 2016).

135. *Id*; Jeremy Diamond, *Ted Cruz: Police Need to 'Patrol and Secure' Muslim Neighborhoods,* CNN (March 22, 2016), http://www.cnn.com/2016/03/22/politics/ted-cruz-muslim-neighborhoods/ [https://perma.cc/RHQ4-8NHN].

against funding food stamps for impoverished immigrant children and for the recognition of English as the national language.[136]

Tennessee, which has been accepting refugee placements for many years, passed a law allowing that state to sue the federal government to prevent the placement of any refugees in its state.[137] Tennessee Senate Resolution 467 argued that Tennessee should not have to accept the federal placement of refugees because it withdrew from the U.S. Refugee Resettlement Program.[138] A conservative non-profit law firm has already volunteered to represent the state in their fight at no cost.[139] As of this writing, the suit has not been filed.[140]

Texas, which sued the federal government to block the placement of a Syrian family in November 2015, argued that they had not been adequately consulted by federal authorities nor provided with enough background information about the placements.[141] Texas Attorney General Ken Paxton argued that, "[t]he federal government's stated inability to run effective background checks on these refugees, entering the United States from one of the world's most potent hotbeds of terrorism, puts all Texans at risk."[142] A Federal District Court denied the Texas request for a restraining order on the placement of refugees in December of 2015.[143] In the Order, the judge held that Texas's argument that "terrorists could have infiltrated the Syrian refugees and could commit acts of terrorism in Texas" is based upon "largely speculative hearsay."[144]

In an election year with a highly partisan congress, national bills like these may have a slim chance of becoming law. State enactments may face better odds, but their chances of survival in the face of a preemption lawsuit by the federal government are low. Despite this, the question they bring to the table—whether states can prevent or limit the placement of refugees—is an important one and should be discussed. At its roots, the question confronts issues of states' rights and federal power over immigration.

A. Federal Supremacy over States

The Supremacy Clause, found in Article VI of the U.S. Constitution, states unequivocally that federal law is the "supreme law of the land," and that any

136. *See Richard Shelby on Immigration*, ON THE ISSUES, http://www.ontheissues.org/International/Richard_Shelby_Immigration.htm [https://perma.cc/NY2Y-EP63] (last visited Mar. 1, 2017).

137. S.J.R. 0467, 109th Gen. Assemb. (Tenn. 2015).

138. *Id.*

139. *See* Joel Ebert, Tennessee Senate Majority Leader: Refugee Resettlement Lawsuit Could Be Filed Soon, TENNESSEEAN (Jan. 11, 2017) (stating that the Thomas More Law Center has offered to represent Tennessee).

140. *Id.*

141. Plaintiff's Verified Original Complaint for Declaratory and Injunctive Relief and Application for Temporary Restraining Order and Preliminary Injunction, Tex. Health & Human Servs. Comm'n v. United States, 2015 WL 10990245 (N.D. Tex. Dec 9, 2015) (No. 3:15 – CV-3851 – N), 2015 WL 7769167.

142. *Texas Files Suit Against Federal Government over Syrian Refugee Placement*, ATT'Y GEN. TEX. (Dec. 2, 2015), https://www.texasattorneygeneral.gov/news/releases/texas-files-suit-against-federal-government-over-syrian-refugee-placement [https://perma.cc/UHR9-CLVB].

143. Tex. Health & Human Servs. Comm'n v. United States, No. 3:15 – CV-3851 – N, 2015 WL 10990245, at *1 (N.D. Tex. Dec. 9, 2015)..

144. *Id.*

conflicting laws enacted by states are unconstitutional.[145] And though certain areas of law have been found to be exclusively and expressly federal, such as foreign affairs, immigration was initially less clear.[146] However, subsequent decisions by the U.S. Supreme Court have clarified the role of the federal and state governments with respect to immigration, finding almost exclusive power to rest with the federal government.[147]

This has not prevented states from trying to enact laws that infringe upon the rights of immigrants. In 1915, the Supreme Court struck down an Arizona law that required most businesses operating in their state to be run by "qualified electors or native-born citizens of the United States."[148] This was the *Truax v. Raich* case, in which the Court concluded that the native-born requirement impacted immigration law, which is exclusively federal.[149] The argument for the appellants included language that resonates with the issue of refugee resettlement within the states today:

> An alien admitted to the United States under the Federal law has not only the privilege of entering and abiding in the United States but also of entering and abiding in any State, and being an inhabitant of any State entitles him, under the Fourteenth Amendment, to the equal protection of its laws.[150]

Some years later, Pennsylvania enacted the 1939 Alien Registration Act, which required all aliens living in Pennsylvania to register with the state, pay an annual fee, and carry their registration card with them at all times.[151] The state Act conflicted with a federal Act that required aliens over the age of 14 to register with the federal government, but did not include any registration fee or requirement that a card be carried by the alien.[152] An appeal was filed by Mr. Davidovitz, an alien subjected to both Acts.[153] Referencing the Supremacy Clause, Supreme Court Justice Black stated, "[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."[154] He went on to explain that "[o]ne of the most important and delicate of all international relationships" is that between the United States and the nationals of other countries.[155] International relations, including the immigration of foreign nationals, is a field that affects the United States as a whole rather than any individual

145. U.S. CONST. art. VI.

146. Kevin J. Fandl, *Immigration Posses: U.S. Immigration Law and Local Enforcement Practices*, 34 J. LEGIS. 16 (2009) [hereinafter Fandl: *Immigration Posses*].

147. *See* Kevin J. Fandl, *Putting States Out of the Immigration Law Enforcement Business*, 9 HARV. L. & POL'Y REV. 529, 535–540 (2015) [hereinafter Fandl: *Law Enforcement*] (examining recent immigration cases addressing preemption of state actions).

148. Truax v. Raich, 239 U.S. 33, 35 (1915).

149. *See id.* at 42 (citing Fong Yue Ting v. U.S. 149 U.S. 698, 713 (1893)) (concluding that the authority to control immigration is vested solely in the Federal Court).

150. *Id.* at 33.

151. The Alien Registration Act, 35 PA. STAT. ANN., §§ 1801–1802 (West 1939), *invalidated by* Hines v. Davidowitz, 312 U.S. 52 (1941).

152. Hines v. Davidovitz, 312 U.S. at 60, 74.

153. *Id.* at 52.

154. *Id.* at 63.

155. *Id.* at 64.

state. Accordingly, the Court found the Pennsylvania Act to conflict with federal authority to regulate immigration.[156]

The *Davidovitz* decision, however, did not prevent states from attempting to control immigration law within their borders. California modified their labor code in 1971 to include section 2805, which states, "No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers."[157] A group of migrant farmworkers brought suit against the California Department of Labor claiming that this was an unconstitutional regulation of immigration that contravenes the Supremacy Clause and is thus preempted.[158] Justice Brennan, writing for a unanimous Supreme Court, began by reiterating that the "[p]ower to regulate immigration is unquestionably exclusively a federal power."[159] However, he went on to say that not every state statute that touches upon the topic of immigration interferes with federal immigration power. Justice Brennan claimed that "the fact that aliens are the subject of a state statute does not render it a regulation of immigration."[160]

In the *De Canas* case, the Court made it clear that under the Tenth Amendment, states are permitted to regulate immigrants so long as those regulations are principally related to inherent state powers and are not an effort to discriminate or target immigrants exclusively.[161]

Toll v. Moreno sets a boundary on these state rights.[162] Justice Brennan also wrote the opinion in the *Toll* case, but in this instance he concluded, in a 6-3 decision, that the state had gone too far by prohibiting nonimmigrant aliens domiciled in a state from obtaining in-state tuition at a state university.[163] A nonimmigrant alien is a lawfully-present alien who does not intend to permanently remain in the United States.[164] And though Maryland offered in-state tuition to both citizens and immigrants domiciled in the state, nonimmigrants, regardless of domicile, could not obtain the same benefits.[165] The Court concluded that because the federal government admitted these aliens to enter the country and to establish domicile in the United States, they could not be prevented by the state from the same rights that similarly-domiciled individuals would have.[166]

In one of the more recent decisions addressing federal preemption with respect to immigration law, the Court struck down an Arizona statute that largely modeled federal laws on immigrant law enforcement.[167] In *Arizona v. United States*, the Arizona legislature sought to grant its state law enforcement entities the authority to enforce

156. *Id.* at 66–67.

157. CAL. LAB. CODE, § 2805(a) (West 1987) (repealed 1988).

158. De Canas v. Bica, 424 U.S. 351, 353 (1976).

159. *Id.* at 354.

160. *Id.* at 355.

161. *Id.* at 358 n.6.

162. *See* Toll v. Moreno, 458 U.S. 1, 17 (1982) (holding the state of Maryland did not have the right to prohibit in-state tuition for nonimmigrant aliens domiciled in a state).

163. *Id.*

164. 8 U.S.C. § 1101(a)(15)(B) (2014).

165. *Toll*, 458 U.S. at 3–4.

166. *Id.* at 17.

167. United States v. Arizona, 641 F.3d 339, 369 (9th Cir. 2011), *aff'd in part, rev'd in part*, 132 S. Ct. 2492 (2012).

some aspects of federal immigration law.[168] When challenged by federal authorities, Arizona claimed that this legislation was meant to supplement federal law in an area where limited resources prevented comprehensive federal law enforcement actions.[169] The U.S. Supreme Court disregarded the state's justification and concluded that the state was attempting to usurp federal immigration law by authorizing its agents to interpret and enforce immigration law on their own.[170]

In the *Arizona* case, Justice Scalia emphasized that state regulation of immigration is prohibited "when, for example, it admits those whom federal regulation would exclude, or excludes those whom federal regulation would admit."[171] The admission of immigrants to the United States is a federal matter, even though their placement is local.[172]

A string of cases throughout the 20th and 21st centuries have upheld federal supremacy over immigration law.[173] No decision to date has concluded that states are preempted from enacting legislation that would block the resettlement of refugees within their borders.[174] And the INA, as amended by the 1980 Refugee Act, makes it clear that states are permitted to express their objections when placement would conflict with a state's "policies and strategies."[175] However, nothing in statutory or case law indicates that a state could outright refuse to accept a refugee placement.[176]

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168. *Id.* at 344.

169. *Id.*

170. *See generally* Arizona v. United States, 132 S.Ct. 2492 (2012) (noting that by authorizing state and local officers to engage in enforcement activities, the Arizona law undermines federal law).

171. *Id.* at 2515.

172. *See generally id.* (referring to the conflict in laws between Arizona law and federal immigration law).

173. *See generally* Matthews v. Diaz, 426 U.S. 67 (1976) (noting that Congress, and not the states, is permitted to discriminate between classes of aliens with respect to access to social welfare programs); Graham v. Richardson, 403 U.S. 365 (1971) (states are not permitted to discriminate in the granting of benefits between aliens and citizens); Takashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (a state agency cannot deny a license on the basis of citizenship status); Traux v. Raich, 239 U.S. 33 (1915) (a state may not pass a quota on the number of aliens permitted to work in that state).

174. Pratheepan Gulasekaram & Karthick Ramakrishnan, *The Law is Clear: States Cannot Reject Syrian Refugees*, WASH. POST (Nov. 19, 2015), https://www.washingtonpost.com/posteverything/wp/2015/11/19/the-law-is-clear-states-cannot-reject-syrian-refugees/?utm_term=.bb38e3189faf [https://perma.cc/4UXZ-2PDH].

175. The Refugee Act of 1980, 8 U.S.C. § 1522(a)(2)(D) (2017) ("With respect to the location of placement of refugees within a State, the Federal agency administering subsection (b)(1) shall, consistent with such policies and strategies and to the maximum extent possible, take into account recommendations of the State.").

176. *See, e.g.*, Tenn. Att'y. Gen. Op. 5-6 (2015), http://attorneygeneral.tn.gov/op/2015/op15-77.pdf (noting that states lack a veto power over a federal decision to locate refugees within their borders) [https://perma.cc/PFK2-VAGF]; *see also* Steven Vladeck, *Three Thoughts on Refugee Resettlement Federalism*, LAWFARE BLOG (Nov. 17, 2015) (stating that "there's no requirement that the federal government actually implement whatever recommendations the state may make").

B. Federal Actions to Suspend Refugee Placements

Most recently, the House of Representatives took up a bill in 2015 that would require the Executive to take responsibility for any refugees that ultimately become a threat to the security of the United States.[177] The American Security Against Foreign Enemies Act ("SAFE Act") would expand the scope of background checks on Iraqi and Syrian refugees;[178] require the Secretary of the Department of Homeland Security, the Director of the Federal Bureau of Investigation, and the Director of National Intelligence to unanimously certify that the proposed refugee poses no security threat to the United States;[179] require the Inspector General of DHS to conduct risk-based reviews of these certifications annually;[180] and require the Secretary of Homeland Security to report monthly to a congressional committee regarding the admissions.[181] The Act would only apply to refugees from Syria and Iraq.[182]

The SAFE Act passed overwhelmingly in the House with a 289-137 vote, which included nearly 50 Democrats living in districts with large populations of concerned constituents.[183] President Obama threatened to veto the bill from the outset,[184] perhaps providing some cover to those Democrats who knew the bill would upset their constituents. However, the bill never came to a veto decision.[185] A 55-43 largely party-line vote in the Senate in January 2016 prevented the bill from reaching President Obama's desk.[186]

Calls to suspend the refugee resettlement program have been vociferous since 2014. As an interesting parallel for comparison, refugee placements immediately after the September 11, 2001 attacks in the United States declined precipitously, leaving as many as 60% of potential refugees without clearance to enter the United States.[187] At that time, a bipartisan group of Senators urged President Bush to take in more refugees.[188] The lawmakers stated, "[t]ens of thousands of refugees have been stranded overseas in places of danger or squalid refugee camps, and have not been able to find a new secure future in the United States during this past year .... These unused

177. H.R. 4038, 114th Cong. § 2(a) (2015).

178. *Id.*

179. *Id.* § 2(b).

180. *Id.* § 2(c).

181. *Id.* § 2(d).

182. *Id.* § 2(e)(1)(A).

183. *See* Jennifer Steinhauer & Michael D. Shear, *House Approves Tougher Refugee Screening, Defying Veto Threat*, N.Y. TIMES (Nov. 19, 2015), http://www.nytimes.com/2015/11/20/us/politics/house-refugees-syria-iraq.html [https://perma.cc/KH2V-PTU7] (referencing the political pressures that lawmakers faced in their home districts).

184. *Id.*

185. Jennifer Steinhauer, *Senate Blocks Bill on Tougher Refugee Screening*, N.Y. TIMES (Jan. 20, 2016), http://www.nytimes.com/2016/01/21/us/politics/senate-refugee-screening-bill-syria-iraq.html?_r=0 [https://perma.cc/PT32-DFTX].

186. *See* Jordain Carney, *Refugee Bill Stalls in Senate After Battle Over Trump Amendment*, THE HILL: FLOOR ACTION (Jan. 20, 2016), http://thehill.com/blogs/floor-action/senate/266480-refugee-bill-stalls-in-senate-after-battle-over-trump-amendment [https://perma.cc/TGX3-8AL7] (explaining that the Bill stopped in the Senate).

187. Christopher Marquis, *Threats and Responses: Seeking Haven; Since Attacks, U.S. Admits Fewer Refugees*, NY TIMES (Oct. 30, 2002), http://www.nytimes.com/2002/10/30/international/americas/30REFU.html [https://perma.cc/7TRF-4T5J].

188. *Id.*

spaces are in essence like unused lifeboats on a sinking ship."[189] The tone of the discussion has certainly changed since that time.

IV. DO STATES HAVE ANY RIGHTS?

All migrants to the United States, refugee and non-refugee, affect the states in which they live. They occupy property, engage in local commerce, send their children to local schools, and utilize local services such as hospitals and law enforcement. After admission to the nation, the entire burden for maintaining the safety and well-being of the immigrants shifts to the states. This has led to understandable frustrations at the state level.[190]

Consider former Arizona Governor Jan Brewer, who said, "[w]e in Arizona have been more than patient waiting for Washington to act....But decades of federal inaction and misguided policy have created an unacceptable situation."[191] Or California Governor Jerry Brown, who said, "[w]hile Washington waffles on immigration, California's forging ahead . . . I'm not waiting."[192] In response to the federal challenge to Arizona's doomed effort to take immigration regulation into state hands, Justice Anthony Kennedy responded, "Arizona may have understandable frustrations with the problems caused by illegal immigration . . . but the State may not pursue policies that undermine federal law."[193]

With respect to immigration in general, the precedent is quite clear that states are preempted from directly legislating in the field of immigration.[194] It is equally clear, however, that states are permitted to legislate in areas affecting the health, safety, and welfare of their residents, even if these laws affect immigrants in a disproportionate manner.[195] Thus, one must ask where this leaves states with respect to the placement and integration of refugees within their communities, an issue that seemingly touches on both federal and local concerns.

States have a statutory right to be consulted prior to receiving refugees for placement.[196] But this requirement only specifies that the federal government will inform states on a regular basis about the sponsorship process and intended

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189. *Id.*

190. *See, e.g.*, Fandl, *Immigration Posses*, *supra* note 146 (tracking numerous state efforts to usurp federal immigration enforcement authority); Fandl, *Law Enforcement*, *supra* note 147 (examining recent immigration cases addressing preemption of state actions).

191. Anne E. Komblut & Spencer S. Hsu, *Arizona Governor Signs Immigration Bill, Reopening National Debate*, WASH. POST (Apr. 24, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/04/23/AR2010042301441.html [https://perma.cc/23JG-C5MM].

192. *Governor Brown Signs Immigration Legislation*, GOVERNOR OF CAL. (Oct. 5, 2013), https://www.gov.ca.gov/news.php?id=18253 [https://perma.cc/X8FF-BQ94].

193. Arizona v. United States, 132 S. Ct. at 2510.

194. *See generally supra* Part III.A.

195. *See, e.g.*, Toll, 458 U.S. at 26 (Rehnquist, J., dissenting) (quoting Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978)) ("[P]rior decisions indicate that 'when a State's exercise of its police power is challenged under the Supremacy Clause, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'").

196. 8 U.S.C. § 1522(a)(2)(A).

distribution of refugees.[197] It does not require any additional information to be transmitted regarding the specific refugees who will be placed within the state.[198] States also maintain the right to withdraw from the Refugee Resettlement Program.[199] However, in the event that they do, the refugee program director is permitted to authorize a replacement designee to coordinate a program within that state.[200]

States also have access to information about upcoming refugee placements, federal funding for the resettlement program, and employment data. This is communicated at quarterly meetings led by ORR in which state agencies are invited to participate.[201] Yet some states desire additional information, such as the potential risks posed by certain refugees.[202] Texas objected to the placement of certain Syrian refugees in 2015 unless and until they received more information about the specific refugees who would be coming to Texas.[203] They also requested a temporary restraining order to prevent the immediate placement of those refugees in their state.[204] However, the order was withdrawn after the State Department provided Texas with more information about the refugees.[205]

As a practical matter, it is important to understand how the federal government places refugees within state communities. The ORR provides funding to support refugee placement within a state.[206] This funding goes directly to state refugee agencies in 33 states, each of which designs and administers their own state refugee resettlement program.[207] As required by the Refugee Act, ORR certifies these state-run

197. *Id.*

198. *See id.* § 1522(a)(2)(B)–(C) (specifying policies and strategies for resettling refugees that must be developed and implemented through consultation with state and local governments).

199. *See* 45 C.F.R. § 400.301(a) ("In the event that a State decides to cease participation in the refugee program . . . .").

200. *Id.* § 400.301(c).

201. OFF. OF REFUGEE RESETTLEMENT, U.S. DEPT. OF HEALTH AND HUMAN SERVS., STATISTICAL ABSTRACT FOR REFUGEE RESETTLEMENT STAKEHOLDERS (2014), http://www.acf.hhs.gov/sites/default/files/orr/statistical_abstract_for_refugee_resettlement_stakeholders_508.pdf [https://perma.cc/A8E8-VYGF].

202. *See* Associated Press, *Alabama Becomes 2nd State To Sue U.S. Government Over Refugee Program*, ABC 33/40 (Jan. 7, 2016), http://abc3340.com/news/local/alabama-gov-robert-bentley-suing-federal-government-over-resettlement-of-refugees [https://perma.cc/TL88-97PD] (explaining that Alabama has also sued the federal government for failing to provide the state with sufficient information about the refugees who have settled or will be settled in the state).

203. *See* Plaintiff's Amended Application for Preliminary Injunction at 8–9, Tex. Health & Human Servs. v. United States, No. 3:15-CV-3851-N (N.D. Tex. Feb. 8, 2016) (addressing the Commission's argument that 8 U.S.C. § 1522 gives the Commission a right to advance information concerning the specific refugees to be resettled prior to resettlement).

204. *Id.* at 9.

205. *See* Camila Domonoske, *Texas, Federal Government Face Off in Court Over Syrian Refugees*, NPR NEWS (Dec. 4, 2015, 1:03 PM), http://www.npr.org/sections/thetwo-way/2015/12/04/458466055/texas-federal-government-face-off-in-courts-over-syrian-refugees [https://perma.cc/3PNC-B8XU] (explaining that Texas' withdrawal of its request for a temporary restraining order was prompted by the federal government's willingness to provide more information about incoming refugees).

206. *See* 45 C.F.R. § 400.207 (2017) (stating that Federal funding is available for reasonable and necessary administrative costs of providing assistance and services set forth in §§ 400.203 through 400.205).

207. *See id.* § 400.4(a) ("In order for a State to receive refugee resettlement assistance from funds appropriated under section 414 of the Act, it must submit to ORR a plan that meets the requirements of title IV of the Act and of this part and that is approved under §400.8 of this part."); *see also* OFFICE OF REFUGEE RESETTLEMENT, *Find Resources and Contacts in Your State*, https://www.acf.hhs.gov/orr/state-programs-annual-overview [https://perma.cc/C3RE-Y34N] (last visited Mar. 6, 2017) (listing 33 states that

programs.[208] At least five states have refused federal funding, in effect channeling that funding to nonprofit charitable organizations, such as Catholic Charities.[209] In 12 states, the funding is channeled through the Wilson/Fish program,[210] which aims to increase employment and self-sufficiency prospects for refugees by using cash assistance to encourage early employment.[211] The only state without any refugee program is Wyoming.[212]

The coordination between state, federal, and community-based organizations in the placement of refugees is fairly straightforward. Once a refugee has been selected for placement and screened by the federal government, a state voluntary agency is contacted by the State Department's PRM Bureau.[213] The voluntary agency then contacts a community-based organization that works with refugees and notifies them of the pending refugee arrival.[214] That organization receives a payment from PRM to arrange housing and other necessities for the refugee.[215] Following arrival of the refugee, the private sector organization receives funds issued by PRM but

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have state-administered programs).

208. *See* 8 U.S.C. § 1522(a)(6)(A) (requiring that a State must submit a plan to the director in order to receive funding); *see, e.g.*, Letter from Kenneth Tota, Acting Director, Office of Refugee Resettlement, to Sidonie Squier, Sec'y, N.M. Human Servs. Dep't (Feb. 4, 2015), http://www.hsd.state.nm.us/uploads/FileLinks/6331671b99b34cafba9bd8cb327bc208/Signed_Letter_with_Approved_Plan.pdf [https://perma.cc/5C3U-EWR6] (certifying that the 2015 State Plan for the New Mexico Refugee Resettlement Program is in compliance with ORR regulations at 45 C.F.R. § 400).

209. Alexa Ura, *Texas Threatens to Withdraw from Refugee Resettlement Program*, TEX. TRIB. (Sept. 21, 2016), https://www.texastribune.org/2016/09/21/texas-threatens-withdraw-refugee-resettlement-prog/ [https://perma.cc/QY8G-V5MY]. *See* OFF. OF REFUGEE RESETTLEMENT, WILSON/FISH ALTERNATIVE PROGRAM: FY 2015-2016 PROGRAM GUIDELINES 3 (2015), https://www.acf.hhs.gov/sites/default/files/orr/wilson_fish_guidelines_fy2015_16.pdf [https://perma.cc/F8XB-KJ2Q] (explaining that the Wilson/Fish program has the regulatory authority to expand sites if a state withdraws from the refugee program and listing agencies that administer the program).

210. 8 U.S.C. § 1522(e)(7) (Wilson/Fish Amendment); *see also* OFF. OF REFUGEE RESETTLEMENT, *supra* note 209, at 3 (explaining this alternate program to facilitate a more efficient use of resources to integrate refugees in the country for less than 36 months).

211. This program is in place in Alabama, Alaska, Colorado, Idaho, Kentucky, Louisiana, Massachusetts, Nevada, North Dakota, South Dakota, Tennessee, Vermont, as well as San Diego County, California. OFF. OF REFUGEE RESETTLEMENT, *supra* note 209, at 3.

212. Letter from Bob Carey, Dir., Office of Refugee Resettlement, FY 2015 Social Services Formula Allocations State Letter 15-04 (Apr. 28, 2015), http://www.acf.hhs.gov/programs/orr/resource/state-letter-15-04 [https://perma.cc/P2QV-8DUX] ("The state of Wyoming does not participate in the State Administered Refugee Resettlement Program.").

213. *See The Reception and Placement Program*, US DEP'T OF STATE, http://www.state.gov/j/prm/ra/receptionplacement/ [https://perma.cc/L2M7-NA2P] (last visited Mar. 6, 2016) (explaining that each refugee approved for admission is sponsored by one of nine resettlement agencies participating in conjunction with the State Department).

214. *See* BUREAU OF POPULATION, REFUGEES & MIGRATION, *Refugee Admissions Reception & Placement Program*, U.S. DEP'T OF STATE (Jan. 26, 2016), https://www.state.gov/j/prm/releases/factsheets/2016/251849.htm [https://perma.cc/6ER2-8K6A] ("The sponsoring agency is responsible for placing refugees with one of its affiliated offices.").

215. *See id.* (explaining that the PRM Bureau supplies resettlement agencies a one-time sum per refugee to assist with rent, furnishings, food, clothing).

administered through the state's voluntary agency.[216] These funds are used to help the refugee obtain employment, receive medical care, and learn useful languages.[217]

Refugees arriving in the United States receive a number of benefits, including a one-time cash stipend for basic needs, Refugee Cash Assistance (monthly amounts vary depending on the size of the family, among other things), Supplemental Security Income for refugees over age 65 ($674/month), and federal health care through the ORR for eight months.[218] Refugees are also granted the right to work and a path to citizenship.[219] Their children may enroll in state schools and their income is taxed at the state and federal level.[220] However, after eight months these benefits cease and a refugee must apply for benefits like any other U.S. citizen.[221]

Many refugee benefits flow to states or state-organizations through federal programs.[222] Supplemental assistance is permitted, but states are not required to offer any additional benefits beyond what the federal government provides.[223] Refugees utilize state services just as other lawful immigrants might, including accessing public schools or public hospitals, renting property, and obtaining jobs.[224] A state is prohibited from restricting access to these public benefits,[225] but because refugees are expected to find employment within six months of arrival and because, statistically,

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216. *See id.* (explaining that the State Department's Reception and Placement program is limited to the first three months after arrival and that then the ORR works through state and nongovernmental organizations to provide longer-term funding, medical assistance, and language, employment, and social services).

217. *Id.*

218. *See id.*; *45* C.F.R. § 400.60 (listing requirements for Refugee Cash Assistance (RCA) program); Kathy Ruffing, *Elderly and Disabled Refugees Face SSI Cutoff*, CTR. ON BUDGET & POLICY PRIORITIES: OFF THE CHARTS (Sept. 29, 2011, 2:56 PM), http://www.cbpp.org/blog/elderly-and-disabled-refugees-face-ssi-cutoff [https://perma.cc/69SQ-VZSR] ("SSI provides . . . $674 a month . . . to elderly [refugees] . . . ."); 45 C.F.R. § 156.602(b) ("Coverage under Refugee Medical Assistance, authorized under section 412(e)(7)(A) of The Immigration and Nationality Act, provides up to eight months and coverage . . . .").

219. *See* 8 U.S.C. § 1522 (a)(1)(A) (explaining that the Director must make available sufficient resources for employment training and placement); *see also id.* § 1522(a)(1)(B) (describing Congress' intent that employable refugees should be employed as soon as possible after their arrival in the United States); 8 C.F.R. § 209.1 (2011) (explaining the refugee process for obtaining lawful permanent residence); 8 C.F.R. § 316.2 (2011) (explaining the process for naturalization).

220. *See The Reception and Placement Program*, *supra* note 213 (explaining that after arriving in the U.S., resettlement affiliates assist refugees in registering children in school); U.S. DEP'T OF STATE, REFUGEE RESETTLEMENT IN THE UNITED STATES (Oct. 21, 2015), https://2009-2017.state.gov/r/pa/pi/249076.htm [https://perma.cc/XYW8-XF28] (explaining that refugees pay taxes).

221. *See Refugees*, OFF. OF REFUGEE RESETTLEMENT, http://www.acf.hhs.gov/programs/orr/refugees [https://perma.cc/JX9C-DBGA] (last updated Jan. 28, 2016) ("ORR supports additional programs to serve all eligible populations beyond the first eight months post-arrival").

222. *See* Amber Phillips, *Here's How Much the United States Spends on Refugees*, WASH. POST (Nov. 30, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/11/30/heres-how-much-the-united-states-spends-on-refugees/ [https://perma.cc/RNK9-Y9CB] (breaking down of the costs of resettling refugees in the United States).

223. *See, e.g.*, 8 U.S.C. § 1522(a)(6) (2012) (distinctly missing a benefit requirement).

224. Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1520–30 (1995) (discussing public benefits and services available to refugees, lawful immigrants, and undocumented immigrants).

225. *See* Plyler v. Doe, 457 U.S. 202, 230 (1982) (holding that the Texas statute effectively prohibiting undocumented children from attending public school was unconstitutional).

many refugees find jobs faster than native-born citizens, there is a high chance that they will contribute to the state's tax revenue promptly after arrival.[226]

Restricting funding for these community-based organizations has been one of the mechanisms that states have utilized to limit the placement of refugees in their communities. In a 2016 case, Indiana instructed its voluntary agencies to withhold funding from a private sector organization, Exodus, in order to discourage the federal government from placing refugees in their state.[227] Indiana Governor Pence announced the Directive in November 2015:

> In the wake of the horrific attacks in Paris, effective immediately, I am directing all state agencies to suspend the resettlement of additional Syrian refugees in the state of Indiana pending assurances from the federal government that proper security measures have been achieved. Indiana has a long tradition of opening our arms and homes to refugees from around the world but, as governor, my first responsibility is to ensure the safety and security of all Hoosiers. Unless and until the state of Indiana receives assurances that proper security measures are in place, this policy will remain in full force and effect.[228]

Exodus was already in the process of placing an arriving family from Syria in Indiana when they were notified by the state voluntary agency that resettlement of Syrian refugees would be suspended.[229] Exodus notified PRM, and the family was ultimately rerouted to Connecticut.[230] Exodus continued placing families in Indiana and was informed by the state that they would only receive federal funds for non-Syrian placements.[231]

The district court in *Exodus* found the Indiana Directive in clear violation of the Equal Protection Clause of the Fourteenth Amendment.[232] By delineating federal funding on the basis of national origin, the state was effectively denying protection on the basis of a protected class.[233] The state's purported legal basis in providing security for its citizens failed by a "wide margin."[234]

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226. *An Overview of U.S. Refugee Law and Policy*, AM. IMMIGR. COUNCIL (Nov. 18, 2015), https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy [https://perma.cc/8HMK-KVUN] [hereinafter *Overview*].

227. Exodus Refugee Immigration, Inc. v. Pence, 165 F. Supp. 3d 719, 723–24 (S.D. Ind. 2016).

228. Press Release, Mike Pence, Governor of Indiana, Governor Pence Suspends Resettlement of Syrian Refugees in Indiana (Nov. 16, 2015), http://www.in.gov/activecalendar/EventList.aspx?view=EventDetails&eventidn=239126&information_id=233816&type&syndicate=syndicate [https://perma.cc/PN45-BZ45].

229. *Exodus*, 165 F.Supp.3d at 726.

230. *Id.*

231. *See id.* at 727 ("Because of Governor Pence's directive, Exodus will not seek reimbursement for social services from the State for the four Syrian refugees currently enrolled in the Matching Grant Program.").

232. *See id.* at 739 ("Exodus has shown a strong likelihood of success that the State's challenged conduct constitutes unconstitutional discrimination in violation of the Equal Protection Clause.")

233. *See id.* at 728 ("Exodus's equal protection and Title VI claims are both predicated on its view that the State's conduct amounts to national origin discrimination in that the State passes on federal funds to Exodus for the social services it provides to its refugee clients except those from Syria.").

234. *Id.* at 738.

Though the *Exodus* case was decided on the grounds of equal protection, one of the hallmarks of the Refugee Act, the judge clearly stated that state laws cannot create a conflict that would prevent the federal government from achieving its legitimate goals, including the placement of refugees.[235] The Refugee Act includes an anti-discrimination provision, which prevents discrimination on the basis of national origin in the distribution of funds to refugees.[236] Accordingly, the Indiana Directive, which discriminated against Syrian refugees, directly contradicted that federal mandate.[237]

Principles of federalism do not altogether prohibit states from acting in the field of immigration. For instance, New York City allocated funding to provide legal assistance to non-citizens in deportation proceedings.[238] New York has also begun issuing identification cards to immigrants, regardless of status, to allow them to acquire benefits in the city.[239] In addition, 20 states currently offer in-state tuition to immigrants regardless of status.[240]

In fact, following welfare reform instituted under the Clinton Administration in 1996, states have been left with significant control over the social benefits immigrants will receive when domiciled within their borders.[241] The 1996 Personal Responsibility and Work Opportunity Reconciliation Act prevented most immigrants from receiving federal welfare benefits for their first five years in the United States.[242] This program was revised over the next several years to provide lawful immigrants with access to food stamps and supplemental security income programs.[243] However, the burden fell to the states to determine whether they would bridge the benefits gap between citizens and lawful non-citizens.[244]

Welfare reform gave states the option to deny most social benefits to immigrants; but refugees were exempted from this rule.[245] After being domiciled in the United

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235. *Exodus*, 165 F. Supp. 3d at 728 ("[T]he Supreme Court's decision in *Armstrong v. Exceptional Child Center, Inc.*, 135 S.Ct. 1378, 191 L.Ed.2d 471 (2015), does not demonstrate that the Refugee Act precludes the Court from exercising its equitable power to enjoin unlawful executive action, as neither of the two requisite factors in that case are met here," and "[t]he State's withholding of federal funds for social services provided to Syrian refugees is diametrically opposed to Congress's goal of providing services to refugees").

236. 8 U.S.C. § 1522(a)(5) (2016).

237. *See Exodus*, 165 F.Supp.3d at 728 ("Exodus's equal protection and Title VI claims are both predicated on its view that the State's conduct amounts to national origin discrimination in that the State passes on federal funds to Exodus for the social services it provides to its refugee clients except those from Syria.").

238. Brooke L. Rollins & John D. Davidson, *A Conservative Case for Immigration Federalism*, REAL CLEAR POL'Y (Mar. 24, 2016), http://www.realclearpolicy.com/blog/2016/03/24/a_conservative_case_for_immigration_federalism_1591.html [https://perma.cc/H4CJ-M43A].

239. *Id.*

240. Gilberto Mendoza, *Tuition Benefits for Immigrants*, NAT'L CONFERENCE OF STATE LEGISLATURES (July 15, 2015), http://www.ncsl.org/research/immigration/tuition-benefits-for-immigrants.aspx [https://perma.cc/ZE65-3GX8].

241. *See generally* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No 104–193, 110 Stat. 2105 (1996).

242. *Id.*

243. 8 U.S.C. § 1612(a)(D) (2012).

244. *See, e.g.*, Audrey Singer, *Welfare Reform and Immigrants: A Policy Review*, *in* IMMIGRANTS, WELFARE REFORM, AND THE POVERTY OF POLICY 21, 21–22 (Philip Kretsedemas & Ana Aparico eds., 2004).

245. *Mapping Public Benefits for Immigrants in the States*, PEW CHARITABLE TRUST, (Sept. 24, 2014), http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2014/09/mapping-public-benefits-for-immigrants-in-the-states [https://perma.cc/8JUD-F9BN].

States for five years, lawful permanent residents, humanitarian immigrants (asylees and refugees), and a few other special categories of immigrants considered "qualified" immigrants were all given access to federal social benefits, including Medicaid, Children's Health Insurance, and Temporary Assistance for Needy Families.[246] Humanitarian immigrants were exempted from this waiting period.[247] In addition, 26 states offer supplemental social benefits for immigrants, such as low cost insurance for children or cash assistance programs for needy families.[248]

Overall, although states are given no choice in the federal placement of refugees within their borders, the burden of providing support to these refugees falls heavily on the federal, and not the state, government.[249] As such, from a federalism perspective, there is little economic argument to be made to justify the rejection of a refugee being placed within a state's borders since the decision is being made to accept the refugee within federal borders and, once admitted to the United States, free movement among all 50 states is permitted. Likewise, it is difficult to fathom a successful argument that refugees pose a security threat given the rigorous review process they undergo.

A. Executive Power over Immigration

Despite the nearly insurmountable argument that states are powerless to act, states have sought creative ways to assert their rights with respect to immigration. One approach has been to challenge the Executive's interpretation of immigration statutes.[250] The authority granted to the President under the INA is ambiguous, allowing the President to take liberties in his reading of the statute.[251]

The Deferred Action for Childhood Arrivals ("DACA") program is a recent example of how states assert standing to challenge federal power over immigration.[252] Starting in 2012, following clear indications from Congress that immigration reform was not forthcoming,[253] President Obama issued a policy statement re-prioritizing the enforcement of existing immigration law.[254] That policy directed the Department of Homeland Security to focus limited enforcement resources on immigrants who may

246. *See Id.* (excepting "humanitarian immigrants and veterans or members of the military" from the five-year waiting period).

247. *Id.*

248. *Id.*

249. *The Reception and Placement Program*, *supra* note 213.

250. Kate M. Manuel, *State Challenges to Federal Enforcement of Immigration Law: From the Mid-1990s to the Present*, CONG. RESEARCH SERV. No. R43839 (Jan. 27, 2016), https://www.fas.org/sgp/crs/homesec/R43839.pdf [https://perma.cc/5R6G-5RW9].

251. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 116–17 (2015) (discussing the authorities given to the Executive by the Immigration and Nationality Act).

252. *See generally* Manuel, *supra* note 252.

253. Philip Bump, *Boehner Kills the Senate Immigration Bill, to the 2012 GOP's Dismay*, WIRE (Nov. 13, 2013), http://www.thewire.com/politics/2013/11/boehner-kills-senate-immigration-bill-2012-gops-dismay/71561/ [https://perma.cc/Q2MR-KGX8].

254. OFF. OF THE PRESS SEC'Y, REMARKS BY THE PRESIDENT ON IMMIGRATION, (June 15, 2012), https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration [https://perma.cc/87KC-ERGT].

pose a national security threats or who committed serious crimes.[255] This took a significant portion of the undocumented immigrant population out of the sights of enforcement authorities.[256] These immigrants were offered deferred action so long as they met certain requirements.[257]

In November 2014, President Obama issued an Executive Memorandum expanding the existing DACA program to include individuals with a son or daughter who is a U.S. citizen or lawful permanent resident as of November 20, 2014.[258] Known as the Deferred Action to Parents of Americans and Lawful Permanent Residents ("DAPA"), this program would cover approximately 4.3 million undocumented immigrants and would temporarily grant them lawful presence status.[259] Though not an immigration benefit per se, this status would allow certain immigrants to receive certain benefits, such as Social Security or access to Medicare.[260] It would also allow them to apply for work authorization.[261]

Texas challenged DAPA by arguing that it would cause the state significant financial injury.[262] The argument emanates from a Texas policy that requires the state to subsidize drivers' licenses in the amount of $130.89 each.[263] Another Texas policy prevents undocumented immigrants from acquiring driver's licenses.[264] Because DAPA would confer deferred action status to undocumented immigrants in Texas, which in effect grants temporary lawful status to those immigrants, Texas would be required to grant and subsidize the issuance of licenses to those immigrants, causing them millions in financial obligations.[265] This argument creates a unique avenue to establish standing for states to challenge federal immigration regulation, and the Fifth Circuit agreed with Texas's argument.[266]

In a well-drafted critique of the case, American Immigration Council Legal Director Melissa Crow argues that the significance of deferred action in the *Texas* case is overblown, considering the fact that the benefits it confers on undocumented

255. *See id.* ("Effective immediately, the Department of Homeland Security is taking steps to lift the shadow of deportation from these young people. Over the next few months, eligible individuals who do not present a risk to national security or public safety will be able to request temporary relief from deportation proceedings and apply for work authorization.").

256. *Id.*

257. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., CONSIDERATION FOR DEFERRED ACTION FOR CHILDHOOD ARRIVALS (Aug. 3, 2015), https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca [https://perma.cc/3RPB-7NTZ] (highlighting the eligibility criteria to qualify for the DACA program).

258. *See* Cecelia Muñoz, *One Year Anniversary of the Executive Actions on Immigration*, WHITE HOUSE BLOG (Nov. 20, 2015), https://www.whitehouse.gov/blog/2015/11/20/one-year-anniversary-executive-actions-immigration [https://perma.cc/7CQM-4UJ9] ("Last November, the Department of Homeland Security (DHS) issued new guidelines for allowing immigrants who are longstanding members of our communities—including immigrants who were brought here as children and the parents of U.S. citizens and lawful permanent residents—to request deferred action on a case-by-case basis.").

259. *Id.*; Texas v. United States, 809 F.3d 134, 148 (5th Cir. 2015).

260. Texas v. United States, 809 F.3d at 198.

261. *Id.*

262. *See id.* at 149 (discussing the district court's holding that Texas would suffer financial injury).

263. *Id.* at 155.

264. *Id.* at 149.

265. *Id.* at 152–53.

266. Texas v. United States, 809 F.3d at 155 ("[Texas] has satisfied the first standing requirement by demonstrating that it would incur significant costs in issuing driver's licenses to DAPA beneficiaries.").

immigrants under DAPA are the same as those granted to undocumented immigrants who are victims of domestic violence, victims of storms like Hurricane Katrina, and many others.[267] In those cases, the federal government provides temporary relief from deportation, which would necessarily require some authorization to earn a sustainable living through employment authorization.[268]

The *Texas v. United States* case, which includes an additional 25 states as plaintiffs, was decided by the Fifth Circuit Court of Appeals in November 2015.[269] In that instance, the court ruled both that states had standing to sue because DAPA appeared to violate the Administrative Procedure Act and that the states had a substantial likelihood of success on the merits of the case.[270] The U.S. Supreme Court delivered an unsigned per curiam affirmance by an equally divided Court on June 23, 2016.[271]

The *Texas* case is only the latest example of states asserting their power against federal immigration action that would have a noticeable effect on their communities. In the case of refugees, rather than an economic impact, state objections highlight security as the principal cause for concern.[272] Yet whether the risk is financial or security-based, state powers are limited to actions that would not conflict with legitimate federal goals.[273] In the case of refugees, the federal government is pursuing a legitimate federal goal under both international treaty obligations and federal law.[274] As a key part of that goal, states will continue to be called upon to accept refugee placements with the financial support of the federal government and to trust that an appropriate security screening has taken place.[275]

CONCLUSIONS

Since the 19th century, our immigration system has been confined to the federal government. An immigrant requests permission to enter the United States, not to enter any single state, even though that immigrant will be physically present in one or more states. Immigration policy affects our national obligations in the sphere of foreign relations by, for example, ensuring that we comply with our treaty commitments and our trade agreements. Immigration policy also affects our national economy as we recruit foreign talent and expertise to meet our economic needs.

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267. *See* Melissa Crow, *Symposium: Back to Immigration Basics—Why the DAPA/DACA Case Is Simpler Than It Seems*, SCOTUSBLOG (Feb. 10, 2016), http://www.scotusblog.com/2016/02/symposium-back-to-immigration-basics-why-the-dapadaca-case-is-simpler-than-it-seems/ [https://perma.cc/8GWF-2KKK] ("The states' argument that the government overstepped its bounds by rendering deferred-action beneficiaries eligible to work ignores the fact that eligibility stems . . . from longstanding, independent legal authority . . . [which] has enabled numerous categories of deferred action beneficiaries . . . .").

268. *Id.*

269. Texas v. United States, 809 F.3d at 134.

270. *Id.* at 147.

271. United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam) (mem.).

272. Pence, *supra* note 228.

273. *See* Domonoske, *supra* note 205 ("It's not clear what individual states can do to keep refugees out. Immigration policy is the jurisdiction of the federal government, and once refugees are allowed into the country, states cannot easily prevent them from entering.").

274. *See Overview*, *supra* note 226 (asking "What is a refugee?").

275. Phillips, *supra* note 222.

Economically, immigration is highly beneficial to the American economy, both at the state and federal levels.[276]

The 1951 United Nations Refugee Convention, as well as the 1980 Refugee Act, make it clear that the United States will play an important role in sheltering a number of qualified foreign refugees fleeing persecution abroad and helping them achieve economic self-sufficiency within the United States.[277] The country's role as a refuge for those fleeing violence has been prevalent throughout our history as a nation, and today many states still recognize the importance of this role.[278] This process met little state resistance prior to the recent events in France and Belgium, but these tragedies unearthed a suppressed fear that immigrants may pose a threat to the United States.[279]

This fear is largely misplaced.[280] Though terrorists have a variety of mechanisms for entering the United States, the intense and distant refugee screening process make it one of the least likely mechanisms for doing so.[281] The fake Syrian passport found on a terrorist attacker in Paris undoubtedly raised concern over refugee terrorists.[282] But even in the event that one of the attackers was a migrant from Syria, access to Europe across a less protected land border would appear to be much simpler than

276. *See, e.g.*, Kevin J. Fandl, *Taxing Migrants: A Smart and Humane Approach to Immigration Policy*, 7 NORTHWESTERN INTERDISCIPLINARY L. REV. 127 (2014).

277. Refugee Act, *supra* note 58.

278. *See, e.g.*, Gary Herbert, Governor of Utah, Statement on Syrian Refugees Entering Utah (Nov. 16, 2015), http://www.utah.gov/governor/news_media/article.html?article=20151116-1 [https://perma.cc/F74M-RN6Q] ("Utahns are well known for our compassion for those who are fleeing the violence in their homeland, and we will work to do all we can to ease their suffering without compromising public safety."); Max Reiss, *Connecticut to Continue to Take in Syrian Refugees,* NBC CONNECTICUT (Nov. 17, 2015), http://www.nbcconnecticut.com/news/local/Connecticut-to-Accept-More-Than-1600-Refugees-from-Syria-Governor--350647401.html [https://perma.cc/3HJU-GVDY] (highlighting statements made by the Connecticut Governor that, "We should be safe .... On the other hand, America has always had a big heart").

279. *See* Tharoor, *supra* note 106 (asserting that the "current refugee influx in Europe has spooked politicians on both sides of the Atlantic, with a slate of Republican governors and presidential candidates in the United States pointing to the terror attacks as reason to bar entry to all Syrian refugees").

280. *See, e.g.*, Daniel L. Byman, *Do Syrian Refugees Pose a Terrorism Threat?*, BROOKINGS INST. (Oct. 27, 2015), http://www.brookings.edu/blogs/markaz/posts/2015/10/27-syrian-refugees-terrorism-threat-byman [https://perma.cc/5KRE-53CG] (discussing the misplaced attention on refugees from Syria as potential risks and suggesting that a less discriminatory screening process be implemented); Abigail Abrams, *Terrorism Attacks Since 9/11 Have Involved U.S. Citizens, Not Immigrants, Despite GOP Debate Claim*, IB TIMES (Dec. 16, 2015, 11:58 AM), http://www.ibtimes.com/terrorism-attacks-911-have-involved-us-citizens-not-immigrants-despite-gop-debate-2228202 [https://perma.cc/KTA8-6P4T] (drawing attention to the number of terrorist attacks in the United States committed by U.S. citizens). *But see*, Russell Berman, *A New Threat to the Syrian Refugee Program*, THE ATLANTIC (Jan. 8, 2016), http://www.theatlantic.com/politics/archive/2016/01/the-arrest-of-iraqi-refugees-on-terrorism-charges/423339/ [https://perma.cc/HPZ4-MZZU] (discussing the arrest of two refugees from Iraq in the United States on terrorism-related charges).

281. *See* Deepa Iyer & Jayesh M. Rathod, *9/11 and the Transformation of U.S. Immigration Law and Policy*, 38 AM. BAR ASSOC. HUMAN RTS. MAG. 1 (2011) (basing changes in immigration law upon the fact that some of the September 11, 2001 terrorists were immigrants to the United States, but not refugees).

282. *See, e.g.*, Christiana Amanpour & Thom Patterson, *Passport Linked to Terrorist Complicates Syrian Refugee Crisis*, CNN (Nov. 15, 2015), http://www.cnn.com/2015/11/15/europe/paris-attacks-passports/ [https://perma.cc/BWM3-HFU3]; Sam Ball, *Syrian Passport Puts Spotlight on Refugees after Paris Attacks, But Real Threat Closer to Home*, FRANCE24 (Nov. 15, 2015), http://www.france24.com/en/20151116-syrian-passport-puts-spotlight-refugees-after-paris-attacks-but-real-threat-closer-home [https://perma.cc/H2VR-5VZ2]; Tharoor, *supra* note 106.

access to the United States, where proper and rigorous screening of the refugees take place long before they set foot on American soil.[283]

Citizens have a right to know how the United States screens potential refugees and what steps it takes to ensure that a potential wrongdoer is not among their ranks. States can and should consult with federal authorities to coordinate the placement of refugees in an effort to provide the best possible placement for them. But it is clear that the role of the state is to consult upon, not to approve the placement of these refugees.[284] The humanitarian argument aside, strong as it may be, states must permit the placement of refugees because they are part of a republic that has obligations to the international community. And when state elected officials enact statutes that promote this mission, an individual state cannot object when the federal government attempts to implement them.

The decision in the *Exodus* case striking down an Indiana law that attempted to deter refugee placements by cutting off funding for local placement agencies is likely the first of several that will examine state legislative efforts to block refugee placements.[285] Based upon years of precedent and clear statutory language in the Refugee Act, there seems to be little room to find any merit in such state efforts. In a country founded by refugees, and one that has been the cause of many refugee crises, our responsibility to refugees is certain. Benefiting from being a part of this nation comes with responsibilities. One of them is to provide refuge for those in need.

283. *See Overview*, *supra* note 226 (describing screening procedures).

284. *See* Domonoske, *supra* note 205 (stating "the government is obligated to consult with states about process, procedures and the overall distribution of refugees around the country").

285. *See* Exodus, 165 F. Supp. 3d 718, 742 (S.D. Ind. 2016) (granting a preliminary injunction "prohibiting the State from taking any actions to interfere with or attempt to deter the resettlement of Syrian refugees by Exodus in the State of Indiana") *aff'd* 838 F.3d 902 (7th Cir. 2016).

An Empirical Research on Piercing the Corporate Veil and Enforcement of Foreign Judgment

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TABLE OF CONTENTS

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INTRODUCTION

Piercing the corporate veil, a judicial process whereby the separate legal personality of a company is disregarded, has long attracted academic discussion due to its dramatic impacts on the liability of shareholders.[1] Most of the time, a shareholder is sued for piercing the corporate veil in the same trial in which the defendant company is sued for the underlying cause of action (for example, the company's breach of contract).[2] The piercing claim will be successful only if the plaintiff succeeds on *both* the underlying claim against the company and the piercing claim against the shareholder.[3] Nonetheless, plaintiffs do not necessarily seek to pierce the corporate

1. *See generally* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036 (1991) [hereinafter Thompson Research]; PHILLIP I. BLUMBERG, ET AL., BLUMBERG ON CORPORATE GROUPS (2005); STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL (2016).

2. *See* Ostrolenk Faber LLP v. Genender Int'l Imps., Inc., 2013 IL App (1st) 112105-U, 2013 WL 1289130, at *9 ("Since piercing the corporate veil is an equitable remedy, in order to maintain this count, [plaintiff] must also state a sufficient claim for liability in a separate cause of action.").

3. *See, e.g.*, Galford v. Friend, No. 13-1134, 2014 WL 5311389, at *9 (W. Va. Oct. 17, 2014) ("The Court concludes that a determination of whether piercing the corporate veil is appropriate is unnecessary because it has concluded that there have been no violations in the first instance of [the statute giving rise to the underlying claim]."); Elie v. Ifrah PLLC, No. 2:13–CV–888 JCM (VCF), 2014 WL 547958, at *7 (D. Nev. Feb. 10, 2014) ("Because plaintiff has not stated causes of action for which relief can be granted, a claim for piercing the corporate veil may not exist on its own."); Stanley Warranty, LLC v. Universal Adm'rs Serv., Inc., No. 3:13-CV-513-JGH, 2014 WL 4805669, at *8 (W.D. Ky. Sep. 26, 2014) ("Because no real cause of action remains against [the defendant], the claim to pierce the corporate veil must also be dismissed."); Vollrath v. Corinthian Ophthalmic, Inc., No. 14 CVS 1676, 2014 WL 6602274, at *6 (N.C. Super. Ct. Nov. 20, 2014) ("Because Plaintiff's claims for fraud and UDTPA fail as a matter of law, Plaintiff's attempt to pierce [defendant company's] corporate veil and impute liability to Defendant [shareholder] on those same claims necessarily fails as well."); Goel v. Ramachandran, 975 N.Y.S.2d 428, 439 (N.Y. App. Div. 2013) ("Since the complaint fails to adequately set forth these underlying causes of action against [the company], those causes of action must be dismissed as against [the shareholder], since 'an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation;

veil in the same trial as the underlying substantive cause of action.[4] The plaintiff may eliminate the legal personality of the defendant company in the first trial and then pierce the corporate veil in a subsequent proceeding to enforce a judgment against the shareholder of the company.[5] Thus, discussions on piercing the corporate veil should consider both the substantive underlying liability in the original trial (first-instance piercing), and subsequent enforcement proceedings.[6] Enforcement of a judgment by piercing the corporate veil ("Enforcement Piercing") is rarely examined in detail by academics.[7] Through an empirical study of Enforcement Piercing cases, this Article explores the various conflict-of-laws aspects that impact Enforcement Piercing cases as compared to standard first-instance piercing cases.

Enforcement Piercing is not uncommon. It is often employed in cases where the plaintiff finds out only during or after the original trial that there exists a close relationship between the defendant company and the shareholder,[8] or in cases where the defendant company's assets have been removed by the shareholder after the defendant company lost the case.[9] However, Enforcement Piercing is a worthwhile topic to discuss not only because of its frequency,[10] but also because of the potential advantages it could bring to the plaintiff in his or her piercing-the-corporate-veil claim. An illustration will be helpful.

In *Bank of Montreal v. SK Foods, LLC*,[11] the plaintiff bank first obtained a judgment against the defendant company for its liability as a guarantor of a default

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rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its [parent].'").

4. *See, e.g.*, Gajda v. Steel Sols. Firm, Inc., 2015 IL App (1st) 14229, para. 19 (holding that "[p]iercing the corporate veil is not a cause of action but, rather, a means of imposing liability in an underlying cause of action").

5. *See* Christopher P. Hall & David B. Gordon, *Enforcement of Foreign Judgments in the United States*, 10 INT'L L. PRACTICUM 57, 57 (1997) ("Virtually every state in the U.S. recognizes the concept of piercing the corporate veil, pursuant to which a state or federal court will allow the successful litigant to pursue the assets of an individual who has dominated the defendant corporation to such a degree, or used the corporate form to conduct a fraud on its creditors, that the protection provided by the corporate form should be disregarded.").

6. *See* King Fung Tsang, *The Elephant in the Room: An Empirical Study of Piercing the Corporate Veil in the Jurisdictional Context*, 12 Hastings Bus. L.J. 185, 186 (2016) [hereinafter *Elephant in the Room*] (discussing jurisdictional piercing, the process by which the minimum contacts of the company are imputed to its shareholder through piercing the corporate veil for the purpose of assuming jurisdiction over the shareholder).

7. While guidance might be found from the RESTATEMENT OF CONFLICT OF LAWS and RESTATEMENT OF JUDGMENT on the topic, as we will see, it is far from clear and may cause even more confusion. It is also interesting to note that in Thompson's Research, Enforcement Piercing is not categorized as a separate type of piercing. Professor Thompson did categorize other procedure-related types of piercing such as those relating to jurisdiction and venue. Thompson's Research, *supra* note 1, at 1060.

8. *See, e.g.*, NYKCool A.B. v. Pac. Fruit Inc., No. 10 Civ. 3867, 2012 WL 1255019, at *3 (S.D.N.Y. Apr. 16, 2012) ("The Judgment remains wholly unsatisfied . . . [Plaintiff] conducted post judgment discovery to locate [defendants'] assets in order to satisfy the Judgment, during which the following information was learned about the alleged alter egos . . . .").

9. *See, e.g.*, NYKCool A.B. v. Pac. Int'l Servs., Inc., No. 12 Civ. 5754, 2013 WL 6799973, at *4 (S.D.N.Y. Dec. 20, 2013) ("[Plaintiff] obtained evidence showing that the [original] judgment debtors had transferred assets from [one group company] to [another group company] in Ecuador to avoid the judgment . . . .").

10. *See infra* Section III, Table 2.

11. Bank of Montreal v. SK Foods, LLC, 476 B.R. 588 (N.D. Cal. 2012), *aff'd sub nom*, Bank of

loan in the U.S. District Court for the Northern District of Illinois.[12] Subsequently, the plaintiff tried to pierce the corporate veil in an enforcement proceeding in the Northern District of California against certain persons[13] who allegedly controlled the company.[14] The California federal district court held in favor of the plaintiff on the piercing claim against two of the three shareholders, allowing the plaintiff to enforce against such shareholders the judgment it had obtained in Illinois against the corporate defendant.[15] The most interesting part of this case is the plaintiff's decision to pursue the piercing claim in California instead of trying to pierce the corporate veil of the company in the same trial in Illinois, or in a subsequent enforcement proceeding in Illinois.[16]

Generally, different states have different substantive laws governing the piercing issue.[17] The choice-of-law approaches also vary across states.[18] In *Bank of Montreal*, without undergoing the choice-of-law analysis,[19] the California district court simply applied California piercing law, the *lex fori*, to the piercing issue.[20] However, the applicable law and the result of the case would have been different if the plaintiff had brought the piercing issue before the Illinois federal district court. Firstly, the Illinois federal district court might have applied the *lex fori*, the Illinois law, on piercing.[21]

Montreal v. Salver, 599 F. App'x 706 (9th Cir. 2015).

12. Bank of Montreal v. SK Foods, LLC, No. 09 C3479, 2010 WL 3385534, at *4–5 (N.D. Ill. Aug. 19, 2010).

13. There were three persons alleged to have controlled the defendant company; namely, a natural person, a trust, and a corporation, all of which claimed to be controlled ultimately by the individual. Bank of Montreal v. SK Foods, LLC, 476 B.R. 588, 594 (N.D. Cal. 2012). However, it is not clear from the case whether they were shareholders to the defendant company. In any event, that does not seem to affect the court's decision in piercing the corporate veil.

14. *Id.*

15. *Id.* at 601–602.

16. *See* Steiner Elec. Co. v. Maniscalco, 2016 IL App (1st) 132023, para. 74 (explaining that "parties may bring a separate suit to pierce the corporate veil in order to enforce the original judgment").

17. *See* K.F. Tsang, *Applicable Law in Piercing the Corporate Veil in the United States: A Choice With No Choice*, 10 J. PRIV. INT'L L. 227, 242–245 (2014) (arguing that there are limited similarities between state laws). The same is true where the context is Enforcement Piercing, *See* Hall & Gordon, *supra* note 5, at 57 ("The precise legal theory pursuant to which each state permits piercing of the corporate form to allow attack on the assets of the individual owners differs from state to state.").

18. *See* Tsang, *supra* note 17, at 249–52 (identifying four commonly used approaches). Note, however, that the states generally are not consistent in their choice-of-law approaches and courts in the same states often adopt different tests. *See, e.g.*, Mark Thomson, *Method or Madness? The Leflar Approach to Choice of Law as Practiced in Five States*, 66 RUTGERS L. REV. 81, 94 (2013) ("[C]ourts—even courts within the same state—take wildly divergent tacks in addressing the similar choice-of-law fact patterns. The differences—not only as to how or when courts go about applying the choice-influencing considerations but also as to what factors they consider while doing so.").

19. *See* Tsang, *supra* note 17, at 253 (showing that the practice of not applying a choice-of-law approach on piercing the corporate veil is certainly not uncommon). In fact, most courts bypass conducting an applicable-law analysis for the piercing issue. *See infra* Section III.A, Table 9.

20. *See Bank of Montreal*, 476 B.R. at 597 (explaining that under California law to an applicant must establish the alter-ego factor test to enforce a judgment against a shareholder).

21. The choice-of-law approaches of the states have been widely inconsistent. *See* Thomson, *supra* note 18, at 94 (explaining that courts within a single state take widely divergent tracks in applying choice-of-law approaches). That said, empirical research indicates that, most of the time, states apply a substantive law that is identical to the law of the forum even if, nominally, they are employing some other choice-of-law approach. *Compare* Tsang, *supra* note 17, at 253 tbl. 11 (stating that the law-of-the-forum choice-of-law approach is employed in 6.32% of cases), *with id.* at 254 tbl. 12 (stating that the forum's substantive law is applied in 92.46% of cases).

Secondly, based on the review of piercing cases between 2012 and 2014, cases governed by California law have a higher success rate in piercing the corporate veil (34.09%) than those governed by Illinois law (27.45%).[22] If we assume that the Illinois federal district court would have applied Illinois law, and that Illinois law on piercing is less favorable to the plaintiff in this case,[23] then the plaintiff would rather have the piercing issue litigated in California than in Illinois. In other words, the plaintiff would be motivated to forum shop. The facts of *Bank of Montreal* suggest that this was exactly what the plaintiff did. However, at the beginning of the Illinois action, it was the *defendant company* who actually sought to have the litigation moved to California.[24] The plaintiff strongly resisted the change in venue.[25] It was not until after the substantive cause of action was litigated in Illinois that the plaintiff decided to move the litigation to California for the piercing issue,[26] thus allowing the plaintiff multiple opportunities to forum shop.

First, unlike a first-instance piercing case in which the plaintiff sues both the defendant corporation (for the underlying cause of action) and its shareholder (for piercing the corporate veil) in the same state,[27] an Enforcement Piercing allows a plaintiff to forum shop on both the underlying causes of action and the piercing issue. Thus, if Illinois contract law is more favorable than California contract law,[28] but California piercing law is more favorable than Illinois piercing law,[29] the plaintiff will be able to get the best of both worlds by first litigating the underlying contract claim in Illinois and then litigating the piercing issue in California in an Enforcement Piercing. Secondly, there could also be more fora to forum shop in an Enforcement Piercing. If enforcement could be sought in any state where the defendant has assets,[30]

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22. *See infra* Section III, Table 3 (showing different piercing rates of various states). These percentages must be treated with caution. The fact that a state enjoys a higher piercing rate generally does not dictate the result in a particular case. Ultimately, it depends on the specific facts of the case. A state law with a lower success rate on piercing could still be more favorable to a plaintiff given certain facts. For example, on the specific issue of whether piercing the corporate veil could be applied to a non-shareholder, Illinois law is more favorable to the plaintiff than California law. This issue was examined in detail in Buckley v. Abuzir, 8 N.E.3d 1166 (Ill. App. Ct. 1st Dist. 2014). After surveying the laws of multiple states, the court concluded that "the weight of authority supports the conclusion that lack of shareholder status . . . does not preclude veil-piercing. Illinois would fall in line with the majority," while "courts applying California law have reached seemingly conflicting conclusions regarding veil-piercing to reach nonshareholders." *Id.* at 1172–77.

23. *See infra* Section III, Table 3 (showing the success rates of piercing cases under various state laws).

24. Bank of Montreal v. SK Foods, LLC, No. 09 C 3479, 2009 WL 3824668, at *1 (N.D. Ill. Nov. 13, 2009).

25. *Id.* at *2.

26. *Id.*

27. It is possible for enforcement piercing in the same state to have this advantage. The same court might apply one choice-of-law approach to piercing (*e.g.*, the law of the state of incorporation), but a different choice-of-law approach in enforcement piercing (*e.g.*, the *lex fori*). K. F. Tsang, *supra* note 17, at 256.

28. This is assuming that the choice-of-law rules on contract of both California and Illinois will both yield their respective forum law. In *Bank of Montreal*, both California and Illinois would likely apply Illinois law, because there is likely a governing law clause in the guaranty. *See Bank of Montreal*, 476 B.R. at 588.

29. This example assumes the choice-of-law rules on piercing of both California and Illinois will both yield their respective forum law.

30. This may potentially be subject to jurisdictional restrictions on enforcement piercing and will be discussed extensively below. *See infra* Section II (summarizing the doctrinal evolution of personal jurisdiction case law in the United States).

the pool of fora in which the plaintiff could choose to litigate would be substantially larger than that of first-instance piercing cases, which are subject to jurisdictional limitation.[31] For example, if a shareholder has assets in both California and New York, and California piercing law is less favorable than that of New York,[32] the plaintiff could instead seek Enforcement Piercing in New York to satisfy the Illinois judgment.

If the potential advantages offered by favorable governing law on piercing exceed the limitations/costs imposed on such forum shopping (as indicated in, *inter alia*, any jurisdictional limitations on Enforcement Piercing), the piercing rate of Enforcement Piercing will be higher than the first-instance piercing cases.[33] This thesis is tested in this Article through an extensive and detailed empirical research of recent piercing cases. Section I of the Article provides a detailed discussion on the background of Enforcement Piercing. Section II sets forth the methodologies of the empirical research. Section III provides the findings of the empirical research and shows that Enforcement Piercing has a substantially higher piercing rate than first-instance piercing, thereby supporting this Article's thesis. Finally, the Article concludes that Enforcement Piercing should not provide unjustifiable advantages to induce forum shopping. Instead, conflict-of-law rules should be realigned to create a level playing field for piercing the corporate veil, whether that happens in the first-instance trial or in subsequent enforcement proceedings.

I. BACKGROUND

Enforcement Piercing stems from two core legal concepts: (i) Piercing the corporate veil, and (ii) enforcement of foreign judgment.[34] This Section outlines the basic requirements of these two concepts, followed by a discussion on the four possible scenarios created by their interaction. Finally, six specific enforcement-related issues are laid out.

A. Piercing the Corporate Veil

Piercing the corporate veil occurs when a court finds that a shareholder is exercising excessive control over the subsidiary, thereby producing inequitable results.[35] The effect is that the shareholder will be liable for the liability of the company

31. Despite not technically being a cause of action itself, piercing the corporate veil in first-instance piercing cases will fail for lack of personal jurisdiction. *See* Rossi v. Innovation Ventures, LLC, No. 13-cv-1870 (JAP), 2014 WL 1315656, at *3 (D.N.J. 2014) (dismissing Plaintiff's piercing claim for lack of personal jurisdiction). *See also* Hubbell Inc. v. DMF, Inc., No. 6:11-cv-00794-MGL-JDA, 2012 WL 6859501, at *8 (D.S.C. 2012) (allowing Defendant's appeal against the substantive claim based on piercing the corporate veil for lack of personal jurisdiction).

32. New York has a general piercing rate of 44.06%, substantially higher than the piercing rate of California (34.09%). *See infra* Section III, Table 3.

33. *Id.*

34. *See* Zweizig v. Rote, No. 3:14–cv–00406–ST, 2014 WL 7229202, at *4 (D. Or. Dec. 16, 2014) (recognizing "suit by judgment creditor of wholly owned subsidiary seeking decree to pierce corporate veil and enforce judgments against parent corporation").

35. Matter of Morris v. N.Y. State Dept. of Taxation & Fin., 623 N.E. 2d 1157, 1160–61 ("Generally . . . piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury.").

beyond what it has paid for shares.[36] In an ordinary piercing case, this happens in corporate groups where a parent company is asked to be responsible for the debt incurred by its subsidiary.[37] To be successful in holding the parent company liable, the plaintiff will first need to prove that the subsidiary is liable for its conduct in the underlying cause of action, most commonly one which is based on contract or tort,[38] and then persuade the court that there is such excessive control exerted by the parent company over the subsidiary that it is just to hold the parent company liable for the subsidiary's liability.[39] The latter is regarded as the piercing-the-corporate-veil doctrine. But piercing the corporate veil will not succeed unless the subsidiary is liable to the plaintiff for the underlying cause of action in the first place.[40] While the law on piercing varies across different states, it generally consists of three main components: Control, fraud, and proximity.[41] Practically all states require the facts of the case to include some combination of these three components in order for piercing to be successful.[42]

B. Enforcement of Foreign Judgment in the United States

To understand Enforcement Piercing, one must look at the enforcement mechanism within the United States. The enforcement of a judgment in a court ("F2") rendered by a state court in a sister state ("F1") in the United States is generally governed by the Full Faith and Credit Clause of the Constitution.[43] The clause states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws

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36. *See id.* at 1160 (stating "[A]n attempt of a third party to pierce the corporate veil . . . is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners" and, by extension, the shareholders of the corporation).

37. *See generally* Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. Corp. L. 573 (1986) (discussing the research on piercing in corporate groups).

38. *See* Thompson Research *supra* note 1, at 1038 (discussing two types of corporate liability in veil piercing actions—contractual liability and tort liability).

39. *See* Bank of Montreal v. SK Foods, LLC, 476 B.R. 588, 597–598 (N.D. Cal. 2012) ("To determine whether there is a sufficient unity of interest and ownership to support alter ego liability, courts consider a long list of factors . . . [including,] the identification of the equitable owners thereof with the domination and control of the two entities.").

40. Wm. Passalacqua Builders, INC. v. Resnick Developers S., Inc., 933 F.2d 131, 138 (2d Cir. 1991) ("To pierce the corporate veil, the parent corporation must at the time of the transaction complained of: (1) have exercised such control that the subsidiary 'has become a mere instrumentality' of the parent, which is the real actor; (2) such control has been used to commit fraud or other wrong; and (3) the fraud or wrong results in an unjust loss or injury to plaintiff.").

41. *See generally* FREDERICK J. POWELL, PARENT AND SUBSIDIARY CORPORATIONS 4–6 (1931).

42. *See* Hall & Gordon, *supra* note 5, at 57 ("Virtually every state in the U.S. recognizes the concept of piercing the corporate veil . . . [and] will allow the successful litigant to pursue the assets of an individual who has dominated the defendant corporation to such a degree, or used the corporate form to conduct a fraud on its creditors, that the protection provided by the corporate form should be disregarded. The precise legal theory pursuant to which each state permits piercing of the corporate form to attack the assets of the individual owners differs from state to state." For instance, in some states "the courts look to whether there has been a 'substantial identity' between the defendant and its individual owners (or any affiliated corporation)").

43. *See* SYMEON C. SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW 327 (2008) ("As between the states of the United States, the recognition requirements are prescribed by federal law, primarily the Constitution's Full Faith and Credit clause.").

prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."[44] By federal legislation, this national recognition of foreign judgments has been extended to judgments rendered by federal courts.[45]

To qualify for enforcement in another state,[46] the judgment must be considered valid.[47] Section 92 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS states that a judgment is valid if:

> (a) The state in which it is rendered has jurisdiction to act judicially in the case; and
>
> (b) A reasonable method of notification is employed and a reasonable opportunity to be heard is afforded to persons affected; and
>
> (c) The judgment is rendered by a competent court; and
>
> (d) There is compliance with such requirements of the state of rendition as are necessary for the valid exercise of power by the court.[48]

There will be few disputes to enforcement in F2 if piercing was litigated and succeeded along with the underlying cause of action in F1.[49] Applying the above criteria, judgment resulting therefrom will be enforced in F2 against the parent if (i) F1 has jurisdiction over the parent (ii) who was properly served with notice and (iii) F1 had subject matter jurisdiction and (iv) had followed the state procedural rule of F1.[50] As we will see below, it will be much less clear in an Enforcement Piercing where the plaintiff tries to pierce the corporate veil of the parent in the enforcement action in F2. Each of the basic requirements above could be a hurdle for the plaintiff in Enforcement Piercing.

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44. U.S. Const. art. IV, §1.

45. 28 U.S.C. §1738 (2012) (stating that judgments of any court within the United States "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage" in the judgment-rendering courts).

46. For the purpose of this Article, we are focusing only on enforcement and will not discuss recognition without the need for positive relief in F2. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 5, topic 2, intro. note (AM. LAW. INST. 1971) ("A foreign judgment is recognized . . . when it is given the same effect that it has in the state where it was rendered with respect to the parties, the subject matter of the action and the issues involved. A foreign judgment is enforced when, in addition to being recognized, a party is given the affirmative relief to which the judgment entitles him.")

47. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 93 (AM. LAW INST. 1971) ("A valid judgment rendered in one State of the United States must be recognized in a sister State . . . .").

48. *Id.* § 92.

49. In fact, in the three-year survey period, the author has not found any case in which there was any issue in the enforcement proceedings when the piercing the corporate veil claim had been settled in the first instance. To review a case beyond the three-year survey period, see, e.g., McCloud v. Lawrence Gallery, Ltd., No. 90 Civ. 30(KMW), 1991 WL 136027, at *12 (S.D.N.Y. July 12, 1991) (confirming the piercing the corporate veil finding of the Ohio court in the enforcement proceeding).

50. This will be illustrated in scenario 2 below. *See infra* Section I, Table 1.

C. *The Four Possible Scenarios*

With these two core principles in mind, there are two important variables in relation to Enforcement Piercing: (i) Whether there is an Enforcement Piercing; and (ii) whether there exists any conflict element in the case. The table below shows the four possible scenarios that could arise under the two variables.

Table 1—The Four Possible Scenarios

	No Enforcement Piercing	Enforcement Piercing
Non-conflict Case	Scenario 1	Scenario 3
Conflict Case	Scenario 2	Scenario 4

1. Scenario 1

Scenario 1 is a classic first-instance piercing case. Both the underlying cause of action (e.g., a tort or contract claim) and the piercing of the corporate veil are litigated in the same trial in the same state, Forum 1 (F1). The case is also purely domestic and without any conflict element.[51] For example, a New York plaintiff sues both a New York defendant company for the underlying cause of action as well as a New York shareholder of the company to pierce the corporate veil in the same trial in a New York state court.[52]

2. Scenario 2

In Scenario 2, like Scenario 1, the underlying cause of action and piercing are both litigated in the same proceedings in F1. What separates the two scenarios is the involvement of a conflict element in Scenario 2 cases. It is important to note that these cases, despite not being Enforcement Piercing cases, could involve a sister state for enforcement purposes.[53] Using the *Bank of Montreal* case as an example, if the underlying contract claim and piercing were both litigated in Illinois, the plaintiff could bring the resulting favorable judgment against the shareholder in California for enforcement.[54] However, this is not Enforcement Piercing, despite involving both piercing the corporate veil and the enforcement of a foreign judgment. The piercing issue, like the contract claim, will be merged with the resulting judgment in F1.[55]

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51. *See infra* Section III for a discussion of conflict cases.

52. Auto Collection Inc. v. Pinkow, 33 Misc. 3d 1206, 2011 WL482628, at *2 (Sup Ct, Kings County Oct. 7, 2011).

53. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92 (AM. LAW INST. 1971) (detailing when a judgment would be valid).

54. *See id.* (detailing when a judgment would be valid).

55. *See id.* § 95 cmt. c ("If the judgment under the local law of the State where it was rendered is a valid and final judgment for the recovery of money damages and its effect is to merge the claim in the judgment, the plaintiff may no longer maintain an action on the original claim in any state."); *see also* Pyshos v. Heart-

Forum 2 (F2) will simply enforce the judgment debt against the shareholder without any regard to the piercing issue. So long as F1 fulfills all the requirements specified above, F2 will have to give effect to the F1 judgment.[56] Because piercing has been completed in F1 prior to the commencement of enforcement proceedings in F2 under Scenario 2, it will not be the focus of this Article.[57]

3. Scenario 3

Scenario 3 is an Enforcement Piercing case. The plaintiff first sues the defendant in F1 for a substantive cause of action and subsequently receives a judgment in his or her favor. He or she then further pursues the shareholder by utilizing the piercing the corporate veil doctrine in a separate proceeding in F1. Thus, there are two trials in F1, one for the underlying cause of action against the defendant company, and the other for the Enforcement Piercing against the shareholder. Again, Enforcement Piercing in the same state is not unusual.[58] The plaintiff might not have realized that the defendant corporation is a shell company with no real assets until the post-judgment discovery process.[59] It is also possible that the shareholder has intentionally removed the assets of the defendant in an attempt to frustrate the collection of judgment by the plaintiff.[60]

4. Scenario 4

Scenario 4 is the most relevant for this Article. The major difference between Scenario 3 and Scenario 4 is the involvement of a conflict element in Scenario 4. This difference is most apparent when an Enforcement Piercing is conducted in another state. This affords the plaintiff multiple opportunities to forum shop for favorable governing laws: First for the governing law of the underlying cause of action in F1, then for the governing law of piercing the corporate veil in F2. The *Bank of Montreal* case is a Scenario 4 case, involving both California and Illinois.[61] Scenario 4 covers cases where F2 is a different state court or a federal court. For example, if F1 is a state court in Illinois and F2 is a federal court in Illinois, it will still be regarded as a Scenario 4 case because of the possibility of the federal court applying a different *lex fori*—the federal common law—to the piercing issue.

Land Dev. Co., 630 N.E.2d 1054, 1058 (Ill. App. Ct. 1994) ("[W]here . . . a party obtains a judgment against another party, the underlying claim merges with the judgment and the judgment becomes a new and distinct obligation of the corporation which differs in nature and essence from the original claim.").

56. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92 (AM. LAW INST. 1971).

57. For other conflict issues arising from Scenario 2 cases, such as choice-of-law and jurisdiction-related issues, see generally Hall & Gordon, *supra* note 5, at 57–59.

58. *See infra* Section III, Table 5 (establishing that there are at least 24 separate cases in which enforcement piercing proceedings were brought within the same state).

59. *See generally* NYKCool A.B. v. Pac. Fruit, Inc., No. 10 Civ. 3867, 2012 WL 1255019 (S.D.N.Y. Apr. 16, 2012).

60. *See generally* NYKCool A.B. v. Pac. Int'l Servs., Inc., No. 12 Civ. 5754, 2013 WL 6799973 (S.D.N.Y. Dec. 20, 2013).

61. *See generally* Bank of Montreal v. SK Foods, LLC, No. 09 C 3479, 2010 WL 3385534, (N.D. Ill. Aug. 19, 2010); Bank of Montreal v. SK Foods, LLC, 476 B.R. 588 (N.D. Cal. 2012).

A potential choice-of-law issue may also be present despite the lack of involvement of another state in Scenario 4, so long as there is a conflict element.[62] Using the *Bank of Montreal* case as an example, even if both the underlying cause of action and the Enforcement Piercing occurred in California, the same California court could potentially apply different governing law in the Enforcement Piercing. In a first-instance piercing case (Scenarios 1 and 2), it is possible that the California court may apply one choice-of-law approach, say, the law of the state of incorporation,[63] and find that Nevada law applies.[64] However, in Enforcement Piercing, if the same California court presides over the piercing issue in the subsequent enforcement action, it could adopt a different choice-of-law approach due to the different nature of the proceedings. For instance, it could regard Enforcement Piercing as an enforcement method, thus making it governed by the *lex fori*—that is, California law.[65] That said, there are certainly more choice-of-law possibilities in cases where another state is involved.

The extent to which the plaintiff could forum shop on the piercing issue in the enforcement stage is dictated by the six issues introduced below in Section D.5[66] Enforcement Piercing in Scenarios 3 and 4 will be explored in this Article.

D. Conflict Issues with Enforcement Piercing

1. Choice-of-Law

The conventional default choice-of-law rule for first-instance piercing is the law of the state of incorporation.[67] However, different states have different choice-of-law rules for governing the applicable law regarding piercing, and most courts in the United States actually forgo the choice-of-law analysis altogether and simply apply the *lex fori*.[68] This motivates parties to forum shop.[69]

In Enforcement Piercing cases, the motivation to forum shop depends on the choice-of-law approach. Three possible choice-of-law approaches are explored below.

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62. For a definition of the conflict element, see *infra* Section III.

63. *See, e.g.*, JBR, Inc. v. Café Don Paco, Inc. No. 12-CV-G2377NC, 2013 WL 1891386, at *4 n.2 (N.D. Cal. May 6, 2013) (serving as an example of when a state court applies the law of the state of incorporation of the corporate defendant).

64. See *Bank of Montreal*, 2010 WL 3385534, at *1 (establishing that the defendant corporation is a Nevada corporation).

65. *See, e.g.*, Toho-Towa Co., Ltd v. Morgan Creek Productions, Inc., 217 Cal. App. 4th 1096, 1108 (Cal. Ct. App. July 11, 2013) (applying California law to the piercing issue despite the company having been incorporated in Delaware). The potential choice-of-law approaches will be discussed fully *infra* Section III.

66. Scenario 3 is subject only to restriction imposed by res judicata. *See infra* Section I.D.5.

67. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 307 (AM. LAW INST. 1971) ("The local law of the state of incorporation will be applied to determine the existence and extent of a shareholder's liability to the corporation for assessments or contributions and to its creditors for corporate debts.").

68. *See generally* K.F. Tsang, *supra* note 17.

69. *Id.*; *see also infra* Section III, Table 3 (showing variations in piercing rates among different states).

a. First Approach—F1 Piercing Law

The first approach provides that the choice-of-law rule on Enforcement Piercing in F2 is dictated by the choice-of-law rule of F1. The basis for this approach can be found in § 94 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS, which provides that "[w]hat persons are bound by a valid state judgment is determined, subject to constitutional limitations, by the local law of the State where the judgment was rendered."[70] This is further explained in *comment b*:

> Persons who are bound personally by the adjudication of litigated matters are (1) parties who were personally subject to the jurisdiction of the court which rendered the judgment, (2) *persons in privity with a party*, and (3) more rarely, persons who stand in a special relationship to a party or privy .... What persons are in privity with a party to the judgment or are otherwise affected by the judgment on account of a special relationship to a party or a privy *is determined by the local law of the State where the judgment was rendered* provided that this law meets the requirement of due process.[71]

Thus, if Enforcement Piercing is regarded as giving effect to the F1 judgment against a shareholder of a corporate defendant, F2 should therefore follow the choice-of-law rule of F1, whichever that is. Adopting this approach, the California court in *Bank of Montreal* should apply Illinois law when resolving the piercing issue.[72] The policy reason behind such an approach could be the prevention of forum shopping. The plaintiff will not be able to pick and choose a more favorable piercing law governing the Enforcement Piercing by going to another state. Whether the plaintiff has piercing litigation in F1 (along with the underlying cause of action) or F2 (by way of Enforcement Piercing), the piercing issue will be governed by the same piercing rule of F1.

b. Second Approach—Same Approach as First-Instance Piercing

The RESTATEMENT is not as clear as one might hope. After outlining the general rule above, *comment b* goes on to state that "the liability of a shareholder imposed by the State of incorporation" should be determined according to the rule set forth in § 307,[73] which in turn refers back to the law of the state of incorporation.[74] This may lead to an argument that Enforcement Piercing should be an exception to the above rule that "privy" is to be interpreted by the rule applied in F1.[75] Following this line of argument, so long as a shareholder's liability is in question, it is to be governed by the general rule of piercing, regardless of whether the forum is a court of first instance or

70. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 94 (AM. LAW INST. 1988).

71. *Id.* cmt. b (emphasis added).

72. *See generally* Bank of Montreal v. SK Foods, LLC, 476 B.R. 588 (N.D. Cal. 2012).

73. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 94 cmt. b (AM. LAW INST. 1988).

74. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 307 (AM. LAW INST. 1971).

75. Instead of stating "[a]s to the liability of a shareholder imposed by the State of incorporation, see § 307," it would be much clearer if the RESTATEMENT stated that the liability of a shareholder is governed by the State of incorporation. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 94 cmt. b (AM. LAW INST. 1988).

a court of enforcement.[76] Although this rule is unclear under the RESTATEMENT, this is seemingly the approach adopted by a number of courts, including the Seventh Circuit, as shown by Judge Posner in *On Command Video Corp. v. Roti.*[77]

To sum up, this second approach treats the choice-of-law rule of Enforcement Piercing the same as courts in first-instance piercing cases.[78] While the RESTATEMENT does not elaborate on why the shareholder's liability should be different from the general privy rule, the basis for using the law of the state of incorporation seems to be that Enforcement Piercing is just like any piercing by which the shareholder is held liable for the defendant corporation's conduct.[79] This contrasts with jurisdictional piercing, where the purpose is to impute the jurisdictional contacts of the corporation to the shareholder.[80] Of course, if all courts adopt the RESTATEMENT's suggested approach, i.e., to apply the law of the place of incorporation, the motivation to forum shop will be eliminated because all courts (whether the court of first instance or the enforcement court) will simply refer to the law of the state of incorporation. However, the practices of courts vary, and it is uncertain whether the law of the state of incorporation will dictate the choice-of-law approach in piercing cases.[81]

c. Third Approach—*Lex Fori*

The third approach treats Enforcement Piercing as an enforcement method and applies the procedural rules of the forum (F2). Because the general choice-of-law rule for procedure is the *lex fori*, Enforcement Piercing would be governed by the *lex fori*.[82] It is, however, at best controversial to call Enforcement Piercing a procedural rule. Looking at the three relevant sections of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS,[83] it seems that the reporter never had Enforcement Piercing in mind in § 94. Enforcement Piercing has more to do with the substantive rights of the parties than

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76. If every state adopts the law of the state of incorporation as the liability piercing rule, the first and second approaches will yield the same result, namely, that the law of the state of incorporation governs.

77. On Command Video Corp. v. Roti, 705 F.3d 267, 272 (7th Cir. 2013) (stating that "veil-piercing claims are governed by the law of the state of the corporation whose veil is sought to be pierced" and deciding accordingly that Illinois law governed the piercing claim that sought to enforce a Colorado judgment against the Illinois corporation's shareholder).

78. This would be applicable at least as far as the choice-of-law rule of first-instance piercing under the Restatement. In the Restatement, the advocated approach is state-of-incorporation. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 307 (AM. LAW INST. 1971). In reality, courts often deviate from that approach. *See infra* Section III, Table 8 (showing the different approaches taken by courts in practice).

79. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 307 (AM. LAW INST. 1971); *see also* Wachovia Sec., LLC v. Banco Panamericano, Inc., 674 F.3d 743, 751 (7th Cir. 2012) (applying the law of the state of incorporation as a choice-of-law approach to enforcement piercing).

80. *See* Superkite PTY Ltd. v. Glickman, 12-CV-7754, 2014 WL 1202577, at *6 (N.D. Ill. Mar. 21, 2014) ("When a party uses veil piercing to establish personal jurisdiction, although the law of the state of incorporation applies to determine whether a party can substantively pierce a corporation's veil, Illinois law governs the analysis of whether personal jurisdiction is proper."); *see generally* Hall & Gordon, *supra* note 5.

81. *See infra* Section III, Table 10 (finding that 84.81% of courts apply the *lex fori* in conflict cases).

82. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 99 (AM. LAW INST. 1971) ("The local law of the forum determines the methods by which a judgment of another state is enforced.").

83. *Id.* §§ 94, 99, 307.

how the litigation is to be conducted.[84] More importantly, of all the approaches, this one encourages forum shopping because a plaintiff could be certain *ex ante* that the *lex fori* of F2 will apply in Enforcement Piercing.

Considering the three approaches, one can assume that if most courts adopt the first approach, the plaintiff will not gain an advantage by forum shopping. On the contrary, if courts are to adopt the second,[85] or particularly the third approach, the piercing rate of Enforcement Piercing cases will be higher than the first-instance piercing cases. The plaintiffs will therefore be more motivated to forum shop by way of Enforcement Piercing so long as the costs of Enforcement Piercing are on par with those of first-instance piercing.

The next five issues serve as additional hurdles that plaintiffs need to clear when utilizing Enforcement Piercing. Because they are not present in first-instance piercing, the level of difficulty in overcoming these hurdles will determine the motivation for plaintiffs to utilize Enforcement Piercing.

2. Personal Jurisdiction

The choice-of-law rule provides a potential advantage to a plaintiff in forum shopping, but a prerequisite to forum shopping is having multiple fora for such shopping.[86] Since the availability of a forum is decided by jurisdictional rules, these rules have long been the safety valves for controlling forum shopping.[87]

In a first-instance piercing case, forum shopping for the piercing issue is just like forum shopping for any other legal issue—the plaintiff must have an alternative forum with personal jurisdiction over the shareholder.[88] However, the same jurisdictional requirement over a shareholder may not apply to Enforcement Piercing.[89]

As Section I.D.1 has shown, the requirements for the enforcement of a judgment consist of only personal jurisdiction over the *defendant*, but there is no such

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84. *See* KERMIT ROOSEVELT, CONFLICT OF LAWS 18 (Foundation Press/Thomas Reuters 2010) (explaining that the "[s]ubstantive law is concerned with what people do outside of court, what is sometimes called 'primary conduct.' . . . Procedural law is concerned with what people do inside court, litigating behavior, or what is sometimes called 'secondary conduct.'"). The Restatement also supports this view and provides several examples of procedural matters, including "the proper form of action, service of process, pleading, rules of discovery, mode of trial and execution and costs." *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 cmt. a (AM. LAW INST. 1971).

85. Assuming that the predominant approach adopted is not based on the law of the place of incorporation

86. *See* Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*, 25 CARDOZO L. REV. 1367, 1369 (2004) ("[I]n a system with overlapping jurisdictions, multiple legal regimes, and transactions that span these jurisdictions, a legal dispute might often be pursued in more than one jurisdiction. Inevitably, in some, if not many cases, the outcome could depend on the choice of forum, which, in turn, raises the issue of who controls that choice. The availability of alternative forums has troubled conflicts scholars, on the grounds that it leads to 'forum shopping,' which is inefficient or unjust.").

87. *See* Stephen Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 230 (2001) (stating that a "safety valve . . . that permits the equilibration of competing jurisdictional claims").

88. This leads to a lot of piercing cases involving jurisdictional piercing. *See generally* Hall & Gordon, *supra* note 5.

89. *See id.* at 57 (stating that precise legal theory differs from state to state).

requirement over the *privy,* or shareholder, in an Enforcement Piercing.[90] Thus, as long as the shareholder has assets in a particular state, the plaintiff could reach such assets by Enforcement Piercing against the shareholder in such state.

On the other hand, there are also precedents requiring personal jurisdiction over the shareholder in F2. One of the leading cases is *Dudley v. Smith*, where the Court of Appeals of the Fifth Circuit was asked by the appellee to enforce an Alabama judgment against the shareholder, who was a Mississippi resident.[91] The shareholder argued that Alabama lacked personal jurisdiction.[92] Drawing on a number of Alabama-related activities by the shareholder, the court found personal jurisdiction over the shareholder and therefore the plaintiff's piercing claim was successful.[93] While not all precedents have clearly elaborated the rationales behind the requirement,[94] and some courts even admitted that they did not know it was a requirement,[95] the answer could simply be due process. The RESTATEMENT (SECOND) OF CONFLICT OF LAWS provides that "if a State of the United States has rules of privity that are inconsistent with due process, these rules are void and persons covered by the rules may not be held affected by the judgment either in a sister State or in the State of rendition itself."[96] This view is shared by Judge Edelstein in *Wm Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*[97] In that case, the plaintiff sought to enforce a Florida judgment against a shareholder in New York.[98] On the point of personal jurisdiction, Judge Edelstein first made the observation that "courts have enforced judgments against 'alter egos' where the court had jurisdiction over the alleged 'alter ego.'"[99] He then went on to distinguish the requirement of due process in first-instance piercing and Enforcement Piercing, finding that the former does not require an F2 finding of personal jurisdiction over the shareholder.[100]

However, in Enforcement Piercing, the court found that personal jurisdiction is required in F2 since "the court is determining the alter ego issue in a proceeding to which [shareholders] are parties."[101] This determination can only be valid "[i]f the court has jurisdiction over the alleged 'alter egos.'"[102] Accordingly, the Due Process

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90. *See generally supra* Section I.D.1.

91. Dudley v. Smith, 504 F.2d 979, 981 (5th Cir. 1974).

92. *Id.* at 982.

93. *Id.*

94. *Id.* While Dudley discussed the personal jurisdiction of the shareholder, the court there did not expressly state that personal jurisdiction is required over the shareholder either.

95. *See* Holmes-Marc v. Support Management, Inc., No. MICV2012-02183-D, 2013 WL 1342282, at *3 ("It is not clear to the court whether . . . the court may recognize a foreign judgment and enforce it against a third party that was not a party to the proceeding which rendered the foreign judgment. [The Massachusetts procedural rule], for example, requires the foreign state to have had personal jurisdiction over the person or entity against which the judgment was entered.").

96. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 94 cmt. b (AM. LAW INST. 1971).

97. Wm Passalacqua Builders, Inc. v. Resnick Developers S., Inc., 611 F. Supp. 281, 283–284 (S.D.N.Y. 1985).

98. *Id.*

99. *Id.* at 284.

100. *Id.* ("When the alleged 'alter ego' is a party to the action whether the 'alter ego' status is litigated, due process will be satisfied. This determination need not be made as part of the underlying action in order to enforce a judgment.").

101. *See id.* (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)).

102. *Id.*

Clause of the U.S. Constitution demands that the enforcement court (F2) must have personal jurisdiction over the shareholder. Not having this requirement would allow a plaintiff to forum shop for Enforcement Piercing in whichever state that the shareholder has assets.[103]

A counter-argument is that if Enforcement Piercing is successful, the shareholder and the defendant corporation will be regarded as the same person, therefore satisfying the jurisdictional requirement by granting F1 jurisdiction over the shareholder. This is essentially jurisdictional piercing.[104] In *Systems Div., Inc. v. Teknek Electronics, Ltd*,[105] the court applied exactly this doctrine, stating that "[t]he exercise of jurisdiction over an alter ego is compatible with due process because a corporation and its alter ego are the *same entity*—thus, the jurisdictional contacts of one are the jurisdictional contacts of the other for the purposes of *International Shoe* due process analysis."[106] Although this argument is certainly viable, jurisdictional piercing and liability piercing might not be the same. The former must satisfy the "minimum contacts" test as set forth in *International Shoe*,[107] while the latter is a state corporate law concept that is solely decided by the state court.[108] Thus, satisfying the piercing test alone does not guarantee the provision of a solid basis that satisfies due process.

In any event, general observation over the state cases shows fragmented practices among different states.[109] The U.S. Supreme Court has recently placed further limitations on the general jurisdiction of courts over large corporations that have business spanning over multiple states in *Goodyear*[110] and *Daimler*.[111] Therefore, there is an increasing need to find out the prevailing practice of courts on jurisdiction in Enforcement Piercing cases. In *Goodyear*, it was argued by the petitioner that North Carolina had general jurisdiction over the defendants because their parent company had a substantial operation in said state despite having neither their place of incorporation nor principal place of business there.[112] The U.S. Supreme Court, in a unanimous decision penned by Justice Ginsburg, emphatically rejected this argument.[113] Pointing to general jurisdiction being the "home" to the corporation, the Court clarified that only the state of incorporation or principal place of business may confer general jurisdiction on any given court.[114] This fragmentation adds to the importance of finding the answer to the jurisdictional requirement.

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103. This is not to be confused with *in rem* jurisdiction. No such case is identified in the research.

104. *See generally* Elephant in the Room, *supra* note 6.

105. Sys. Div., Inc. v. Teknek Elecs., Ltd., 253 F. App'x 31, 33 (Fed. Cir. 2007).

106. *Id.* at 37.

107. Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945).

108. Most courts, however, apply the same "minimum contacts" test. For the detailed debate, see Elephant in the Room, *supra* note 6, at 206–240 (comparing and contrasting jurisdictional piercing and liability piercing).

109. *Id.* at 204.

110. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924–30 (2011).

111. Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014) (emphasizing *Goodyear*'s formulation of general jurisdiction as rendering a corporation "essentially at home in the forum State").

112. *See Goodyear*, 564 U.S. at 917–19 (discussing differences in jurisdictional reach over Goodyear USA, the parent company, and its indirect subsidiaries located abroad).

113. *Id.* at 919.

114. *Id.* at 924 ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.").

3. Subject Matter Jurisdiction

If the enforcement court is required to also have subject matter jurisdiction over the shareholder, this requirement will again limit the forum-shopping opportunities of the plaintiff. This generally only applies to federal question cases where both F1 and F2 are federal courts. After the F1 federal court renders a judgment against the defendant corporation based on federal question subject matter jurisdiction, the F2 federal court must decide whether it has subject matter jurisdiction to take the case for Enforcement Piercing. The RESTATEMENT (SECOND) OF CONFLICT OF LAWS is silent on this.[115] The answer to that could, however, be provided by the U.S. Supreme Court. In *Peacock v. Thomas*,[116] the court was faced with an Enforcement Piercing claim by the plaintiff against the officer of the defendant who was liable for a judgment based on an ERISA claim.[117] It was decided that "[p]iercing the corporate veil is not itself an independent ERISA cause of action, 'but rather is a means of imposing liability on an underlying cause of action.'"[118] As a result, the plaintiff's piercing claim "does not state a cause of action under ERISA and cannot independently support federal jurisdiction."[119] Nor could plaintiff rely on the subject matter jurisdiction of the original trial, i.e., ancillary jurisdiction.[120] But this rule is not without its issues—most notably the artificiality of distinguishing piercing the corporate veil from fraudulent transfer. Claims involving the latter will be able to invoke the ancillary jurisdiction of the court.[121] Subsequent courts have followed this narrow distinction,[122] despite showing notable hesitation in some difficult cases.[123] One aspect that the courts rarely explore is the possibility of subject-matter jurisdictional piercing[124] in an enforcement

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115. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 94 (Am. Law Inst. 1971) (omitting discussion of federal appellate jurisdiction with regard to Enforcement Piercing).

116. Peacock v. Thomas, 516 U.S. 349 (1996).

117. *Id.* at 351–52.

118. *Id.* at 354 (quoting CHARLES R.P. KEATING & GAIL O'GRADNEY, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41 (perm. ed. 1990)).

119. *Id.* at 353–54.

120. *Id.* at 355 ("In a subsequent lawsuit involving claims with no independent basis for jurisdiction, a federal court lacks the threshold jurisdictional power that exists when ancillary claims are asserted in the same proceeding as the claims conferring federal jurisdiction.").

121. *Id.* at 356 ("[W]e have approved the exercise of ancillary jurisdiction over a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments—including . . . fraudulent conveyances.").

122. *See* Epperson v. Entm't Express, Inc., 242 F.3d 100, 106 (2d Cir. 2001) ("Since *Peacock*, most courts have continued to draw a distinction between post-judgment proceedings to collect an existing judgment and proceedings, such as claims of alter ego liability and veil-piercing, that raise an independent controversy with a new party in an effort to shift liability."); *see also* Int'l Bhd. of Elec. Workers Local 449 v. Black Ridge Energy Servs., Inc. No. 4:13-CV-00355, 2014 WL 3891291, at *8 ("[A] judgment-enforcement action based on a retroactive alter ego claim . . . requires its own basis for federal jurisdiction separate from the extant judgment against [shareholder].").

123. *See, e.g.*, Knox v. Orascom Telecom Holding S.A.E., 477 F. Supp. 2d 642, 646 (S.D.N.Y. 2007) ("Plaintiffs contend that the circumstances of this action are more in line with those in *Epperson*, because Plaintiffs do not seek to hold [shareholder] liable for the judgment against the [defendant company]. Rather, they simply seek recovery of funds due the [defendant company] that happen to be in [shareholder's] possession. There is some merit in both parties' arguments, rendering the Court's judgment an acutely close call.").

124. There are examples that subject-matter jurisdiction could be gained through the application of piercing the corporate veil doctrine. *See, e.g.*, RMS Titanic, Inc. v. Zaller, 978 F. Supp. 2d 1275, 1291 (N.D.

scenario, but no reported case on this issue has yet been identified, and certainly not during the survey period. Finally, if the case also happens to be a diversity case, the subject matter jurisdiction issue will not arise since the plaintiff does not need to rely on federal question jurisdiction.[125]

4. Notice

The RESTATEMENT (SECOND) OF CONFLICT OF LAWS does not impose any additional requirement on Enforcement Piercings (e.g., the requirement of personal jurisdiction and subject matter jurisdiction).[126] The RESTATEMENT (SECOND) OF JUDGMENT, does, however, discuss an additional notice requirement. Section 59(5) states that:

> A judgment against a corporation that is found to be the alter ego of a stockholder or member of the corporation establishes personal liability of the latter *only if he is given notice that such liability is sought to be imposed and fair opportunity to defend the action resulting in the judgment.*[127]

Thus, the shareholder must be notified at the F1 proceeding in order for it to be liable for the judgment. This rule seems to be derived from a widely influential U.S. Supreme Court case, *Zenith Radio Corp. v. Hazeltine Research, Inc.*[128] In that case, the Supreme Court rejected the plaintiff's attempt to hold the shareholder liable for the defendant's judgment debt in an enforcement action due to the fact that the shareholder was not served with notice of the first-instance proceeding against the defendant.[129] A closer look at *Zenith* may yield a different interpretation.

First, there was no Enforcement Piercing in the case.[130] In the lower court, the parent was held liable on the basis of a stipulation between the subsidiary and the plaintiff which provided that "for purposes of this litigation [the subsidiary] and its parent . . . will be considered to be one and the same company."[131] Thus, not only was there no Enforcement Piercing, there was no piercing issue at all. This was the view taken by the U.S. Supreme Court—it rejected the stipulation as a valid basis to hold the parent liable, stating that:

> Perhaps [plaintiff] could have proved and the trial court might have found that [defendant subsidiary] and [parent company] were *alter egos*; but absent jurisdiction over [parent company], that determination would bind only

Ga. 2013) (extending subject matter jurisdiction based on the Latham Act over foreign party through piercing the corporate veil due to its alter ego status with a U.S. party).

125. On federal court jurisdiction, *see generally* SYMEON C. SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW 34–36 (2008).

126. One may argue that it was discussed indirectly, *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 94 (AM. LAW. INST. 1988) (stating that the enforceability of a judgment is only subject to constitutional limitations and local law).

127. RESTATEMENT (SECOND) OF JUDGMENT § 59(5) (AM. LAW INST. 1982) (emphasis added).

128. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969).

129. *Id.* at 110 ("It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as party or to which he has not been made a party by service of process.").

130. *See generally id.*

131. *Id.* at 109.

> [defendant subsidiary]. *If the* alter ego *issue had been litigated, and if the trial court had decided that [defendant subsidiary] and [parent] were one and the same entity and that jurisdiction over [defendant subsidiary] gave the court jurisdiction over [parent], perhaps [parent's] appearance before judgment with full opportunity to contest jurisdiction would warrant entry of judgment against it. But that is not what occurred here.* The trial court's judgment against [parent company] was based wholly on [defendant subsidiary's] stipulation. [Defendant subsidiary] may have executed the stipulation to avoid litigating the *alter ego* issue, but this fact cannot foreclose [parent company], which has never had its day in court on the question of whether it and its subsidiary should be considered the same entity for purposes of this litigation.[132]

Apart from this technically not being a piercing case, the decision of "piercing" was based on the concession of the subsidiary, which had no such authority.[133] More importantly, the Supreme Court, from the extract above, was clearly of the opinion that, should a parent company properly be served and found liable on piercing at trial, it would have accepted the parent's liability based on piercing.[134] Thus, if F2 adjudicates the piercing issue against the shareholder in the enforcement proceeding (which did not happen in *Zenith*), the shareholder will have that opportunity to litigate on the alter ego issue and therefore comply with due process.[135] It will be interesting to see whether courts follow the rule formulated by the RESTATEMENT (SECOND) OF JUDGMENT or the interpretation of *Zenith* advocated above.

5. Res Judicata

The final conflict issue that might limit a plaintiff's advantage in an Enforcement Piercing is res judicata. An argument that has consistently been rejected by the courts is that piercing could not be raised in an enforcement proceeding in F2 because it will constitute res judicata; in other words, the Enforcement Piercing constitutes a re-litigation of the legal matter.[136] Defendants typically argue that Enforcement Piercing in F2 is, in essence, a re-litigation of the underlying cause of action that has already

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132. *Id.* at 111 (emphasis added).

133. *Id.* at 110.

134. *Zenith Radio Corp.*, 395 U.S. at 111.

135. *See* Wm Passalacqua Builders, Inc. v. Resnick Developers S., Inc., 933 F.2d 131, 142–143 (2d Cir. 1991) ("In *Zenith* the Court held it unconstitutional for a court to enforce a judgment against a parent corporation—alleged to be the *alter ego* of a subsidiary—who had controlled the litigation against the subsidiary, but who had never been subjected to the personal jurisdiction of the court. What the defendants ignore is the statement in *Zenith* that the judgment against the subsidiary could be *res judicata* against the parent in a court, as the district court here, that did have proper jurisdiction over the parent. Consequently, if the plaintiffs in this case can prove the defendants are in fact the *alter ego* of Developers, defendants' jurisdictional objection evaporates because the previous judgment is then being enforced against entities who were, in essence, parties to the underlying dispute; the *alter egos* are treated as one entity.").

136. *See, e.g.*, Monahan v. N.Y. City Dep't of Corr., 214 F.3d 275, 284 (2d Cir. 2000) ("The doctrine of . . . claim preclusion, holds that 'a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'") (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)).

been adjudicated in F1, and therefore prohibited by res judicata.[137] The courts often reject this argument because plaintiffs are not re-litigating the underlying cause of action that was concluded in F1, but are instead litigating the piercing issue, which is a separate legal concept from the underlying cause of action.[138] Perhaps the strongest argument for res judicata is that the plaintiff *could have* raised the piercing issue in F1 instead of dragging it to F2 for Enforcement Piercing.[139] However, for the piercing claim to be barred, it "logically must have arisen before the prior action."[140]

This comes down to the factual questions of whether the plaintiff knew about the need of piercing during the trial in F1 (e.g., whether there are enough assets in F1 to satisfy the judgment), and whether there is a prospect of piercing (e.g., whether the shareholder and the defendant corporation are of such a relationship that piercing is possible). To hold otherwise would mean that "any time a plaintiff sues a corporation, it would effectively be required to join the corporation's owners or be barred from later recovering on the judgment from the owners in a separate veil-piercing action."[141] Apparently, the choice-of-law rules of res judicata could have an impact on the whole forum-shopping game.[142] How strictly the courts interpret the factual scenarios for a plaintiff in raising the piercing argument in F1 will be of key significance in the applicability of the doctrine.

6. State Procedural Rule

Another issue that might arise is whether Enforcement Piercing constitutes a valid claim during the enforcement stage.[143] Generally, piercing the corporate veil is regarded as an equitable remedy.[144] It is ancillary in nature and cannot by itself be the

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137. *See, e.g.*, Cent. States, Se & Sw Areas Pension Fund v. Hayes, 789 F. Supp. 1430, 1433 (N.D. Ill, 1992) (summarizing plaintiff's argument that because plaintiff was not joined as a party in the first proceeding, defendant is barred by *res judicata* and/or collateral estoppel from bringing the second proceeding against plaintiff).

138. *See* Am. Federated Title Corp. v. GFI Mgmt. Servs., Inc., 39 F. Supp. 3d 516, 523 (S.D.N.Y. 2014) ("The issue of contractual liability was litigated in a proceeding in which Defendants here were not parties, and it involved issues distinct from whether Defendants are liable on a veil-piercing theory."); *see also* Strange v. Estate of Lindemann 408 S.W.3d 658, 661 (Tex. App.—Fort Worth 2013) ("Typically, a postjudgment suit against an alleged alter ego is not a collateral attack on the prior judgment, and thus is not barred by res judicata.").

139. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 930 (2011) ("Neither below nor in their brief in opposition to the petition for certiorari did respondents urge disregard of petitioners' discrete status as subsidiaries and treatment of all Goodyear entities as a 'unitary business,' so that jurisdiction over the parent would draw in the subsidiaries as well. Respondents have therefore forfeited this contention, and we do not address it.").

140. *Am. Federated Title Corp.*, 39 F. Supp. 3d at 524. *See also Estate of Lindemann*, 408 S.W.3d at 661 ("For res judicata to apply to a claim, that claim must have been in existence when the first suit was filed.").

141. *Am. Federated Title Corp.*, 39 F. Supp. 3d at 524.

142. *See infra,* Section I.D.

143. *See, e.g.*, Pyshos v. Heart-Land Dev. Co., 630 N.E.2d 1054, 1058 (Ill. App. Ct. 1994) (examining whether Enforcement Piercing constituted a claim and concluded that it could be brought in a separate action as a means of enforcement).

144. *See* Trs. of the Nat'l Elevator Indus. Pension, Health Benefit & Educ. Funds v. Lutyk, 332 F.3d 188, 193 n.6 (3d Cir. 2003) ("As 'an equitable remedy,' . . . piercing the corporate veil is not technically a mechanism for imposing 'legal' liability, but [rather] for remedying the 'fundamental unfairness [that] will result from a failure to disregard the corporate form.'").

cause of action in litigation.[145] Thus, if the underlying cause of action is merged into the judgment, how could the plaintiff sue the shareholder only to pierce the corporate veil? Different states have different answers, depending on the procedural rule of the state in question. For example, in Illinois, Enforcement Piercing has long been regarded as an exception to the general rule that piercing cannot be a cause of action.[146] In *Buckley v. Abuzir*, the court stated that "[p]iercing the corporate veil is not a cause of action but, rather, a means of imposing liability in an underlying cause of action. Parties may, however, bring a separate action to pierce the corporate veil for a judgment already obtained against a corporation."[147] In California, Enforcement Piercing can be affected by an amendment to the original judgment.[148] In *Bank of Montreal*, the court stated that the "California Civil Procedure Code § 187 allows the amendment of a judgment 'to add additional judgment debtors on the grounds that a person or entity is the alter ego of the original judgment debtor.'"[149] In other states, it is less clear how Enforcement Piercings are in compliance with the general requirement of a cause of action.[150]

Having reviewed the issues above, it is clear that the different approaches to choice of law could change the potential advantages available to the plaintiff in Enforcement Piercing, and issues 2–6 could impose hurdles to forum shopping.

II. METHODOLOGY

This empirical study aims to survey the Enforcement Piercing cases decided in the United States over three years, between 2012 and 2014. The research methodology is set forth below.

A. Survey Period

The survey period lasts from January 1, 2012 to December 31, 2014. This period is chosen for two reasons. First, the survey intends to cover the recent cases decided on the contemporary practices of Enforcement Piercing among U.S. courts. In this sense, it is not a full historical account of Enforcement Piercing in the United States, but a snapshot of recent developments of the doctrine. This provides a focused examination of recent cases and avoids unnecessary noise from outdated cases. As we

145. *See* Nick Corp. v. JNS Aviation, Inc. (In re JNS Aviation, LLC), 376 B.R. 500, 521 (Bankr. N.D. Tex. 2007) (according to Texas law, "an assertion of veil piercing or corporate disregard does not create a substantive cause of action, that such theories are purely remedial and serve to expand the scope of potential sources of relief by extending to individual shareholders or other business entities what is otherwise only a corporate liability").

146. Buckley v. Abuzir, 8 N.E.3d 1166, 1169 (Ill. App. Ct. 2014).

147. *Id.*

148. Bank of Montreal v. SK Foods, LLC, 476 B.R. 588, 597 (N.D. Cal. 2012).

149. *Id.* (quoting NEC Electronics Inc. v. Hurt, 208 Cal. App. 3d 772, 778 (1989)).

150. In most cases, the courts simply do not address the procedural aspect of Enforcement Piercing. *See, e.g.*, Black v. Gigliotti (In re Gigliotti) 507 B.R. 826, 829 (Bankr. E.D. Pa. 2014) (stating that the plaintiff sought to "recover on the state court judgment from the [shareholders] based on a theory of piercing the corporate veil").

will see, the survey period yields 90 Enforcement Piercing cases[151]—a sizeable sample providing a reasonable basis for in-depth discussion.

Second, the beginning of the research period, January 1, 2012, also happens to be the first full calendar year after the latest Supreme Court announcement of *J. McIntyre Machinery, Ltd. v. Nicastro*[152] and *Goodyear Dunlop Tires Operations, S.A. v. Brown.*[153] These cases substantially changed the jurisdictional regime of the United States.[154] Personal jurisdiction is a big part of the analysis on Enforcement Piercing, as it relates to both itself and other relevant topics, and starting from 2012 allows the survey to capture the latest phase of the development of conflict of laws of the country.[155]

B. Types of Cases

The survey focuses on Enforcement Piercing (Scenarios 3 and 4), particularly the types of Enforcement Piercing cases in Scenario 4 where Enforcement Piercing involves conflict issues. To identify these cases, two search phrases were used: "piercing the corporate veil" and "disregard! corporate entity."[156] These search phrases have been widely utilized in a number of empirical studies involving piercing the corporate veil since Professor Robert Thompson's seminal article on the subject, including in empirical research on the interaction of piercing and conflict of law.[157] After applying the search phrases in Westlaw, the relevant piercing cases were categorized into Enforcement Piercing cases and non-Enforcement Piercing cases. Finally, the Enforcement Piercing cases were divided into Scenario 3 cases (where the underlying cause of action and the piercing happened in two separate proceedings yet without conflict elements) and Scenario 4 cases (where Enforcement Piercing involves conflict elements).

C. Covered Jurisdiction

This Article focuses on Enforcement Piercing cases within the United States. The focus on the United States is obvious: United States courts are open to the concept of piercing the corporate veil.[158] This is supported by the sheer number of piercing cases, the consistent rise in such cases, and the surprisingly high rate of successful piercings.[159] Other countries may not have the piercing concept at all, or even if they do, rarely

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151. *See infra* Section III, Table 2 (presenting the empirical research findings of this study).

152. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011).

153. Goodyear Dunlop Tires Operations, S.A. v. Brown 564 U.S. 915 (2011).

154. *See* Todd David Peterson, *The Timing of Minimum Contacts After* Goodyear *and* McIntyre, 80 GEO. WASH. L. REV. 202, 235–41 (2011) (discussing the potential changes brought by *Goodyear* and *McIntyre*).

155. *See infra* Section III.B.1 (discussing the relevance of personal jurisdiction to Enforcement Piercing).

156. *See* Thompson Research, *supra* note 1, at 1036 n. 1 (using four undisclosed key numbers as well).

157. *See, e.g.*, Charles Mitchell, *Lifting the Corporate Veil in the English Courts: An Empirical Study*, 3 COMPANY, FIN. & INSOLVENCY L. REV. 15, 15 (1999) (discussing English courts' treatment of veil piercing claims); *see also* Hui Huang, *Piercing the Corporate Veil in China: Where Is It Now and Where Is It Heading?*, 60 AM. J. COMP. L. 743, 747 (2012) (describing the research method employed in the study).

158. Thomas K. Cheng, *The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines*, 34 B.C. Int'l Comp. L. Rev. 329, 331 (2011).

159. Thompson Research, *supra* note 1, at 1044, 1048 (finding 1600 cases involving the issue of corporate veil piercing, where courts pierced the veil in about 40% of reported cases).

apply it.[160] For example, a recent United Kingdom Supreme Court judgment, *Prest v. Petrodel Resources Ltd.*,[161] indicates that the piercing's application is going to be further narrowed within that jurisdiction.[162] As such, the empirical research simply does not have the pool of raw data necessary to conduct corresponding research in these other jurisdictions.

D. Related Research

The author has previously conducted two related studies on the relationship between piercing the corporate veil and conflict of laws. The first one examines the relationship between choice of law and piercing the corporate veil ("Choice of Law Research"),[163] while the second analyzes the relationship between piercing the corporate veil and jurisdiction ("Jurisdictional Piercing Research").[164] While these studies adopt similar methodology in identifying piercing cases, their focuses are different and do not overlap with this Article.

E. Limitation

As mentioned, this empirical research is not a full historical account of all Enforcement Piercing cases in the United States. Thus, it does not claim to have the most comprehensive coverage of cases on the topic. However, the key cases that have shaped the development of Enforcement Piercing, both before and after the survey period, have been thoroughly and carefully researched and reviewed. These cases, so long as they are material to the discussion, are laid out in Section III. Additionally, like all case-based empirical research, this research is also subject to selection bias.[165]

III. FINDINGS OF EMPIRICAL RESEARCH

The findings of the empirical research are presented in this Section. Starting with the basic statistics, including the number of the various types of cases and the respective piercing rates, followed with findings on the six issues highlighted in Section I.

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160. *See, e.g.*, Cheng, *supra* note 157, at 331 (stating "English courts are loathe to apply the doctrine" of corporate veil piercing, which is permitted only under exceptional circumstances).

161. Prest v. Petrodel Resources Ltd. [2013] UKSC 34 (appeal taken from Eng.).

162. *See* 1 PALMER'S COMPANY LAW paras 2.1544.1–2.1544.7 (Geoffrey Morse ed., 25th ed. 2016) ("The Judgment of the Supreme Court in Petrodel Resources Ltd v Prest takes a considerably more restrictive approach to the question of veil-piercing than some of [the older authorities] and limits its proper application to, arguably, one specific example of the 'abuse' of the privilege of limited liability . . . It would appear from the above that the circumstances in which the courts a) are entitled to pierce the corporate veil, and b) to find it necessary to do so, are likely to be extremely limited, indeed Lord Mance suggested that such circumstances are likely to be 'novel and very rare.' In this respect the veil-piercing doctrine, as pronounced by the Supreme Court, is of exceptionally narrow scope and, on Lord Neuberger's analysis at least, has never been *necessarily* applied by the courts.") (emphasis added).

163. Thompson, *supra* note 17.

164. *See Elephant in the Room*, *supra* note 6, at 3 (discussing the jurisdictional piercing process).

165. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984) (describing that the standard of decision influences the rate of success in litigation only partially).

Table 2—Basic Findings

	No. of Cases	Pierced Cases	Piercing Rate
Raw Cases	1,587	-	-
Piercing Cases	1,044	368	35.25%
Conflict Cases	810	298	36.79%
Enforcement Piercing Cases	90	47	52.22%
Non-Enforcement Piercing Cases	953	320	33.58%

There are, in total, 1,044 piercing cases, drawing from the initial pool of 1,587 raw cases.[166] Among the relevant piercing cases, there are a total of 90 enforcement cases (Scenarios 3 and 4). This represents 8.62% of all piercing cases. These are undoubtedly a minority, but Enforcement Piercing cases still account for a substantial number of all piercing cases. This makes Enforcement Piercing an established category of piercing cases, attesting to its importance. If we only take into account the successful piercing cases, the importance of Enforcement Piercing cases is even more obvious. As indicated in Table 2, of the 368 successful piercing cases, 47 of them are Enforcement Piercing cases, accounting for 12.77% of such cases.

Table 3—Different States, Different Laws, and Different Piercing Rates

States	Number of cases	% of overall cases	Pierced cases	Piercing rate
California	44	4.21%	15	34.09%
Delaware	49	4.69%	17	34.69%
Federal	113	10.81%	43	38.05%
Illinois	51	4.89%	14	27.45%
New Jersey	43	4.11%	16	37.21%
New York	143	13.68%	63	44.06%
Ohio	48	4.60%	19	39.58%
Texas	46	4.41%	11	23.91%
U.S. Total	1,044	100%	368	35.25%

Table 3 shows the piercing rates of the eight states that handle the most piercing cases. These states have, in total, 198 cases, accounting together for 53.80% of all

166. *See supra* Section II (explaining methodology for deriving the raw cases).

piercing cases, and each has at least 43 piercing cases (more than 4% of overall piercing cases). Table 3 demonstrates how the piercing rates vary among different state laws, ranging from 44.06% under New York law to 27.45% under Illinois law. As mentioned above, if plaintiffs are able to identify the choice-of-law approaches of different states, they will be motivated to forum shop for more favorable governing law.

Table 4—Type of Piercing Cases

	No Enforcement Piercing	Enforcement Piercing
Non-conflict	206 **Scenario 1**	24 **Scenario 3**
Conflict	748 **Scenario 2**	66 **Scenario 4**
Total	1,044	

Section I broke down the piercing cases into four Scenarios,[167] and Table 4 shows the distributions of piercing cases corresponding with each categorization. Scenario 1 includes purely domestic cases with no conflict element. There are 206 such cases, accounting for 19.73% of all piercing cases. Not surprisingly, Scenario 2, first-instance piercing cases with conflict elements, accounts for most types of piercing cases (748 cases (71.65%)). The lion's share of such cases could be explained by the predominance of two types of cases that the category consists of: Conflict cases and first-instance piercing cases. Conflict cases, particularly those involving diversity in the litigating parties,[168] and first-instance piercing cases are both substantially higher in number than non-conflict cases and Enforcement Piercing cases, respectively. It is important to note again that first-instance piercing cases also have conflict issues, such as choice of the proper law on piercing and jurisdiction.[169] However, because these cases do not involve Enforcement Piercing, they are not relevant for our purpose.

167. *See supra* Section I.C (describing the four possible scenarios created by the interactions of piercing the corporate veil and enforcement of foreign judgments).

168. *See supra* Section III, Table 4 (depicting the number of conflict and non-conflict cases).

169. *See supra* Section III, Table 5 (explaining that first-instance piercing cases can involve a sister state).

Table 5—Piercing Rate of Enforcement Piercing Cases

All Piercing Cases (1 + 2 + 3 + 4)		Enforcement Piercing Cases (3 + 4)		Non-conflict Enforcement Piercing Cases (3)		Conflict Enforcement Piercing Cases (4)	
No. of Cases	Piercing Cases (%)	No. of Cases	Piercing Cases (%)	No. of Cases	Piercing Cases (%)	No. of Cases	Piercing Cases (%)
1,044	368 (35.25%)	90	47 (52.22%)	24	10 (41.66%)	66	37 (56.06%)

The most important statistic, as indicated by Table 5, shows a substantially higher piercing rate of Enforcement Piercing cases (52.22%) as compared with that of non-Enforcement Piercing cases (33.54%), a difference of almost 20%. At first glance, one might attribute this difference to the fact that the Enforcement Piercing cases have had success in the underlying cause of action. Because piercing the corporate veil is not in itself a cause of action, if the underlying cause of action fails, so will the claim on piercing the corporate veil.[170] This will be the case for Scenarios 1 and 2, where the underlying cause of action was tried together with the piercing issue in the same trial. But Enforcement Piercing is not subject to the same problem. In this sense, Enforcement Piercing offers the plaintiff no strategic advantage. Because the piercing rate of Enforcement Piercing does not take into account the failure rate of the underlying cause of action, the plaintiff essentially gains nothing by delaying the piercing claim to the enforcement stage. However, this argument is not convincing if one looks at the number of cases where piercing failed because of a failure in the underlying cause of action, as shown in Table 6.

Table 6—Reasons of Failure for Non-Enforcement Piercing Cases

	Number of Cases	Percentage of Failed Cases
Failure for Underlying Cause of Action	5	0.79%
Failure for Other Reasons	628	99.21%
Total Failed Cases	633	100%

Apparently, while theoretically a piercing case could fail because of the underlying cause of action, such instances are rare in practice. So although this theory could still be a reason for the higher piercing rate, there must be other explanations.

170. *See* Galford v. Friend, No. 13-1134, 2014 WL 5311389, at *9 (Sup. Ct. App. W. Va. Oct. 14, 2014) (showing that an underlying claim is necessary before a determination of whether piercing the corporate veil is appropriate).

The element of fraud may present an alternative theory. In many Enforcement Piercing cases, plaintiffs bring the Enforcement Piercing in F2 because of the fraudulent conduct of the defendant and its shareholder.[171] A prime example is the fraudulent transfer of the assets of the defendant to the shareholder. In cases like these, the F2 court will likely be sympathetic to the plaintiff who has won the underlying cause of action in F1, but is unable to be compensated because of the fraudulent conduct of the defendant and its shareholder. If an Enforcement Piercing action is brought, it is likely to satisfy the fraud element, which is usually required by most states' piercing tests.[172] This view is recorded in Table 7.

171. *See, e.g.*, AngioDynamics, Inc. v. Biolitec AG, 910 F. Supp. 2d 346, 348 (D. Mass. 2012) (wherein defendant was accused of, *inter alia*, fraudulent transfer in violation of Mass. Gen. Laws ch. 109A of Massachusetts, F2 in the case). *See also* Wachovia Securities, LLC v. Banco Panamericano, Inc., 674 F.3d 743, 757 (7th Cir. 2012) (wherein defendant was accused of, *inter alia*, fraudulent transfer in violation of the Uniform Fraudulent Transfer Act of Illinois, F2 in the case). In both cases, enforcement piercing was successful. *AndgioDynamics*, 910 F. Supp. 2d at 357; *Waschoiva,* 674 F.3d at 757.

172. POWELL, *supra* note 41, §§ 3, 4–6 (defining fraud as "abuse of privilege of doing business in corporate form").

Table 7—Comparison of Reasons for Successful Piercing

	Piercing		Enforcement Piercing		Non-Enforcement Piercing	
	Success	Failure	Success	Failure	Success	Failure
Control, Fraud, and Proximity	27	17	3	3	24	14
Control and Fraud	181	221	34	12	147	209
Proximity and Fraud	2	7			2	7
Just Fraud	38	113	2	6	36	107
Fraud-related Subtotal	248	358	39	21	209	337
Just Control	64	126	1	3	63	123
Just Proximity	-	3	-	-	-	3
Proximity and Control	-	1	-	1	-	-
Insufficient Fact	-	62	-	2	-	60
No Application/ Irrelevant	56	125	7	16	49	109
Others Subtotal	120	317	8	21	112	295
Total	368	675	47	43	321	632

As mentioned above, the fraud factor represents an injustice that results from excessive control—and this fraud factor is the best way to access the sympathy of the courts in Enforcement Piercing cases.[173] Accordingly, Enforcement Piercing cases should have a higher success rate when this element is present.

Table 7 shows the actual factors that the courts have applied when determining the piercing issue. These factors are broadly categorized into the three major elements of piercing—control, fraud, and proximity,[174] which in turn yield the combinations set forth in Table 7. In total, there are 606 cases in which the courts have considered the fraud element. Two hundred and forty-eight of these fraud-related piercing cases were successful, and 358 of these cases failed, yielding a success rate of 40.92%. In contrast, the success rate on the fraud-related Enforcement Piercing cases was 65.00%, a difference of 24.08%. The difference is even more pronounced if the respective success rates of fraud-related Enforcement Piercing cases and fraud-related non-

173. *Id.*
174. *Id.*

Enforcement Piercing cases (38.28%) are compared. This further expands the difference to 26.72%.

On the other hand, the data on non-fraud-related piercing cases is relatively closer. The success rate of the non-fraud-related piercing cases generally is 37.85%, whereas the corresponding rates for Enforcement Piercing and non-Enforcement Piercing are at 27.59% and 37.07%, respectively, thereby showing a difference of less than 10%.

The percentage of cases that actually considered fraud is also higher for Enforcement Piercing cases. Among the 90 Enforcement Piercing cases, 60 cases (66.66%) actually considered fraud. In contrast, only 546 non-Enforcement Piercing cases (57.29%) actually considered fraud. Among the successful Enforcement Piercing cases, the fraud-related cases account for 82.89%. The corresponding percentage for non-Enforcement Piercing cases is only 65.11%.

In short, courts address the fraud element more frequently and more favorably in Enforcement Piercing cases, and that supports the assumption that the courts may be more sympathetic to Enforcement Piercing in these cases, thus resulting in a higher piercing rate.

However, even with the higher piercing rate due to the fraud element, one cannot conclude that this is purely due to sympathy or favorable applicable law. This is particularly so if one looks at the difference in piercing rates between Scenarios 3 and 4. As set forth at the beginning, the hypothesis of this Article is that the various conflict-of-law rules offer potential advantages to a plaintiff in terms of forum shopping. For Enforcement Piercing cases with conflict elements (Scenario 4), the piercing rate is 56.06%, higher than the general piercing rate of Enforcement Piercing, and substantially higher than the piercing rate of Enforcement Piercing without conflict elements (41.66%). The difference of 14.40% in the piercing rate due to the absence of a conflict element suggests that sympathy is not the only reason for the higher general piercing rate. Instead, we must look into the choice-of-law advantages and potential limitation of forum shopping for a more detailed analysis.

A. Choice of Law

As shown below, advantages come from favorable choice-of-law rules (and the resulting favorable governing law) as a result of the second forum shopping afforded by Enforcement Piercing.

Table 8—Choice-of-law Approaches of Scenario 4 (Conflict Enforcement Piercing) Cases

	No. of Cases	Percentage
Approach of F1	-	-
Treated as if First-Instance Piercing	-	-
Procedural Rule of F2	-	-
No Specified Approach	49	74.24%
Law of Incorporation	5	7.57%
Law of Forum	3	4.55%
Law of Transaction	3	4.55%
Closest Connections	1	1.52%
Others	5	7.57%
Total	66	100%

Among the three suggested approaches in Section I.4.i, none of the cases expressly adopts any one approach. Instead, the majority of cases simply did not involve any choice-of-law analysis (77.27%). However, most courts implicitly adopt the second approach and treat Enforcement Piercing the same as first-instance piercing for the choice-of-law matter.

While the cases do not expressly state that the choice-of-law approaches of the two types of piercing are the same, 7.58% of Enforcement Piercing cases had expressly adopted the law of the place of incorporation. That again is the conventional approach of first-instance piercing.[175] In fact, if one compares the choice-of-law approaches of the general piercing cases with those of the Enforcement Piercing cases, the percentages of the various approaches are actually similar.

175. *See* RESTATEMENT (SECOND) CONFLICTS OF LAW § 307 cmt. a (AM. LAW INST. 1971) (commenting that, "[u]nder the local law of most states, a shareholder is liable for any balance that remains unpaid upon a subscription made by him to the shares of a corporation").

Table 9—Comparison of Choice-of-law Approach

	Enforcement Piercing with Conflict Element	General Piercing with Conflict Element
Approach	**Percentage**	**Percentage**
No Specified Approach	74.24%	65.56%
Law of Incorporation	7.57%	13.09%
Law of Forum	4.55%	5.56%
Law of Transaction	4.55%	5.06%
Most Significant Connections	1.52%	1.60%
Others	7.57%	9.01%
Total	100%	100%

Similar to the choice-of-law approaches of general piercing cases with conflict elements, the ironic observation is that "no specified approach" is the most common approach, accounting for 74.24% of the Enforcement Piercing conflict cases and 65.56% of the general piercing cases, respectively. Among the most adopted approaches, when the courts specified an approach, is the law of the place of incorporation in both types of cases, accounting for 7.57% and 13.09%, respectively. The next most adopted approaches are the law of forum and the law of transaction, each accounting for around 5% of the respective type of cases. The law with the most significant connections is the last approach, with percentages of 1.52% and 1.60%, respectively. Overall, the distributions of the choice-of-law approaches are very similar between the two types of cases, but the similarity does not stop there.

Putting aside the specified approaches, the fact is most courts simply apply the forum law of F2 for both types of cases. Table 10 shows the actual law applied by the court in both the Enforcement Piercing cases with a conflict element, and the general piercing cases with a conflict element.

Table 10—Application of Forum Law

	Enforcement Piercing Cases with Conflict Element	Conflict Cases
Applied Forum Law	58	687
Percentage of Forum Law Application	87.88%	84.81%
Applied Non-forum Law	8	123
Percentage of Non-forum Law Application	12.12%	15.19%
Total Cases	66	810

Of the 66 Enforcement Piercing cases with a conflict element, 87.88% applied the forum law of F2. This is very close to the finding that 84.81% of all conflict piercing cases applied forum law. Combined with the similarities in the specified approaches shown in Table 9 and the lack of any special approach for Enforcement Piercing, like three approaches suggested in Section I.4.i, this strongly suggests that the courts do not tailor specific choice-of-law rules for enforcement piercing. Instead, they have simply applied the same approach as a first-instance piercing.[176]

B. Enforcement Limitations

The result of the practice that the courts treat Enforcement Piercing as first-instance piercing on the choice-of-law issue, the effective application of forum law, combined with the variation in piercing rates among different state laws as shown in Table 3, provide the motivation for plaintiffs to engage in forum shopping. That, however, is just half of the equation; we must also look at the various hurdles that might limit such forum shopping, as discussed in Section B.4.ii–v. Table 11 summarizes the failed conflict Enforcement Piercing cases that result from the application of one of such hurdles.

176. The fact that most courts adopt F2's forum law could also support the argument that courts regard Enforcement Piercing as a procedural remedy of F2. However, even if we take that as a possibility, this approach will not be recommended in any event for the potential of forum-shopping, as will be shown below. *See infra* Section III.B.

Table 11—Hurdles in Conflict Enforcement Piercing Cases

	Successful Cases	Percentage of Conflict Enforcement Cases	Discussed Cases	Percentage of Conflict Enforcement Cases
Personal Jurisdiction	2	3.03%	6	9.09%
Subject Matter Jurisdiction	3	4.55%	7	10.61%
Notice	2	3.03%	6	9.09%
Res Judicata[177]	-	-	7[178]	10.61%
State Procedural Rules[179]	1	1.52%	3[180]	4.56%
Total	6[181]	9.09%[182]	27[183]	40.91%

Table 11 shows that the hurdle discussed in Section B.4 rarely negatively impacted the Enforcement Piercing cases. Of the 66 conflict Enforcement Piercing cases (Scenario 4 cases), only six such cases failed because of one of these hurdles. These arguments were presented in 27 cases, but the success rate of these arguments was only 22.22%.[184] The specific findings on each of these hurdles are presented below.

177. Note that res judicata is not limited to conflict cases. *See generally* Strange v. Estate of Lindemann, 408 S.W.3d at 658 (Tex. App.—Forth Worth 2013).

178. There are only seven conflict-enforcement cases raising the res judicata defense and none were successful. However, if we also include the non-conflict enforcement cases, there are four additional cases, one of which is successful at raising the res judicata defense. *Id.*

179. Note that the restrictions imposed by state procedural rules are not limited to conflict cases.

180. There are only three conflict enforcement cases raising the res judicata defense, with one successful. However, if we also include the non-conflict enforcement cases, there is one additional case that was not successful.

181. *See supra* Section III.

182. *See generally Strange*, 408 S.W.3d at 658.

183. *Id.*

184. Note, however, the discussion of the lowered importance of res judicata. *See infra* Section III.B.4.

1. Personal Jurisdiction

Only two Scenario 4 cases failed on the basis of a lack of personal jurisdiction over the parent company in F2.[185] Apart from those two cases, only four other cases discussed the jurisdictional requirement of the parent company and in these cases jurisdiction was found. It is important to note that the jurisdictional requirement over the parent company will not be an issue in some of these cases anyway—in eight of the 66 Scenario 4 cases, the parent company was actually incorporated or had its principal place of business in the forum, thereby giving general jurisdiction to the forum.[186] Enforcement Piercing by its very nature seeks to hold the parent company liable for the debt of the subsidiary; the plaintiff will therefore try to initiate Enforcement Piercing in a jurisdiction in which the parent company has assets, and the state of incorporation or the principal place of business is one of the many places where the parent company will have assets. Thus, the picture of the rules is unclear, but practically speaking, it is rare for Enforcement Piercing cases to fail on jurisdictional grounds.

2. Subject Matter Jurisdiction

Similar to personal jurisdiction, only seven cases discussed the issue of subject matter jurisdiction, and only in three of these cases the issue prevented the Enforcement Piercing from succeeding. Because the subject matter jurisdiction issue could only arise in federal question cases,[187] a more accurate discussion should focus on the success rate of this argument against federal question cases that have no diversity. Of the 21 federal question cases with no diversity, these three cases account for 14.29% of all such cases. While this suggests a higher significance for subject matter jurisdiction in these cases, due to the small number of federal question cases, the general practical impact on Enforcement Piercing remains small. The courts also have neglected to discuss subject matter jurisdiction in 14 federal question cases.[188] Having said that, if subject matter jurisdiction becomes an issue in a particular case, the plaintiff could always consider bringing Enforcement Piercing in state courts.[189]

3. Notice

Notice is also not a significant impediment. There are only six cases that have discussed notice, and only two have succeeded—and successful arguments for notice may not ultimately bar a plaintiff from raising Enforcement Piercing again. In

185. *See supra* Section III, Table11 (showing that only two cases failed for lacking personal jurisdiction).

186. *See, e.g.*, Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 922–24 (2011) (discussing how a company is subject to general jurisdiction).

187. *See supra* Section I.D.3 (stating that if the court "is required to have subject matter jurisdiction . . . this generally refers only to federal question cases").

188. Unlike personal jurisdiction, subject matter jurisdiction cannot be waived. *See* Ins. Corp. of Ir. v. Comagnie des Bauxites de Guinee, 456 U.S. 694, 694–95 (1982) (stating that unlike subject-matter jurisdiction, which is an Art. III as well as a statutory requirement, personal jurisdiction flows from the Due Process Clause and may be waived).

189. State courts enjoy concurrent jurisdiction in most cases, see SYMEONIDES, *supra* note 42, at 327–28 n.1 (stating that federal courts are required to enforce state judgments). Whether to bring the case to the state court will, however, be subject to other considerations.

NYKCool A.B. v. Pacific Fruit Inc.,[190] while the court rejected Enforcement Piercing by referring to the notice requirement, it went on to state that the judgment creditor "is free to commence a new action against those parties before whatever court would have personal and subject matter jurisdiction over those additional parties."[191] Practically speaking, notice requirements are unlikely.

4. Res Judicata

Res judicata is the most raised conflict defense to Enforcement Piercing and yet, the least successful. No conflict case surveyed in the study has succeeded using the argument. As mentioned above, the strongest argument for res judicata in an Enforcement Piercing case is that the plaintiff *could* have raised the issue in the original trial of the underlying cause of action. However, in the seven conflict enforcement cases that have discussed this issue, no court has made such a finding. While the argument is most frequently raised among all defenses, like the discussion on state procedural rule below, res judicata could be raised in non-conflict Enforcement Piercing cases as well. Thus, it may be better to measure the frequency of the defense against all 90 Enforcement Piercing cases instead. In this light, the defense was raised in only 12.22% of cases, with only one being used successfully.

5. State Procedural Rule

There are only three conflict Enforcement Piercing cases that have discussed the viability of bringing Enforcement Piercing under the relevant state procedural rule, with only one succeeding with this defense.[192] Since this argument could also be brought in non-conflict Enforcement Piercing cases, these cases can be added to the analysis. However, there was only one such case and it was not successful.[193] Accordingly, state procedural rule is not likely to be a real threat to the success of the plaintiff.

Issues 1 to 5 in this Section all could have added extra requirements on the plaintiff's Enforcement Piercing to make it more difficult to pierce successfully. But as shown above, they are not real hurdles in practice—the uncertainty in the law notwithstanding. The current choice-of-law approaches favoring forum shopping and minimal restrictions on forum shopping contributes to the success rate of Enforcement Piercing. Evidently, these factors fit with the hypothesis that the higher success rates are due to the favorable conflict reasons.

190. NYKCool A.B. v. Pacific Fruit Inc., No. 10 Civ. 3867C (LAK)(AJP), 2012 WL 1255019 (S.D.N.Y. Apr. 16, 2012).

191. *Id.* at *8.

192. *See supra* Section III, Table 11.

193. *Id.*

6. International Cases

The discussion above has assumed that F1 is a U.S. court. What if F1 is a non-U.S. court? This Section deals with judgments rendered by a court of a foreign country.

The first thing to note is that the Full Faith and Credit Clause is not applicable.[194] Instead, the enforcement is generally subject to state laws.[195] While the state enforcement rules might be different, they are substantially the same.[196] Generally, the enforcement rules of a foreign-country judgment are very similar to those of a sister-state judgment.[197] The foreign-country judgment will still need to be a valid judgment nonetheless and satisfy the rules in § 92 of RESTATEMENT (SECOND) OF CONFLICT OF LAWS.[198] There are additional defenses that are applicable to the enforcement of a foreign-country judgment that would not be otherwise available in the enforcement of a sister-state judgment (e.g., the foreign-judgment is contrary to public policy).[199] But they are not particularly relevant to Enforcement Piercing.[200] There has also been some confusion over the applicability of the reciprocity doctrine. In *Hilton v. Guyot*,[201] the U.S. Supreme Court refused to enforce a French judgment because France failed to reciprocally enforce the U.S. judgment.[202] Most commentators are of the opinion that the *Hilton* rule is a federal common law rule that did not survive the *Erie* case, which provides that in most foreign judgment enforcement cases, federal courts apply state law.[203]

There is only one case in the survey period that involves an F1 judgment rendered by a foreign country,[204] and the way the court handled the Enforcement Piercing did

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194. *See* SYMEONIDES, *supra* note 42, at 333 ("The Full Faith and Credit Clause, which plays such an omnipotent role in the recognition of sister-state judgments, does not apply to foreign-country judgments."). *See also* David P. Stewart, *Recognition and Enforcement of Foreign Judgments in the United States*, 12 Y.B. OF PRIV. INT'L L., 179, 180 (2010) ("Unlike sister-state judgments that must be accorded full faith and credit, the judgments of foreign courts are not constitutionally entitled to recognition or enforcement in U.S. courts.").

195. *See* Stewart, *supra* note 195, at 180 ("Because the vast majority of actions for recognition are filed in state courts, and because even those filed in the federal courts are founded on 'diversity' jurisdiction, the decision to give effect to a foreign judgment is almost always made under state law.").

196. *See id.* at 181–82 (noting the majority of states have adopted either the 1962 Uniform Foreign Money-Judgments Recognition Act or its revision, the 2005 Uniform Foreign-Country Money Judgment Recognition Act).

197. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. b (AM. LAW INST. 1971) (providing "[i]n most respects, however, such [foreign] judgments, provided they are valid under the rule of § 92, will be accorded the same degree of recognition to which sister State judgments are entitled").

198. *See id.* ("The rule of this Section is limited to valid judgments, that is, to judgments which meet the requirements of § 92.").

199. *See* SYMEONIDES, *supra* note 42, at 346–53 (describing defenses applicable to only foreign country judgments).

200. *See id.* at 348–50 (describing non-enforcement of penal and tax law judgments).

201. Hilton v. Guyot, 159 U.S. 113 (1895).

202. *Id.* at 227–28.

203. SYMEONIDES, *supra* note 42, at 334. *See also* Stewart, *supra* note 194, at 183 ("It is important to note that reciprocity between the rendering and enforcing jurisdictions is not required by the 1962 Act (or its 2005 revision), much less the *Hilton* doctrine, although some states have included such a ground in their enactments.").

204. Vitol, S.A. v. Primerose Shipping Co. 708 F.3d 527 (4th Cir. 2013). Also, there are three cases involving underlying judgments rendered in the United Kingdom (including *Vitol*), yet two of them chose

not differ from the general practice observed in this Article. However, the survey reveals other interesting observations about foreign-country judgments. Despite the relatively little difference between enforcement regimes for a sister-state judgment and for a foreign-country judgment, the difference could still potentially encourage forum shopping. In the Enforcement Piercing context, this may result in a plaintiff first domesticating[205] the foreign judgment in a state with a favorable enforcement rule before seeking Enforcement Piercing in another sister state that has a favorable piercing rule. One may regard the domesticating state as an "F1a state" because it is the transition state where the foreign judgment is domesticated as a U.S. judgment before Enforcement Piercing is sought in an F2 state. Although it is far from dispositive due to the limited number of cases, three cases involved such an F1a state, and two of them involved original judgments being rendered in the United Kingdom.[206] This could be viewed as yet another forum-shopping exercise. The plaintiff first seeks to domesticate the judgment in a state where the judgment could be recognized most easily, such as a state with a less stringent enforcement rule, and then proceed with an Enforcement Piercing in a state that has both the assets to satisfy the judgment and a favorable piercing law. In this way, the plaintiff can enjoy three favorable rules: Namely, the favorable law on underlying cause of action, the favorable enforcement law of a foreign-country judgment, and, finally, the favorable piercing law. Having said that, with the limited number of such Enforcement Piercing cases, the observations above are far from conclusive.

Enforcement Piercing in a foreign country judgment context could also have an impact on the choice-of-law approach. As discussed in Section I.B. above, F1 law should govern the piercing issue due to the Full Faith and Credit Clause. However, since F2 "is not bound by the rendering country's concept of res judicata,"[207] the argument will not be relevant where the Enforcement Piercing at issue deals with a foreign country judgment. However, the lone case on foreign country judgment in our survey does not touch on this issue.

7. Tort v. Contract

Theoretically, courts should be more willing to pierce the corporate veil in tort cases where the plaintiff does not have the opportunity to take self-protection measures, as opposed to contract cases where the plaintiff does have the opportunity.[208]

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domestication. In contrast, there is only one case involving domestication of a sister-state judgment. *See* Pricaspian Dev. Corp. v. Martucci, No. 11-CV-1459 (DMC), 2014 WL 105898 at *1 (D.N.J. Jan. 9, 2014) (noting the Colorado judgment was first domesticated in the state of New Jersey before the Enforcement Piercing in New Jersey federal district court).

205. *See* Stewart, *supra* note 195, at 193 (discussing the practice of seeking to have "the foreign country judgment . . . recognized in one state, but [to have] its enforcement . . . sought in another state").

206. *See* Flame S.A. v. Indus. Carriers, Inc., 39 F. Supp. 3d 769, 775 (E.D. Va. 2014) (discussing the domestication of an English judgment in New York before this enforcement piercing in Virginia); Paradigm BioDevices, Inc. v. Viscogliosi Bros, LLC, 842 F. Supp. 2d 661, 664 (S.D.N.Y. 2012) (discussing the domestication of an English judgment in Massachusetts before enforcement piercing in New York). The only intra-U.S. domestication case is *Martucci*, 2014 WL 105898 at *1 (discussing the domestication of a Colorado judgment in New Jersey).

207. Stewart, *supra* note 195, at 189.

208. *See* Thompson Research, *supra* note 1, at 1058–59 (describing how commentators believe tort claimants have a better claim to pierce the veil because they did not choose to deal with the corporate entity,

The Thompson Research shows that courts in practice do not follow that logic.[209] Surprisingly, Thompson found that courts did the exact opposite, and were more willing to pierce the corporate veil in contract cases than in tort cases.[210] This Section explores how the tort versus contract debate impacts Enforcement Piercing.

Section I noted that the underlying cause of action of the F1 trial is merged with the subsequent judgment.[211] As a result, the tort versus contract debate will have no impact on Enforcement Piercing and therefore the piercing rates should be about the same for the enforcement of judgments based on tort or contract. This is supported by the empirical research.

Table 12—Tort v. Contract

	Enforcement Piercing			
	Tort	Contract	Statute	Unknown
Number of Cases (Piercing Rate)	8 (50.00%)	60 (51.66%)	22 (40.91%)	3 (66.67%)

As Table 12 shows, there are 60 F1 judgments that have contract as the underlying cause of action. They account for the majority of the Enforcement Piercing cases, whereas F1 judgments based on tort and statute account for only eight and 22 Enforcement Piercing cases, respectively. As far as the piercing rates are concerned, the tort and contract cases are very close, having piercing rates of 50.00% and 51.66%, respectively. These are also very close to the 52.22% general piercing rate for Enforcement Piercing. The only type of cases that have a substantially lower piercing rate than the general Enforcement Piercing rate are the statute cases, with a piercing rate of 40.91%. The best possible explanation is the available defense of subject matter jurisdiction. As mentioned above, despite limited impact on Enforcement Piercing as a whole, the subject matter jurisdiction defense only applies to Enforcement Piercings that involve federal questions, and therefore it applies only to statute-related cases.[212] Overall, the findings from the tort versus contract debate are consistent with the general findings of the empirical research.

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while contract claimants voluntarily deal with the corporate entity).

209. *Id.* at 1038.

210. *Id.*

211. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 95 cmt. c (AM. LAW INST. 1971) ("If the judgment under the local law of the State where it was rendered is a valid and final judgment for the recovery of money damages and its effect is to merge the cause of action in the judgment, the plaintiff may no longer maintain an action on the original cause of action in any State."); *see also Pyshos,* 630 N.E.2d at 1058 ("[W]here a party obtains a judgment against another party, the underlying claim merges with the judgment and the judgment becomes a new and distinct obligation of the corporation which differs in nature and essence from the original claim.").

212. *See supra* Section I.D.3 (discussing the conflicts raised by subject matter jurisdiction).

CONCLUSION

The findings discussed in Section III show that a plaintiff could, whether intentionally or not, obtain an advantage over a defendant in a piercing action if he or she moves the piercing part of the proceeding from the first-instance trial to the enforcement proceedings. This advantage is most notable in the choice-of-law aspect, where the plaintiff could choose a favorable piercing law by bringing the enforcement proceeding in a state where such law would be applied. The various conflict-of-law safeguards are also rarely discussed, and even more rarely successful. While the uncertainty of the various rules could discourage plaintiffs from engaging in Enforcement Piercing, there are those who did benefit from it, as indicated by the much higher piercing rate. This leaves us with two questions: Why are there not more Enforcement Piercing cases? And are the advantages to the plaintiff by Enforcement Piercing justified?

As shown in Table 2, Enforcement Piercing accounts for about 8.62% of all piercing cases. Given the substantially higher piercing rate for Enforcement Piercings, it is natural to ask why there are not more of such attempts by plaintiffs. First, there is likely a lack of information about this advantage. Prior to this empirical study, there had not been any research on Enforcement Piercing.[213] It is possible that plaintiffs and their counsel were simply not aware of such advantages. Second, while the empirical research above shows that the various choice-of-law approaches and limitations on jurisdictions are generally favorable to the plaintiffs in Enforcement Piercing in practice, it also shows that the law on each of the issues is far from certain. The general percentage favors plaintiffs undertaking Enforcement Piercing, but each case must be analyzed on its own, and the uncertainty surrounding a particular legal issue could simply discourage plaintiffs from making the attempt in the first place. Third, the research does not and could not take into account the additional litigation costs involved in Enforcement Piercing. There is no question that first-instance piercing, where both the underlying cause of action and the piercing claim are handled in one proceeding in the same court, is less costly both in terms of time and money. Thus, if Enforcement Piercing is to take place, the plaintiffs must be convinced that their improved chance of success resulting from the higher piercing rate outweighs the uncertainty of the law and the extra legal costs. Finally, Enforcement Piercing only makes sense when there are assets of shareholders located in a sister state. Plaintiffs will not incur the extra legal costs to pursue Enforcement Piercing unless there are assets in F2. Thus, these factors could simply make it too costly for Enforcement Piercing to be the prevailing practice.

Of the three reasons suggested for the higher piercing rate, the first two—the de facto success of the underlying action and the sympathy from the court—are both justified. However, the third one—the current practice on the conflict issues—is not justified. The truth is that there will always be legitimate reasons for bringing the piercing part of the litigation at the enforcement stage.[214] The key, therefore, is not to stop Enforcement Piercing, but to provide a level playing field for the litigants. If the

213. *See supra* note 7; *see also* Thompson Research, *supra* note 1, at 1061 (failing to categorize Enforcement Piercing as a separate type of piercing action).

214. *See, e.g.*, NYKCool A.B. v. Pacific Fruit Inc., No. 10 Civ. 3867C (LAK)(AJP), 2012 WL 1255019, at *8 (S.D.N.Y. Apr. 16, 2012) (showing an instance where Enforcement Piercing has been used).

plaintiff needs to bring the piercing issue to the enforcement stage, he or she should not be better off because of the change of forum. As we have seen, the combined effect of a favorable choice-of-law rule and minimal jurisdictional limitations practically allows the plaintiff to enforce a judgment against the parent company anywhere in the United States where the parent company happens to have sufficient assets, and hence gives the plaintiff more potential options in finding favorable governing law on piercing.

The preferred approach to choice of law should be to choose the law of the state of incorporation. As argued in cases of first-instance piercing, the state of incorporation always has a strong interest in having its law applied in a piercing situation.[215] This should be the same whether the forum for the piercing dispute is in the first-instance trial or the enforcement court. If all courts adopt such an approach, the plaintiff will have the same piercing rules, whether it is F1 or F2. This should be the general rule. However, courts should retain some discretion and be able to depart from the law of the state of incorporation in particular situations, as justice so requires.[216] This should be exceptional and not interrupt the general goal of preventing forum shopping.

Moreover, jurisdictional safeguards should be respected by the courts. As argued in Section III.D.2, it is unreasonable to ignore the jurisdictional requirement over the shareholder in F2 who has not been a part of the F1 proceedings. To do otherwise would violate due process. We can also consider the question from the jurisdictional perspective of F1. In a traditional first-instance piercing case, the plaintiff will have to prove to the F1 court that F1 has jurisdiction over both the defendant corporation and the shareholder. However, if the plaintiff were allowed to pursue Enforcement Piercing in whichever state the shareholder has assets, without requiring the judgment enforcement state to have jurisdiction thereto, it would seriously undermine the jurisdiction of F1. This would open a floodgate of litigation, particularly in cases where the plaintiff first pursues Enforcement Piercing in a state that the shareholder does not have assets, but has favorable piercing law, and then seeks to enforce further this F2 judgment in another state (F3) where the shareholder has assets, under the Full Faith and Credit Clause. This would be another form of abuse of domestication.

The same goes for subject matter jurisdiction. The restraints that could be neglected are the notice requirement and res judicata. This is because they are not valid limitations on the exercise of jurisdiction.[217] How these changes should be effected is subject to further investigations. Theoretically, it is feasible for Congress to legislate based on the Full Faith and Credit Clause. However, piercing the corporate veil—both in first-instance piercing cases and in Enforcement Piercing cases—has long been the domain of state law. An alternative could be a model statute in line with the Uniform Enforcement of Foreign Judgments Act.[218] However, despite

215. *See* Kalb, Voorhis & Co. v. Am. Fin. Corp., 8 F.3d 130, 132 (2d Cir. 1993) ("The law of the state of incorporation determines when the corporate form will be disregarded and liability will be imposed on shareholders: 'Because a corporation is a creature of state law whose primary purpose is to insulate shareholders from legal liability, the state of incorporation has the greater interest in determining when and if that insulation is to be stripped away.'") (citing Soviet Pan Am Travel Effort v. Travel Committee, Inc. 756 F. Supp. 126, 131 (S.D.N.Y. 1991)).

216. *See* Tsang, *supra* note 17, at 264 (suggesting that the choice-of-law rule of first-instance piercing shall be the law of the place of incorporation but subject to a flexible exception).

217. *See supra* Section I.D.4 & 5 (arguing why these restraints should be ignored).

218. *See* Uniform Enforcement of Foreign Judgments Act, 13 U.L.A. 261 (1986) (detailing "a speedy

both measures being possible,[219] the empirical research of this Article does not yield any data that supports one over the other. Hopefully, this Article will at least raise awareness of the important Enforcement Piercing issues the courts face.

and economical method of doing what is required to do by the Constitution" in an effort to increase uniformity across the states).

219. *See* Stewart, *supra* note 195, at 197–99 (discussing potential reforms in the context of the enforcement of foreign country judgments).

The Human Right to Education: Mercosur Commitment and Economic Inequality

*Craig Lauchner**

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INTRODUCTION

Some have argued that the human rights framework has little to say about economic inequality.[1] The International Covenant on Economic, Social and Cultural Rights certainly contemplates economic rights, such as the right to social security, food, and an adequate standard of living,[2] yet the fulfillment of these economic human rights is not inconsistent with the persistence of extreme disparities in the distribution

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1. *See generally* Samuel Moyn, *A Powerless Companion: Human Rights in the Age of Neoliberalism*, 77 L. & CONTEM. PROBS. 147 (2014) [hereinafter *A Powerless Companion*].

2. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, at 3–4 (Dec. 16, 1966).

of wealth within societies.[3] Samuel Moyn, in his essay *A Powerless Companion: Human Rights in the Age of Neoliberalism*, argues that the human rights framework lacks the proper tools to effectively address economic inequality, in part because it was never intended to do so.[4] Moyn makes the bold claim that even perfectly realized human rights are compatible with extreme economic inequality.[5] In assessing such a claim, regional analyses can be helpful to see if the pursuit of human rights has truly failed to bring about a meaningful decline in economic inequality. This Note provides such a regional analysis by considering the promotion of one human right in particular, the right to education in Latin America, and the contemporaneous state of economic inequality in the region.

Whether human rights contemplate the issue of inequality or not, the promotion of certain human rights, including the right to education, has been used to achieve greater equality in Latin America.[6] Specifically, the Common Market of the South (Mercosur), a trading bloc promoting the free movement of goods, capital, services, and people among its member states, has developed regional coordination in the area of education, resulting in substantial investment in all levels of education—primary, secondary, and tertiary.[7] This Note argues that the right to education has not proven to be an effective tool for achieving long-lasting results in the area of economic inequality in Latin America. In fact, there may be unintended consequences to these regional educational efforts, namely the perpetuation of already existing educational inequalities and, by extension, economic inequality. The impact of government-funded education programs on economic inequality in Latin America offers a possible confirmation of Moyn's thesis that fully-realized human rights can coexist with economic inequality. The creation of a basic floor of protection against violations of human rights is insufficient to combat inequality. Floors guard against the most atrocious human rights abuses but can cause policy makers to shift their focus to other areas of desired progress. In the context of education, policy makers, having met their goal of ensuring basic primary education for all, have shifted their focus to tertiary education at the expense of lower levels of public education relied upon by the poorest communities. The result is a system that increasingly favors and funds those who need government assistance the least, while neglecting those who need it the most.

Part I of this Note explores the current condition of inequality in Latin America and analyzes the claim that decreasing inequality in the region can be attributed in great part to increased government expenditures on public education. Part II traces the recognition of the human right to education in Latin America and within Mercosur. Part III outlines Mercosur's educational objectives and their impacts on the education

3. *See generally* Samuel Moyn, *Do Human Rights Increase Inequality?*, CHRON. HIGHER EDUC., May 26, 2015 [hereinafter *Do Human Rights Increase Inequality*].

4. Moyn, *A Powerless Companion*, *supra* note 1, at 149.

5. Moyn, *Do Human Rights Increase Inequality*, *supra* note 3.

6. Evridiki Tsounta & Anayochukwu I. Osueke, *What Is Behind Latin America's Declining Income Inequality?* 2 (Int'l Monetary Fund, Working Paper 14/124, 2014).

7. Mercosur is South America's leading trading bloc and was set up in 1991. Full members include Argentina, Brazil, Paraguay and Uruguay; Venezuela will be a full member pending ratification. Associate members include Bolivia, Chile, Colombia, Ecuador and Peru. *Profile: Mercosur – Common Market of the South*, BBC, http://news.bbc.co.uk/2/hi/americas/5195834.stm (last visited Dec. 22, 2016); *see* UNESCO, COMPARATIVE EDUCATION INDICATORS FOR THE MERCOSUR: WORKSHOP-SEMINAR ON EDUCATION STATISTICS FOR THE MERCOSUR COUNTRIES 15 (1997) (discussing ways to measure Mercosur's effect on investment in different education levels).

systems within its member states, argues that these well-intentioned programs and policies might be perpetuating inequality, and calls for further research.

I. MEASURING LATIN AMERICAN INEQUALITY

Despite recent decreases in inequality, Latin America is still the most unequal region in the world.[8] It has a Gini coefficient higher than that of sub-Saharan Africa and Eastern Asia.[9] Compounding a history of inequality, wealth disparities increased in the latter part of the 20th century due to neoliberal policies adopted in the 1980s and 1990s.[10] During that period, many countries in Latin America experienced significant market-oriented reforms, liberalizing trade and foreign investment.[11] Many state-owned enterprises were privatized and markets were deregulated.[12] These changes culminated in the breakout of multiple economic crises.[13]

The crises had an "unequalizing" effect.[14] In some countries, adjustments that led to a contraction in the demand for labor disproportionately affected unskilled workers.[15] The newly-instituted neoliberal policies left high-skilled workers in the region earning wages four times greater than those of low-skilled workers at the turn of the 21st century.[16] The poor were less able than others to protect themselves from high inflation, and domestic social safety nets were either insufficient in light of the severity of the crises or were altogether absent.[17] The weak labor institutions and insufficient safety nets had disastrous impacts on the social situation in the region despite the fact that the level of development was relatively high.[18]

This is not to say that these countries have made no strides in increasing equality. While still the world's most unequal region, there is at least one area where progress is readily apparent: Income inequality in Latin America has decreased over the last decade by around three Gini points.[19] By 2012, the income disparity had shrunk by

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8. Tsounta & Osueke, *supra* note 6, at 20.

9. Luis F. López-Calva & Nora Lustig, *Explaining the Decline in Inequality in Latin America: Technological Change, Educational Upgrading, and Democracy*, *in* DECLINING INEQUALITY IN LATIN AMERICA: A DECADE OF PROGRESS? 1, 1 (Luis F. López-Calva & Nora Lustig eds., 2010). The Gini Coefficient measures income distribution and is the most widely used metric of income inequality. *Who, What, Why: What is the Gini Coefficient?*, BBC NEWS (Mar. 12, 2015), http://www.bbc.com/news/blogs-magazine-monitor-31847943.

10. Giovanni Andrea Cornia, *Inequality Trends and Their Determinants: Latin America over the Period 1990–2010*, THE WORLD FIN. REV., Jan.–Feb. 2014, at 62.

11. *See generally* ANDRÉS SOLIMANO & RAIMUNDO SOTO, ECON. COMM'N LATIN AMERICA & CARIBBEAN, ECONOMIC GROWTH IN LATIN AMERICA IN THE LATE 20TH CENTURY: EVIDENCE AND INTERPRETATION (2005), http://citeseerx.ist.psu/viewdoc/download?doi=10.1.1.617.8682&rep1&type=pdf.

12. *See generally* Cornia, *supra* note 10.

13. *See generally id.*

14. Leonardo Gasparini & Nora Lustig, *The Rise and Fall of Income Inequality in Latin America*, *in* THE OXFORD HANDBOOK OF LATIN AMERICAN ECONOMICS 691–92 (José Antonio Ocampo & Jaime Ros eds., 2011).

15. *Id.*

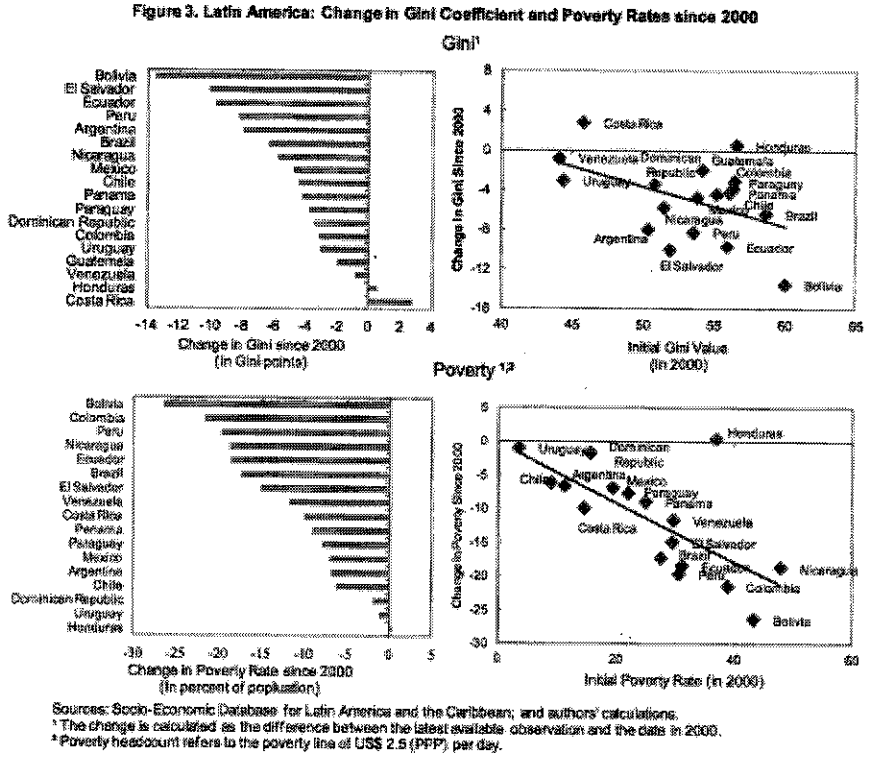
16. Tsounta & Osueke, *supra* note 6, at 10–11.

17. Gasparini & Lustig, *supra* note 14, at 691–92.

18. Studies generally agree that Latin American countries have much higher rates of inequality than their level of development would suggest. *Id.* at 693.

19. Tsounta & Osueke, *supra* note 6, at 6.

about one-third, with high-skilled workers earning only 2.7 times the rate earned by low-skilled workers.[20] During the same time, the region experienced declining poverty rates and a growing middle class.[21] Mercosur member states were among the beneficiaries of these improvements. The graphs below show Bolivia, Argentina, and Brazil in the top six Latin American countries to enjoy a decline in income inequality since 2000.[22]



Charts taken from Tsounta & Osueke, supra note 6, at 10.

The improvement is impressive. Income inequality is undoubtedly an important social indicator, and a decrease in relative income levels is significant in the assessment of overall inequality; however, what led to the decline in income inequality in Latin America may not result in greater equality across other aspects of socio-economic life, such as wealth accumulation and wage inequality. One International Monetary Fund (IMF) working paper[23] offers an answer to the first part of that question by concluding that higher education spending is "the most important contributor to the decline in income inequality" in Latin America.[24] The authors point to significant improvements

20. *Id.* at 10–11.

21. *Id.* at 6.

22. *Id.* at 10.

23. The International Monetary Fund (IMF) working paper represents the views of the authors and does not necessarily represent the views of the IMF.

24. Tsounta & Osueke, *supra* note 6, at 6 (finding that almost a quarter of the decline in income

in education in multiple areas. For example, access to primary education has improved considerably—Latin America is nearing the Millennium Development Goal of universal primary school enrollment in Latin America.[25] Other observable improvements include the youth literacy rate, which exceeds the world average, and gender equality, as there is no statistical disparity between the number of boys and girls enrolled in secondary schools and universities.[26]

The authors further identify a strong correlation between increased government spending on education—specifically education benefitting the most vulnerable groups—and lower income inequality.[27] They conclude that increasing access to quality education is an efficient tool for lowering inequality.[28] Because education is more readily available to the most vulnerable, there is "an increase in the relative supply of workers with completed secondary and tertiary education."[29] Yet, despite high spending and considerable improvements in the realm of education, greater inequalities (both income and non-income based) are more persistent in Latin America than in any other part of the world.[30] There are two potential responses to the authors' findings: (1) Income inequality may not be the best metric by which to measure economic inequality in the region and (2) increasing education spending may not be the proper tool with which to combat inequality.

First, income inequality, while easy to measure, does not present the full picture of inequality in any region of the world, and much less so in the most unequal of regions.[31] The richest 20 percent of Latin Americans still earn on average 20 times more than the poorest 20 percent.[32] Several types of economic inequalities exist in Latin America and a focus only on *income* inequality fails to address long-standing inequalities in pay, wealth, or wage disparities based on education level.[33] Poverty in Latin America has indeed decreased.[34] Paradoxically, many countries in Latin America have also seen an increase in wealth inequality between 1990 and 2009 despite having achieved some progress in the equalization of income levels.[35] Reports focusing on improvements in income inequality can be misleading; the most recent data shows that inequality actually appears to be stagnating in Latin America.[36]

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inequality is explained by increased spending in higher education).

25. CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., RS227788, OVERVIEW OF EDUCATION ISSUES AND PROGRAMS IN LATIN AMERICA, 1, 1–2 (2007).

26. *Id.* at 2.

27. Tsounta & Osueke, *supra* note 6, at 16–17.

28. *See id.* at 21 ("Improving the access of low-income families to education could be an efficient tool for boosting equality of opportunity, and over the long run, lower income inequality.").

29. *Id.* at 11.

30. Heraldo Muñoz, UN Assistant Sec'y Gen. & Dir. Reg'l Bureau for Latin America & the Caribbean, *Lessons from the World's Most Unequal Region*, Remarks at Thematic Discussion on Inequality, General Assembly (July 10, 2013) http://www.latinamerica.undp.org/content/rblac/en/home/presscenter/speeches/2013/07/10/lessons-from-the-world-s-most-unequal-region.html.

31. *See* JAMES GALBRAITH, INEQUALITY: WHAT EVERYONE NEEDS TO KNOW 3 (2016) (discussing the difference in inequality of income, pay, and wealth).

32. *UN Study Says Wealth Gap in Latin America Increases*, BBC NEWS (Aug. 22, 2012), http://www.bbc.com/news/world-latin-america-19339636.

33. *See generally* GALBRAITH, *supra* note 31.

34. *UN Study*, *supra* note 32.

35. *Id.*

36. George Gray Molina, *Inequality Is Stagnating in Latin America: Should We Do Nothing?*, THE

"Between 2000 and 2010, the regional Gini index (how the World Bank measures inequality) declined on average by 0.94 percent per year, while in 2011 it fell by just 0.33 percent, and in 2012 it fell a paltry 0.02 percent."[37] Inequality has stagnated and wealth has continued to concentrate in the hands of the wealthy in spite of contemporaneous increases in education spending.[38]

Second, access to education may not be the best tool to combat Latin America's inequality problem. Increased spending on education has undoubtedly been a focus in the last decade throughout Latin America.[39] Notably, spending in the 1990s concentrated on improving access to education and incorporating new students.[40] Primary and secondary education received the bulk of the spending increases during that decade.[41] During the first eight years of this century, public investment was refocused to target the quality of the education offered.[42] Investments targeted school infrastructure, equipment, didactic materials, and more[43]—targets that are central to the right to education.[44] Nevertheless, despite improved quality and access to education at lower levels, tertiary education is by far the greatest beneficiary of public education expenditures.[45]

If increased access to primary and secondary education has a positive impact on income inequality, one might expect a similar trend with an increase in access to university education, as was concluded in the IMF working paper. But that paper called for an increase in education spending while admitting that it was "beyond [its] scope . . . to analyze the optimal level of education spending, and which type of education (primary, secondary or tertiary) is . . . more effective."[46] The problem with such an admission is that it seems to assume government spending on education is going to be allocated in such a way that the poor will be able to take advantage of it at all three levels of education. In reality, poor students benefit most from primary and secondary educational investment.[47] Yet, as outlined in the following sections, government spending on tertiary education in Latin America often serves as a subsidy for the rich.

GUARDIAN (Aug. 27, 2014), http://www.theguardian.com/global-development-professionals-network/2014/aug/27/inequality-latin-america-undp.

37. *Id.*

38. *Id.*

39. UNESCO, THE STATE OF EDUCATION IN LATIN AMERICAN AND THE CARIBBEAN: TOWARDS A QUALITY EDUCATION FOR ALL 22 (2013).

40. ORG. FOR ECON. COOPERATION & DEV., LATIN AMERICAN ECONOMIC OUTLOOK 2012 94 (2011), www.oecd-library.org/docserver/download/4111051e.pdf?expires=1477690652&id=id&accname=ocid194987&checksum=C30418F960A52F0CFFABIABA3961144D.

41. *Id.*

42. *Id.*

43. *Id.*

44. *See* International Covenant on Economic, Social and Cultural Rights art. 13, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR] ("The States Parties to the present Covenant recognize the right of everyone to education.").

45. ORG. FOR ECON. COOPERATION & DEV., *supra* note 40, at 94.

46. Tsounta & Osueke, *supra* note 6, at 21.

47. UNICEF, INVESTMENT CASE FOR EDUCATION AND EQUITY 54–62 (2015), http://www.unicef.org/publications/files/Investment_Case_for_Education_and_Equity_FINAL.pdf.

II. MERCOSUR COMMITMENT TO THE HUMAN RIGHT TO EDUCATION

In order to propose that Mercosur's endeavors in protecting the right to education may be having unintended consequences on economic inequality, it is important to first establish that Mercosur contemplated human rights in its educational policy. While Mercosur is undoubtedly most recognized as a trade and customs bloc,[48] its commitment to human rights should not be discounted. Mercosur's commitment to pursue human rights as a regional bloc is most obvious in its Asunción Declaration on Human Rights in 2005, in which it committed to use Mercosur's institutional mechanisms for the promotion and effective protection of human rights and fundamental freedoms.[49]

Some have argued that Mercosur had no agenda for human rights prior to this pronouncement,[50] but that is not the case. The bloc has long had a strong social agenda with human rights squarely in view of its policy implementation.[51] Mercosur is a sum of its parts, with its member states each individually demonstrating strong commitments to human rights.[52] All Mercosur member states are signatories to the American Convention of Human Rights and have accepted the competence and jurisdiction of the Inter-American Court of Human Rights.[53] Additionally, each Mercosur member state is a signatory to the International Covenant on Economic, Social and Cultural Rights, which specifically enumerates the right to education as a human right.[54] But more than merely recognizing the right, Mercosur member states

48. Alfredo M. Gomes, Susan L. Robertson, & Roger Dale, *Globalizing and Regionalizing Higher Education in Latin America: Locating Brazil in Multiscalar Projects and Politics*, *in* HIGHER EDUCATION IN THE GLOBAL AGE: POLICY PRACTICE AND PROMISE IN EMERGING SOCIETIES 160, 163 (Daniel Avaya & Peter Marber eds., 2014) ("The 1991 Treaty of Asunción formally marked the creation of MERCOSUR by Argentina, Brazil, Paraguay, and Uruguay. It is an economic arrangement encompassing the: (1) free circulation of goods, services and factors of production; (2) elimination of customs duties and nontariff restrictions; (3) establishment of a common external tariff; (4) adoption of a common trade policy in relation to third states or group of states; (5) coordination of positions in economic and commercial regional and international forums; (6) coordination of macroeconomic and sector policies between the member states; and (7) commitment to harmonize member states legislation in relevant areas in order to strengthen the process of regional integration.").

49. Andrea Ribeiro Hoffman, *At Last: Protection and Promotion of Human Rights by Mercosur*, *in* GOVERNANCE TRANSFER BY REGIONAL ORGANIZATIONS: PATCHING TOGETHER A GLOBAL SCRIPT 192, 192 (Tanja A. Börzel & Vera Van Hüllen eds., 2015).

50. *Id.*

51. *See* Santiago Perez Del Castillo, *MERCOSUR: History and Aims*, 132 INT'L LAB. REV. 639, 643–44 (1993) (describing the development of Mercosur's social agenda since 1991).

52. *See* Frank J. Garcia, *Integrating Trade and Human Rights in the Americas*, *in* INTERNATIONAL TRADE AND HUMAN RIGHTS: FOUNDATIONS AND CONCEPTUAL ISSUES 329, 338–39 (Frederick M. Abbott et al. eds., 2006) ("MERCOSUR officials used several other regional and international challenges to democracy as a platform/occasion on which to adopt statements affirming the centrality of democracy and human rights to MERCOSUR.").

53. *See* Organization of American States, American Convention on Human Rights, Nov. 22 1969, 1144 U.N.T.S. 123 (having been ratified by Mercosur's full members Argentina, Brazil, Paraguay, Uruguay, and Venezuela, as well as Mercosur's associate countries Bolivia, Chile, Peru, Colombia, Ecuador, and Suriname; however, Venezuela denounced the Convention on Sept. 10, 2012).

54. *See* ICESCR, supra note 44, art. 13 ("The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental

identify a justiciable right to education in their domestic constitutions,[55] which has been enforced through decisions by numerous adjudicative bodies.[56] This history of a commitment to human rights cannot be divorced from the impact human rights have had on Mercosur's robust coordination in the area of education.

Perhaps more noteworthy is Mercosur's express intention to use human rights as a tool to combat inequality. Mercosur explicitly names wealth redistribution as one goal of its education policies.[57] The notion of education as a tool to combat inequality in the region has its roots in the early days of national education policies in Latin America, where educational equality was widely considered capable of stamping out other forms of inequality in society.[58] It was thought of as a means by which a society could establish a fair and equal distribution of economic resources.[59] In many ways, *Sector Educativo de Mercosur* (SEM) is a regional enterprise intended to fulfill this long-held notion.

III. MERCOSUR'S EDUCATIONAL OBJECTIVES AND WHY THEY MAY NOT BE DECREASING INEQUALITY

In 1991, the Ministers of Education from Argentina, Brazil, Paraguay, and Uruguay signed a Protocol of Intention with the purpose of facilitating Mercosur objectives through the development of education programs.[60] This protocol led to the

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freedoms.").

55. Art. 19, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) *translated at Argentina's Constitution of 1853, Constitute, Reinstated in 1983, with Amendments through 1994*, CONSTITUTE, https://www.constituteproject.org/constitution/Argentina_1994.pdf?lang=en; Constituicao Federal [C.F.] [Constitution] art. 205 (Braz.) *translated at Brazil's Constitution of 1988 with Amendments through 2015*, CONSTITUTE, https://www.constitutproject.org/constitution/Brazil_2015.pdf?lang=en; Constitución Politica de 1992 art. 73 (Para.) *translated at Paraguay's Constitution of 1992 with Amendments through 2011*, CONSTITUTE, https://www.constituteproject.org/constitution/Paraguay_2011.pdf?lang=en; Constitución de 1967 con Reformas hasta 2004 art. 70 (Uru.) *translated at Uruguay's Constitution of 1966, Reinstated in 1985, with Amendments through 2004*, CONSTITUTE, https://www.constituteproject.org/constitution/Uruguay_2004.pdf?lang=en; Constitución de 1999 art. 102 (Venez.) *translated at Venezuela (Bolivarian Republic of)'s Constitution of 1999 with Amendments through 2009*, CONSTITUTE, https://www.constituteproject.org/constitution/Venezuela_2009.pdf?lang=en.

56. LATIN AMERICAN ESC RIGHTS STRATEGIC LITIGATION WORKSHOP: THE CHALLENGE OF IMPLEMENTATION OF COURT DECISIONS 3–6 (2013), https://www.escr-net.org/sites/default/files/report_latin_american_strategic_litigation_workshop_on_implementation_of_decisions_english_0.pdf (describing two right-to-education cases, one from Argentina and another from Brazil).

57. Facundo Solanas, *El Impacto del Impacto del Mercosur en la Educación Superior: Un Análisis Desde la "Mercosurización" de Las Políticas Públicas*, 17 ARCHIVOS ANALÍTICOS DE POLÍTICAS EDUCATIVAS 1, 2 (2009).

58. *See* Francisco Muscará, *Problems and Challenges of Educational Policies in Latin America: The Argentina Viewpoint*, 2 J. NEW APPROACHES EDUC. RES. 109, 110 (2013) (explaining that modern educational systems in Latin America were first established in the early 19th century on the belief that free, compulsory public education was the main instrument with which to combat social and economic inequality).

59. *See id.* ("Most Latin-American educational systems were set up at the end of the 19th century, in the period in which national states were being organised. Back then, one of the imperative political objectives was to 'build up national union' and 'free, compulsory, universal, public' education was considered to be the main instrument which would allow the building up of 'social cohesion' and the establishment of the legitimacy of the state and its representatives upon the idea of nation.").

60. Gomes et al., *supra* note 48, at 164.

establishment of the SEM,[61] which has realized increasing cooperation since its inception.[62] SEM has advanced academic mobility throughout the region and it has seen advances in the recognition of diplomas and research networks.[63] This advancement, however, has not accomplished the SEM's stated goal of combatting inequality for two reasons: (1) The financial burden of Mercosur coordination falls unfairly on the smallest member states, and (2) Mercosur's educational initiatives incentivize member states to continue to increase spending on tertiary-level education in which the students who reap the benefits overwhelmingly belong to the highest wealth percentiles in their respective nations.

A. The Three-Phase Implementation of the Mercosur Education Sector

The SEM commitment requires the negotiation of common standards that will allow for evaluation of the quality of the countries' institutions of higher education based on the activities of national agencies that supervise education. SEM's policies have been rolled out in phases. In the first phase (1991 through 2001), the member states focused on building institutional structure, establishing bonds of trust between officials, and sharing information about domestic educational systems in an effort to create "common indicators to obtain comparable information from the different systems."[64] In the Protocol for Recognition of Primary and Secondary Education, signed in August of 1994, Mercosur member states agreed to recognize primary and secondary diplomas issued by public or private institutions meeting the educational norms of the respective parties.[65] This recognition not only established a regional norm, but it also had the stated goal of achieving democratic consolidation with fewer social inequalities.[66]

Four years later, in 1998, the member states took their sub-regional cooperation to the university level.[67] The Ministers of Education from Mercosur's member states signed the "Memorandum of Understanding" on the implementation of an experimental accreditation mechanism for university degrees.[68] The Memorandum ushered in the second phase of the SEM policy rollout with the operation of MEXA (the Experimental Mechanism for University Programs).[69] MEXA operated only on

61. *See* DANIELA PERROTTA, "MERCOSUR BRAND": REGIONALISM AND HIGHER EDUCATION, Presented at Regionalism, Norm Diffusion and Social Policy: Dealing with Old and New Crises in Europe and Latin America Conference 3 (Nov. 22, 2013), http://www.academia.edu/5069852/_MERCOSUR_Brand_regionalism_and_higher_education (explaining that the four member states over several meetings created the *Sector Educativo de Mercosur*).

62. *Id.*

63. *Id.*

64. *Id.* at 14.

65. Protocolo de Integración Educativa y Reconocimiento de Certificados, Títulos y Estudios de Nível Primario y Medio/No Técnico art. 3, Aug. 5, 1994, http://www.mercosur.int/innovaportal/file/5785/1/1994_protocolo_es_integraeducareconoctitulos.pdf.

66. *Id.*

67. PERROTTA, *supra* note 61, at 17.

68. Julia Nielson, *Trade Agreements and Recognition*, *in* QUALITY AND RECOGNITION IN HIGHER EDUCATION: THE CROSS-BORDER CHALLENGE 155, 194 (Org. for Econ. Co-operation & Dev. ed., 2004).

69. PERROTTA, *supra* note 61, at 14–15.

an experimental basis with the aim to promote the regional accreditation of degrees.[70] MEXA was intended to allow diplomas received in any of the sub-region's universities to be automatically recognized in any of the member countries (including associate members Bolivia and Chile).[71] Degree accreditation as initially proposed was intended to extend only to academic degrees in the educational sector; nonetheless, the labor market was the discernible target of the program.[72] MEXA has since turned into a permanent system and is the central mechanism by which higher education programs are compared within the region.[73]

The third phase of SEM began in 2011 with teacher training becoming an important focus of its pursuits.[74] As mentioned, SEM set the reduction of inequality squarely in its sights from its outset.[75] With that goal in mind, it is important to consider where and on whom the costs of SEM's pursuits have fallen. Regional integration of education is not unique to Mercosur. The European Union and NAFTA both have their own versions, yet the accreditation policy in Mercosur is different from that of its counterparts.[76] In North America and Europe, the national systems assume the burden of adjusting themselves to the system considered to be most competitive.[77] That is, national systems must take the initiative internally to recognize degrees from the most educationally competitive countries. In the EU's version, for example, each member adapted its curricular structure to that of the British System.[78] Mercosur's accreditation policy, on the other hand, sought to achieve the same benefits as the EU and NAFTA programs—the harmonization of national systems and the establishment of a common quality seal—in a manner that would not infringe upon the autonomy of national universities to define their own curriculum or evaluation systems.[79] To carry out this goal of harmonization without yielding university autonomy, Mercosur formed a body of regional experts who developed criteria for quality evaluation and then applied it to each of the degrees participating in the accreditation program.[80] The meeting of experts involved a "process of exchange and dialogue through meetings and workshops nationally and regionally, with travel expenses and professional fees paid out of the accounts of states and national universities."[81] The result was that Mercosur's policy was much more expensive from its outset than that of its counterparts in the EU and NAFTA.[82] The costs of this process were borne by the member states and their national universities.[83]

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70. Gomes et al., *supra* note 48, at 165.

71. INTER-AMERICAN DEV. BANK & INST. FOR INTEGRATION LATIN AMERICA & CARIBBEAN, MERCOSUR REPORT NO. 4 31 (1998).

72. Gomes et al., *supra* note 48, at 165–66.

73. PERROTTA, *supra* note 61, at 21.

74. *Id.* at 15.

75. *See id.* at 14 ("Throughout [its] twenty-one years of development, [SEM] has consolidated a solid institutional framework so as to fulfill the goals of educational integration.").

76. *Id.* at 7–12.

77. MERCEDES BOTTO, POLICY DIFFUSION AND HIGHER EDUCATION IN THE 1990S: IS MERCOSUR A GOOD CASE STUDY? 19, http://flacso.org.ar/wp-content/uploads/2013/12/Paper-Botto-Regionalismo.pdf.

78. *Id.* at 10.

79. *Id.* at 19.

80. *Id.*

81. *Id.* at 19–20.

82. *Id.*

83. BOTTO, *supra* note 77, at 19–20.

The costs of the educational transformations also fell disproportionately to the member states with the most changes to make, namely the smaller nations.[84] Large Mercosur nations like Brazil and Argentina have giant national systems that include millions of students and reach much of their respective college-aged populations through their mega-universities.[85] Accordingly, these member states already had the institutional infrastructure in place to adjust to the important transformations triggered by the regional cooperation.[86] In contrast, small countries like Paraguay and Uruguay have smaller education systems and previously lacked the institutions necessary to accredit and evaluate their universities under the new framework.[87] These small nations also have, as do many Latin American countries, systems in which the majority of those who enroll in university come from socioeconomically privileged families.[88] The choice faced by these smaller nations then is one of investing money into a system that subsidizes higher education for the wealthy or sitting out of the regional cooperation altogether.

B. Public Spending Acting as a Subsidy for the Rich

As laid out in the preceding section, Mercosur is indeed a good example of sub-regional cooperation and integration by member states that recognize the right to education. Since SEM's inception, higher education has seen the most development as a result of Mercosur efforts.[89] But its efforts, particularly at the university level, may instead be perpetuating the very inequalities in education and upward mobility that the member states' university systems sought to eradicate when established. This is because educational inequality is directly related to economic inequality in Latin America,[90] and, as demonstrated by the high Gini coefficient for the distribution of education, the distribution of education is far from equal.[91] The contrast in the number of years of schooling between high- and low-income households in Mercosur is significant. At least five years of schooling separates the highest and lowest income

84. Solanas, *supra* note 57, at 9.

85. Enrique Martinez Larreceha & Adriana Chiancone Castro, *New Demands and Policies on Higher Education in the Mercosur: A Comparative Study on Challenges, Resources, and Trends*, 7 POL'Y FUTURES EDUC. 473, 475 (2009).

86. *Id.* at 475; BOTTO, *supra* note 77, at 21.

87. Solanas, *supra* note 57, at 9.

88. Larrechea & Castro, *supra* note 85, at 475.

89. PERROTTA, *supra* note 61, at 3.

90. Tsounta & Osueke, *supra* note 6, at 12.

91. *Id.*

groups.[92] The disparities in years of education can be seen by income quintile in the chart below.[93]

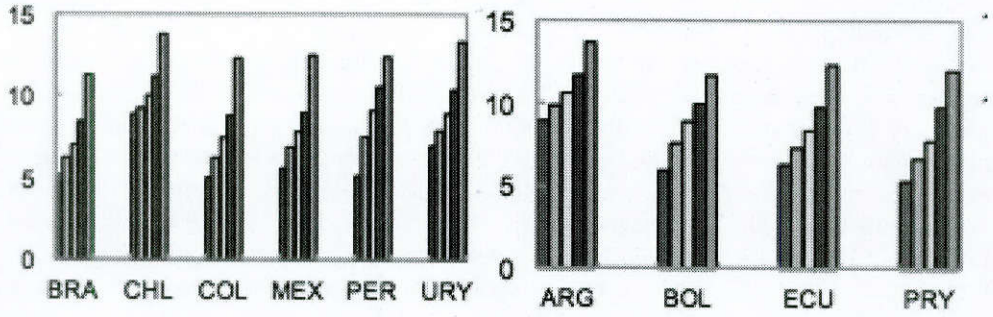

Chart taken from Tsounta & Osueke, What Is Behind Latin America's Declining Income Inequality? 2 (Int'l Monetary Fund, Working Paper 14/124, 2014).

Despite the apparent paradox it presents, claiming that educational inequality is directly related to economic inequality does not undermine the claim that the right to education might be perpetuating inequality. While efforts to ensure the basic right to education at every level appear to have been marginally effective in relation to income inequality, national investment (particularly in tertiary education) often subsidizes the rich and increases overall inequality over time.[94] Education spending in Latin America reflects an inverted pyramid with a higher proportion of public funds invested at the tertiary level than in primary or secondary education when compared with more developed countries.[95] Education spending per level of education, while not a perfect method for considering the quality of and access to education, provides insight into a country's efforts in investing in its social capital.[96] It also paints a portrait of the greatest beneficiaries of such investments. The chart below shows Latin American public expenditures as a percentage of GDP, by country, in each level of education in the year 2000.

92. *Id.*

93. *Id.*

94. *See generally* Martın González Rozada & Alicia Menendez, *Public University in Argentina: Subsidizing the Rich?*, 21 ECON. EDUC. REV. 341 (2002).

95. PATRICE FRANKO, THE PUZZLE OF LATIN AMERICAN ECONOMIC DEVELOPMENT 481 (2007).

96. *See* Laurence Wolff & Martin Gurría, *Money Counts: Projecting Education Expenditures in Latin America and the Caribbean to the Year 2015*, UNESCO INSTITUTE FOR STATISTICS, MONTREAL 21 (2005) ("Estimating public education expenditure as a percentage of GDP measures the effort that a country is making to shape its nation's social capital.").

Countries	Pre-primary 2000	Primary 2000	Secondary 2000	Tertiary 2000	Total 2000
Argentina	0.21	1.31	1.38	1.49	4.4
Bolivia	0.13	2.00	0.74	1.90	4.8
Brazil	0.30	1.33	1.01	1.07	3.7
Chile	0.24	1.94	1.56	0.95	4.7
Colombia	n.a.	2.02	1.24	0.86	4.1
Costa Rica	0.42	2.50	1.31	0.77	5.0
Dominican Rep.	n.a.	0.64	0.25	0.06	1.0
Ecuador	n.a.	0.51	0.49	0.46	1.5
El Salvador	0.09	0.87	0.18	0.06	1.2
Guatemala	n.a.	0.96	0.34	0.17	1.5
Honduras	n.a.	2.12	0.74	0.74	3.6
Jamaica	0.07	3.04	4.03	1.54	9.7
Mexico	0.49	2.03	1.51	0.81	4.8
Nicaragua	n.a.	1.33	0.34	1.48	3.2
Panama	n.a.	2.09	1.78	1.37	5.2
Paraguay	n.a.	3.18	2.25	0.81	6.2
Peru	0.20	1.46	0.90	0.61	3.2
Uruguay	0.18	1.02	1.03	0.63	2.9
Venezuela, RB	n.a.	0.95	0.71	n.a.	n.a.
Latin America and the Caribbean	0.23	1.65	1.15	0.79	3.9
Total OECD	0.4	3.5		1.2	5.2

Sources: OECD (2003), UNESCO Institute for Statistics (2003).
Notes: For Chile, private primary and secondary schools receiving government support are considered as public schools.

The difference in overall GDP apportioned to each level of schooling does not appear striking on its face. In many Mercosur nations, the investment in tertiary education is comparable to investment at the primary and secondary levels.[97] But if we consider that national investment in public tertiary education disproportionately benefits the most economically advantaged students, it follows that the government is spending close to the same amount, and in some cases more, for the higher education of the wealthy than it is spending on basic education for the masses. In Argentina, for example, a nation with free public education and tuition-free universities, almost half of the students attending the country's numerous public universities belong to families in the top 20 percent of the income distribution.[98] Even more striking is that 90 percent of public university students belong to families with higher-than-median per capita family income, and nearly 50 percent of the enrolled students attended private secondary schools where they paid tuition for a preparatory education.[99]

This phenomenon is not unique to Argentina. In Brazil, 70 percent of all university students belong to the highest income quintile.[100] The national government spends more than five times as much per university student as it does per primary school student—the most unequal ratio on the globe.[101] In fact, throughout the region, government spending on primary education—which benefits the whole of society—is proportionately less than its spending at the university level, which overwhelmingly

97. *Id.* at 22.

98. Rozada & Menendez, *supra* note 94, at 348.

99. *Id.*

100. DAVID DE FERRANTI ET AL., CLOSING THE GAP IN EDUCATION AND TECHNOLOGY 98 (2003).

101. H.J., *Latin American Universities: Pulling Rank*, THE ECONOMIST, Oct. 10, 2011, http://www.economist.com/blogs/americasview/2011/10/latin-american-universities.

benefits students from wealthy families.[102] The following chart shows per student educational expenditures for 2011 by level of education in three Mercosur nations.

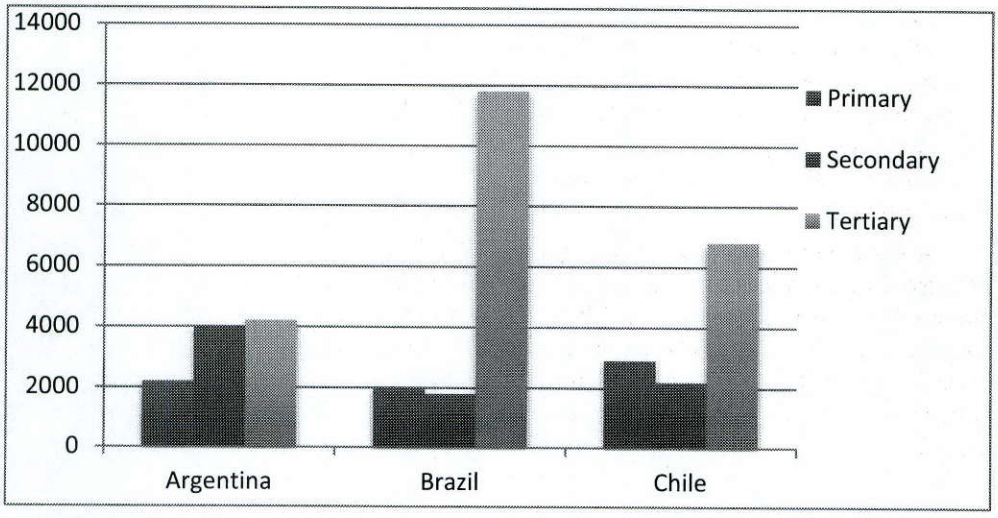

Chart created by author using OECD indicators for 2011. Data for remaining Mercosur countries not available.[103]

This does not mean that public investment in secondary education has been of no value. In fact, part of the problem at the university level is that more students are graduating secondary school than ever before.[104] This fact undoubtedly contributes to the observed improvements in income equality.[105] But it also increases the number of prospective university students, raising demand for the limited number of seats in public universities. As the competition increases, better-prepared students will logically have an inherent advantage by attaining one of the coveted seats at these free or highly subsidized universities. The result is a system in which the unspoken prerequisite to success at university is a family wealthy enough to provide private secondary education. The increase in aggregate enrollment, therefore, is not the ideal solution for a system that disproportionately benefits the upper class. States' comparative neglect of primary and secondary education has meant that the promise of the right to education has become a false entitlement for the poor because the education that is available is often of such poor quality that it is of little real benefit to their economic plight.[106]

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102. *Id.*

103. *See generally* ORG. FOR ECON. CO-OPERATION & DEV., EDUCATION AT A GLANCE 2011: OECD INDICATORS, OECD PUBLISHING (2011).

104. *See id.* at 44–45 (noting the positive growth in rates of upper-secondary graduation, which have increased by an average of eight percentage points among OECD countries with comparable data, representing an annual growth rate of 0.7%).

105. *See generally* Tsounta & Osueke, *supra* note 6.

106. *See* John Sheahan & Enrique V. Iglesias, *Chapter Two: Kinds and Causes of Inequality in Latin America*, *in* BEYOND TRADEOFFS: MARKET REFORM AND EQUITABLE GROWTH IN LATIN AMERICA 36–39 (Nancy Birdall et al. eds., 1998) (discussing the significant differences between how the wealthy exercise their right to education and how lower-income groups do so).

The high rate of wealthy students enrolled in universities in Latin America is problematic for assertions that inequality is decreasing. In spite of the scarcity of data on relative financial returns to education in Latin America,[107] it is fair to assume that financial returns on higher education are substantial. One study concluded that each year of additional schooling in Uruguay correlated to an additional 22 percent in earnings.[108] In Argentina, the rate of return on one year of schooling increased from 8.6 percent to 11.4 percent between the early 1990s and early 2000s.[109] Employment rates are also telling. The employment rate for Brazilians with a tertiary education was 85.6 percent in 2009, compared to 77.4 percent for those with an upper-secondary education and 68.7 percent without an upper-secondary education.[110]

A system in which the educational opportunities are not only extremely unequal but also directly related to one's earning potential perpetuates educational inequality among unequal social classes. When these systemic inequalities are considered in conjunction with Mercosur's regional educational goals, wealthy students in Mercosur nations not only benefit from government subsidies for their education, they also enjoy increased mobility and regional recognition throughout the bloc as SEM continues to unfold.[111]

C. Why the Right to Education May Not Be the Answer to Latin America's Inequality Problem

The fact that inequality has stagnated in Latin America may be owed in part to the nature of human rights. Samuel Moyn argues that the human rights framework fails altogether to offer a solution to economic inequality.[112] From Moyn's perspective, human rights developed contemporaneously with, and against a common background of, neoliberalism.[113] The rise of both at the same point in history is demonstrative, according to Moyn, of the fact that human rights are concerned with gross abuses by the state and the establishment of a basic floor of rights, both of which Moyn argues can be achieved in spite of radical economic inequality.[114] The harmony of the two is owed to the absence of a ceiling on wealth; the relative wealth gap between the rich

107. Interview with Jonathan Pratter, Int'l & Foreign Law Librarian, Tarlton Law Library, in Austin, Tex. (Oct. 2015).

108. Graciela Sanroman, *Returns to Schooling in Uruguay* 1–2 (Departamento de Economía, Universidad de la República, Working Paper No. 14/06, 2006), http://www.researchgate.net/publication/23692759_Returns_to_schooling_in_Uruguay.

109. Harry Anthony Patrinos & Maria Paula Savanti, *The Screening Hypothesis and Returns to Schooling in Argentina*, 6 RES. IN APPLIED ECON. 28, 30 (2014).

110. OECD, EDUCATION AT A GLANCE: OECD INDICATORS 2012, BRAZIL 4 (2012), http://www.oecd.org/brazil/EAG2012%20-%20Country%20note%20-%20Brazil.pdf.

111. *See* H.J., *supra* note 101 (discussing how higher spending on tertiary education favors the wealthy who are able to invest in private education earlier and thus pass entrance exams and benefit from going to school longer).

112. Moyn, *A Powerless Companion*, *supra* note 1, at 161.

113. *Id.* at 156.

114. *Id.* at 161. *See* Moyn, *Do Human Rights Increase Inequality*, *supra* note 3 (imagining Croesus's world in which a benevolent dictator ensures the needs of all, perfectly realizing human rights).

and poor is not a concern present in the legal regimes or social movements that champion human rights.[115]

Moyn's theory appears to hold true when applied to Mercosur efforts in promoting the human right to education to combat inequality. In the three-phase SEM roll out, the focus on primary and secondary education can be viewed as the establishment of a floor of protection. Mercosur nations take this human right seriously. Their sincerity is demonstrated by their judicial enforcement of the right to education.[116] When governments have failed to meet their human rights obligation to a particular segment of society, litigation has worked to ensure the right.[117] But this litigation has typically fought to acquire only a basic level of educational access for a particular poor community.[118] In essence, what is judicially enforceable is the floor of protection but not the right to equal education. The danger with the focus on the floor is that a basic safety net couched in human rights language permits policymakers to ignore the unequal benefits enjoyed by the citizens at the top of the ladder when the rights of those at the bottom are not being fully realized.[119] Primary and secondary educational floors can be established while prescribing no limit to the economic mobility and academic recognition of the privileged that continue to flourish as a result of public investment in their elite tertiary education. If ensuring the access to education is the floor, continued increases in investments primarily benefitting the wealthy can be viewed as a failure to place a ceiling on the rich's accumulation of educational resources. While the right to education has long been championed in Latin America, Mercosur's history nevertheless fits the narrative that human rights were only advocated in an effort to weaken the harsh blow of neoliberal economic policies.[120] Mercosur was, after all, born during the height of Latin America's neoliberal era with the main purpose of promoting free trade and the fluid movement of goods, people and currency,[121] and even its social pursuits cannot escape such a context.

The argument that the wealthy reap the most benefits from human rights protections is not new. A similar argument has been made in the context of right to

115. Moyn, *A Powerless Companion*, *supra* note 1, at 162–63.

116. *See, e.g.*, LATIN AMERICAN ESC RIGHTS STRATEGIC LITIGATION WORKSHOP: THE CHALLENGE OF IMPLEMENTATION OF COURT DECISIONS BOGOTÁ, COLOMBIA, FEBRUARY 7–8, 2013 3–6 (2013) (discussing right to education litigation in Argentina and Brazil).

117. In Brazil, for example, the constitutional right to education has been amplified over the years, and the government may now be held liable for failing to provide compulsory education or for providing it irregularly. That right has been litigated with some frequency with over 480 cases litigated between the years 1991 and 2008. The lawsuits covered topics such as access to basic education, state responsibility, state regulatory power, management of public resources, and more. The right to education has also been successfully litigated in Argentina. In 2008, an interest group in Argentina filed an action of protection against the government for its violation of thousands of children's right to education. A city court required the government to provide adequate transportation for children living in a large slum in Buenos Aires and went so far as to fine the city's Head of Government for its delay in complying with the order. *Id.*

118. *See, e.g.*, *id.* at 3–4 (noting the 2008 Argentine litigation involved children from one area seeking access to primary education).

119. This is Moyn's Croesus dilemma. *See generally* Moyn, *Do Human Rights Increase Inequality?*, *supra* note 3.

120. *See* Daniel M. Brinks & William Forbath, Commentary, *Social and Economic Rights in Latin America: Constitutional Courts and the Prospects for Pro-poor Interventions*, 89 TEX. L. REV. 1943, 1944 (2011) (describing socio-economic rights as "promissory notes to be redeemed in the form of protection against the harshness and widening inequalities of new market-based political economies").

121. *Id.* at 1948.

health litigation in Latin America.[122] Many of the newly drafted Latin American constitutions of the late 20th century included Socio-Economic Rights (SER) regimes intended to mitigate the harshness of the neoliberal economic and political systems they were ushering in.[123] If the intent of these SER regimes was the distribution of social goods, then the overall effect of enforcing these rights should not be to "reinforce privilege."[124] Yet, where SER regimes are judicially enforceable, individuals need access to resources in order to successfully bring their claims,[125] resulting in a right enforceable only for the upper and middle classes.

In response to this argument, Brinks and Forbath point out that such a view assumes that we are dealing with the allocation of scarce resources in a zero-sum environment where if the rich are consistently the winners, then the concentration of public health resources shifts in favor of the wealthy litigant class to the detriment of the poor.[126] It is important, they argue, to consider the effects of group litigation as well as the leverage individual cases can have systemically.[127] Individual claims, made by rich and poor alike, lead to benefits for people wholly uninvolved in that particular litigation.[128] The wealthy may benefit from the realization of certain human rights, but SER are not a zero-sum game; benefits for the wealthy do not preclude benefits for the poor.[129] As with the judicial enforceability of SER, regional initiatives and domestic programs on education are not a zero-sum game. There are benefits to society as a whole for increased spending on education in an effort to ensure the human right to education. Floors are necessary, but they do not appear sufficient to effectively combat inequality.

CONCLUSION

Increased public investment in education has undoubtedly improved the accessibility and quality of education in Latin America, and Mercosur has been a driver of those improvements. Income inequality has declined as a result. Nevertheless, the push for the right to education has not proven to be the tool for combating economic inequality as originally intended. More data is needed before a strong conclusion can be reached that Mercosur initiatives are undoubtedly causing an increase in economic inequality in its member states; however, the data that *is* available seems to suggest that efforts to promote the human right to education are impeding economic equality. Education policies, with a focus on establishing a floor of basic access to and quality of education, appear to be placing blinders on policymakers who invest increasing public funds into institutions filled with the rich. Universal primary

122. *See id.* at 1945–46 ("Relatively well-off claimants, with access to lawyers and courts, are bound to secure an ever greater proportion of the public health budget, leaving less and less for the have-nots, who have more limited access to the courts.").

123. *Id.* at 1948.

124. *Id.* at 1950.

125. *Id.* at 1950–51.

126. Brinks & Forbath, *supra* note 120, at 1950.

127. *Id.* at 1951.

128. *Id.*

129. *See id.* at 1951–55 ("Perhaps more importantly, before we can reach a conclusive evaluation of the net effect of SER litigation—whether positive or negative—we must reach for a much more comprehensive evaluation . . . .").

education is heralded while money continues to flow toward making tertiary education more competitive within Mercosur, and the poor continue to be excluded.

Swaziland, the AGOA, and ILO Convention 87: A Case Study for the Trade Preference Program Enforcement Model

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INTRODUCTION

With no oversight body on the international level, many scholars have concluded that international law cannot effectively be enforced. But even though international law has weaker enforcement potential than domestic law, history abounds with examples of states complying with international law. And when states do disobey international law, some action is usually taken. The effectiveness of an action taken to bring a state into compliance with international law is the subject of this Note.

A trade preference program ("TPP") enforcement model is an effective method of enforcing international law. Policy and economics argued in a vacuum will often produce Panglossian conclusions that reinforce ineffective behavior. For that reason, I examine my argument in the context of Swaziland's removal from the African Growth and Opportunity Act ("AGOA") following its continued noncompliance with the International Labour Organisation's ("ILO") Convention 87: Freedom of Association and Protection of the Right to Organise ("Convention 87").

A TPP is a program that "give[s] temporary, non-reciprocal, duty free [] market access to select exports of eligible countries."[1] TPPs are permissible under the General Agreement on Tariffs and Trade because of a 1979 World Trade Organization decision that provided an exception to most-favorable nation treatment for the benefit of developing countries.[2] The TPP enforcement model is simple. A developing state is given trade benefits via duties exemptions. This generates economic prosperity that directly accrues with the developing state's citizenry. The TPP benefits are granted subject to conditions—conditions which require adherence to an international law or norm. When the developing state engages in noncompliant behavior, the TPP's benefits are removed. This creates internal opposition against the developing state's government to correct the noncompliant behavior. Additionally, the removal of the TPP's benefits signals a violation of international law to the international community. The increasing internal and external pressure generated by the noncompliant behavior will motivate the developing state to correct its behavior. The existence of the TPP itself will result in the enforcement of its conditions against a noncompliant state. This process is the TPP enforcement model.

There are several limitations to the applicability of a TPP enforcement model. First, it can only apply to developing states because it requires asymmetrical economic

1. VIVIAN C. JONES ET AL., CONG. RES. SERV., R41429, TRADE PREFERENCES: ECONOMIC ISSUES AND POLICY OPTIONS 1 (2013).

2. Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries arts. 1–2 (Nov. 28, 1979), GATT BISD (26th Supp.), at 191 (1980).

power between the benefactor and beneficiary.[3] Second, the TPP enforcement model is dependent on its capability to generate internal pressure against a government's noncompliant action. If the TPP does not produce a large enough economic benefit to the citizenry, then the removal of its benefits will have little effect.[4] Finally, the removal of the TPP's benefits must appear legitimate to the international community. Only in this manner will external pressure be created against a noncompliant state.

In Part I, I address how the TPP enforcement model fits into the existing body of international relations and international law theory on the enforcement of international law. Part II provides background information on the ILO, Swaziland, and the AGOA. Part III presents the case study of the United States's removal of AGOA's benefits from Swaziland after Swaziland's continual failure to comply with Convention 87. Part IV analyzes the moving parts of the case study. Finally, I conclude by addressing further areas of the TPP enforcement model that need to be explored.

I. THEORETICAL FRAMEWORK

Effective enforcement of international legal standards is an area of controversy.[5] While "almost all nations observe almost all principles of international law and almost all of their obligations almost all the time,"[6] there remains the assumption that international law cannot be enforced when states fail to adhere to their international obligations.[7] This Part seeks to situate the Note's assertion that TPPs are an effective means of enforcing international law within the context of the debate generated around enforcement.

Some international law scholars advocate sanctions as a legitimate and effective means of enforcing international law, but there are those who disagree.[8] Other scholars have sought to create new systems by which to enforce international law or

3. *See* JONES ET AL., *supra* note 1, at 3 (discussing how countries that are members of Generalized System of Preferences, the oldest and largest U.S. TPP, are mandatorily graduated from the program if they reach a certain level of economic development).

4. *See, e.g.*, Philip I. Levy, *Sanctions on South Africa: What Did They Do?*, 89 AM. ECON. REV. 415, 417–418 (1999) (discussing how the impact of trade sanctions to punish South Africa for apartheid was limited because the government was able to circumvent them).

5. *See, e.g.*, Anu Bradford & Omri Ben-Shahar, *Efficient Enforcement in International Law*, 12 CHI. J. INT'L L. 375, 377 (2012) (stating that high costs and low credibility undermine efforts to enforce international law).

6. LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979) (emphasis omitted).

7. *See* Frederic L. Kirgis, *Enforcing International Law*, AM. SOC'Y INT'L L.: ASIL INSIGHTS (Jan. 22, 1996), https://www.asil.org/insights/volume/1/issue/1/enforcing-international-law [https://perma.cc/3HW8-6ZH8] (discussing how the United Nations Security Council could only authorize member states to use force because it lacked the agreements required to enforce the UN Charter); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2603 (1997) ("Like most laws, international rules are rarely enforced, but usually obeyed.").

8. *See, e.g.*, Anthony D'Amato, *Is International Law Really "Law"?*, 79 NW. U.L. REV. 1293, 1299 (1985) (arguing that enforcement of international law can only be achieved by affirmative coercion, such as a sanction); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1828 (2002) (arguing that international law becomes effective through repeated interactions involving relatively small stakes).

new theories to explain why international law is obeyed.[9] Additionally, a classical realist interpretation of international relations asserts that international law itself has no force, and thus cannot be enforced, because it is a temporary reflection of the mutable power structure that exists among states.[10] Any enforcement action would necessarily be an extension of a state's power through politically expedient means—the means or justification being international law that would be irrelevant to the power consideration.[11] As a counterpoint, a liberalist interpretation looks to the norms and identity among the international community as a whole to determine whether enforcement would be effective.[12] State action plays an integral part, thus compliance becomes a recursive part of enforcement: The more often an international law is enforced, the more likely other states will comply. When a state incorporates compliance with international law as a component of its identity, it is more likely to become a state that adheres to international law principles. A constructivist looks to international law as a manifestation of constructed norms based on perceived identity.[13] Enforcement of international law outside of what a state perceives its identity to be, therefore, would not be effective.

Before addressing these various theories, there are four spectrums within enforcing international law that must be addressed. The first is the noncompliant-behavior spectrum. At the extreme end of the spectrum are actions that violate fundamental precepts of international norms and law—for example, the use of aggressive force, the use of nuclear weapons, or the crime of genocide. Furthest from the fundamental-violations pole would be the violation of procedural requirements found in treaties. Populating the rest of the spectrum are actions that violate a state's international obligations but that are not of a fundamental character. Included within this part of the spectrum are actions that violate a state's international trade obligations or general treaty obligations.

The second spectrum is the enforcement-action spectrum. At the extreme end of this spectrum lies the use of force. At the other end of the spectrum are actions that amount to shaming—declarations or pronouncements that condemn the noncompliant behavior but take no affirmative steps toward ending that behavior beyond words or the reference to a duty to comply with international law or norms. The rest of the spectrum is populated by actions such as economic sanctions, closing diplomatic relations, or terminating treaties.

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9. *See, e.g.*, Bradford & Ben-Shahar, *supra* note 5, at 395 (advocating for a system of "Reversible Rewards"); Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181, 183 (1996) (promoting the transnational legal process theory of why states comply with international law).

10. *See* Casper Sylvest, *Realism and International Law: The Challenge of John H. Herz*, 2 INT'L THEORY 410, 411 (2010) ("[International] law is regarded as an epiphenomenon concealing temporary cooperation among power- or security-seeking states.").

11. *Id.* ("For realists, law is a function of power if it is not ignored outright.").

12. *See* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 226–27 (1993) (suggesting that liberals would want a theoretical framework that considers factors such as ideology and identity).

13. *See* Jutta Brunnée, *A Constructivist Theory of International Law?*, EJIL: TALK! (Sept. 23, 2015), http://www.ejiltalk.org/a-constructivist-theory-of-international-law/ [https://perma.cc/PDF6-KDVU] (explaining that constructivists believe states are motivated to comply with international law based on normative beliefs).

The third spectrum is the acceptability spectrum, which measures the acceptability of the enforcement measure to international actors. One extreme of this spectrum is total acceptance of the measure, while the other extreme is total rejection exemplified by actively preventing the enforcement action. Populating the middle of the spectrum is tolerance, with international actors neither condemning nor accepting the enforcement action. Additionally, international actors could disapprove the enforcement action but take no steps to prevent its implementation. This spectrum is in some measure dependent on the noncompliant-behavior spectrum.

Finally, the fourth spectrum is the benefit spectrum, which describes the benefit derived from noncompliant behavior. At one pole of the spectrum is extreme benefit, while at the other pole is little benefit. This spectrum comes into play when a state implements an enforcement action. When the enforcement action is weaker than the benefit derived, the enforcement action is more likely to fail. Nevertheless, the intersection of the enforcement-action spectrum and the benefit spectrum is speculative because it is often impossible to adequately calculate the detriment an enforcement action will have or the benefit that a noncompliant state derives from its behavior.

A. Sanctions

Sanctions have been thought to be the best means of enforcing compliance with international law,[14] especially when the noncompliant behavior involved is not a "threat to the peace, breach of the peace, or act of aggression"[15] which would allow the UN Security Council to potentially authorize the use of force to correct the noncompliance.[16] But the effectiveness of sanctions has been questioned because sanctions are beginning to look untenable at best or ineffective at worst.[17] Recently, scholars are seeking different and creative methods of enforcing compliance with international law and norms.[18] But sanctions track well with a realist perspective. A sanction expresses the economic power of a state, and its application would seek to weaken the power of another state.[19]

One major weakness of sanctions is that they are, at times, impractical.[20] For example, it is difficult to imagine that European states will ever impose an effective

14. *See* Kirgis, *supra* note 7 (noting that the assumption with international law is that compliance cannot be enforced without coercion).

15. U.N. Charter art. 39.

16. U.N. Charter art. 42.

17. *See, e.g.*, Abdelmalek Alaoui, *From Russia to Africa: Why Sanctions Are Ineffective Against Toxic Leadership*, FORBES (Feb. 24, 2015, 11:33 PM), http://www.forbes.com/sites/abdelmalekalaoui/2015/02/24/from-russia-to-africa-why-sanctions-are-ineffective-against-toxic-leadership/2/#5e47d8853b79 ("In most cases, sanctions and embargos even aggravated the global humanitarian situation, while strengthening the iron grip of dictators, their entourage, and accelerating their assets-diverting strategies."); Levy, *supra* note 4, at 415 ("The fundamental problem in assessing the role of sanctions [against South Africa] is that the end of apartheid was overdetermined.").

18. *See, e.g.*, Bradford & Ben-Shahar, *supra* note 5, at 395 (advocating for a system of "Reversible Rewards").

19. *See generally* JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS 55–82 (2014).

20. *See* Madeleine K. Albright, *Enforcing International Law*, 89 AM. SOC'Y INT'L L. PROC. 574, 576 (1995) ("Sustaining sanctions can be complicated, however, by the expense of enforcement, by the costs of

sanctions regime against Russia so long as they remain dependent on Russia's natural gas exports. Sanctions also punish the citizens of the sanctioned state, as the sanctioned government passes on the costs of the sanctions to its people.[21] W. Michael Reisman, in acknowledging the devastation economic sanctions can wreak on innocent civilians, has called for the application of international humanitarian law's principles of military necessity, proportionality, and differentiation to sanctions.[22] Additionally, sanctions may have little effect in under-developed, agrarian states.[23] Deprivation of luxury imports and high technology will mean little to societies predominated by subsistence farming. And withholding humanitarian aid from those states—possibly the only sanctioning action capable of generating mass internal pressure for change—is likely to be domestically unpopular within the sanctioning state.

But new support has emerged for targeted sanctions, which seek to minimize the harm to innocent civilians. Targeted sanctions "are intended to focus their impact on leaders, political elites, and segments of society believed to be responsible for objectionable behavior, while simultaneously reducing collateral damage to the general population and to third countries."[24] Targeted sanctions, which include arms embargoes, travel bans, and asset freezes, have been relatively successful when applied against terrorists, but would be virtually ineffective when applied outside of a coordinated effort by powerful states.[25] This is a component of the collective-action problem under international law. While many states might be willing to come together to target terrorists, whose actions could directly harm them, it is hard to imagine such a coordinated effort for the violators of a lesser international obligation.

B. Shaming

Shaming can be defined as "a deliberate attempt to negatively impact a state, regime, or leader's reputation by publicizing and targeting violations of international law norms."[26] Shaming mechanisms seek to label a state as an offender; to create a bad reputation for a state engaged in noncompliant behavior; and to call attention to

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foregone commerce especially to neighboring states, and by adverse humanitarian consequences."); Bradford & Ben-Shahar, *supra* note 5, at 383 ("At times, a Sender cannot effectively resort to sanctions.").

21. *See, e.g.*, Albright, *supra* note 20, at 578 ("One of the problems with which we had to cope throughout this period was the hardship that the sanctions caused to the innocent people of Haiti. We regretted those hardships deeply, but our resolve was strengthened . . . by evidence that many Haitians were willing to pay a high price in personal sacrifice to have the government they voted for restored.").

22. W. Michael Reisman, *Sanctions and International Law*, 4 INTERCULTURAL HUM. RTS. L. REV. 9, 11–12 (2009).

23. *See* Charles M. Becker, *The Impact of Sanctions on South Africa and Its Periphery*, 31 AFR. STUD. REV. 61, 65–66 (1988) (observing sanctions, other than an oil embargo, cannot directly affect South Africa's underdeveloped economy, which consists predominantly of low-productivity peasant agriculture, because it uses few imported inputs and requires little capital or skilled labor).

24. Gary C. Hufbauer & Barbara Oegg, *Targeted Sanctions: A Policy Alternative?*, 32 L. & POL'Y INT'L BUS. 11, 12 (2000).

25. *Id.* at 12–16. In spite of the "targeted" nature of UN-coordinated effort to hinder terrorist activities, there is still a high degree of collateral damage to innocent civilians, who often find themselves unable to remove themselves from the list directing states to freeze their assets and deny their travel. Adeno Addis, *Targeted Sanctions as a Counterterrorism Strategy*, 19 TUL. J. INT'L & COMP. L. 187, 194–95 (2010)

26. Sandeep Gopalan & Roslyn Fuller, *Enforcing International Law: States, IOs, and Courts as Shaming Reference Groups*, 39 BROOK. J. INT'L L. 73, 75 (2014).

the shamed state's noncompliant behavior to the international community.[27] In this manner, shaming acts as a coercive force that motivates actors to correct their noncompliant behavior in order to regain acceptance in the international community.[28]

Shaming theory applied to international law has evolved from criminal law theory.[29] It operates not only on a deterrence basis, by which states adhere to international law to avoid being shamed, but also on a retributive basis to punish the state engaged in noncompliant behavior.[30]

The benefit to shaming is that it cannot be passed down to the citizens of a shamed state. The shame rests solely at the top with the leadership engaged in the noncompliant behavior. In this manner, shaming may function in a more targeted manner than targeted sanctions. While collective action might be necessary for shaming to actually be effective, the transaction costs of implementing shaming as an enforcement mechanism are much lower than applying sanctions or even targeted sanctions.[31] Lower transaction costs make it easier for a concerned state to rally support behind it in condemning the noncompliant state's behavior.

The downside of shaming is that its coercive effect is highly dependent on how a state perceives itself. A shamed state that does not care how the international community perceives it is unlikely to change its noncompliant behavior.[32] This situates the shaming theory firmly within the constructivist perspective on international relations. An additional detriment to shaming is that a group of states condemning the actions of a noncompliant state may allow the noncompliant state to bolster its domestic political capital by claiming that the international community is set against it and that the noncompliant state has not surrendered to external political pressure.[33] Furthermore, a shaming state takes the moral high ground when it condemns the actions of a noncompliant state. This limits the shaming state's flexibility under international law, as it can no longer engage in behavior that might appear morally compromised.[34]

C. Other Theories

Harold Hongju Koh has written on a transnational legal process theory that synthesizes the formation, interpretation, enforcement, and internalization of

27. *Id.* at 75–76.

28. *Id.*

29. *See id.* at 74 ("The emphasis on shaming is not new to legal scholarship: criminal law scholars, among others, have produced a rich vein of literature on shame sanctions.").

30. *Id.* at 81.

31. *See id.* (arguing that "shaming is more cost-effective").

32. *See* D'Amato, *supra* note 8, at 1299 (arguing that international law is only effective with a positive action that compels compliance rather than social stigma on the international plane).

33. *See* Alaoui, *supra* note 17 (explaining that after the United States had stepped up sanctions, a rally of the Russian "president's supporters gathered thousands in support of his Ukrainian policy, and theories supporting the assertion that Russia is the victim of a 'vast conspiracy' aiming at destroying the only alternative to US supremacy over the world are flourishing throughout state-controlled medias").

34. Gopalan & Fuller, *supra* note 26, at 83.

transnational laws in order to explain why states obey international law.[35] Transnational legal process has four features:

> First, it is nontraditional: [I]t breaks down two traditional dichotomies that have historically dominated the study of international law: [B]etween domestic and international, public and private. Second, it is non-statist: [T]he actors in this process are not just, or even primarily, nation-states, but include nonstate actors as well. Third, transnational legal process is dynamic, not static. Transnational law transforms, mutates, and percolates up and down, from the public to the private, from the domestic to the international level and back down again. Fourth and finally, it is normative. From this process of interaction, new rules of law emerge, which are interpreted, internalized, and enforced, thus beginning that process all over again. Thus, the concept embraces not just the descriptive workings of a process, but the normativity of that process. It focuses not simply upon how international interaction among transnational actors shapes law, but also on how law shapes and guides future interactions: [I]n short, how law influences why nations obey.[36]

Koh addresses both the realist and liberalist perspectives on international law in discussing the transnational legal process theory.[37] He rejects the traditional realist approach outright.[38] This is to be expected, as it is near impossible for an international law scholar to support a classical realist perspective on the non-existence of international law. But in engaging with the liberalist perspective, Koh criticizes it for ignoring the fluidity of identity in influencing international norms.[39] What is key for Koh is interaction between all the movable parts of the transnational legal process theory and the internalization of norms that emerge from those interactions.[40] The interactions between states, between a state and its non-state actors, and between a state and international law, for example, create new perceptions of identity that become internalized through repeated interaction.[41]

The transnational legal process theory is fairly attractive, but it is not without its flaws. First, it is overwhelmingly broad. The multiple actors and their interactions, not just with each other but also with international law and their perceived identities, are difficult to follow as time multiplies the interactions and thus the changes produced by those interactions. Practically speaking, it would be difficult for a person applying this theory in real time to effectively determine when an enforcement mechanism would work.

Perception of identity, along with identity in general, are also difficult to decipher. A person applying the transnational theory would not only have to consider an actor's

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35. Koh, *supra* note 9, at 183–84.

36. *Id.* at 184.

37. *See generally id.* at 186–205.

38. See *id.* at 199 ("As contemporary international relations theorists have long recognized, nations are not exclusively preoccupied with maximizing their power vis-à-vis one another in zero-sum games.").

39. *Id.* at 202 ("Like national interests, national identities are not givens, but rather, socially constructed products of learning, knowledge, cultural practices, and ideology.").

40. *Id.* at 203–04.

41. *See* Koh, *supra* note 9, at 206 (explaining that continuous interaction and internalization leads states to engage in interest-recognition and identity-formation).

perception of its identity, but would also have to begin a game-theory analysis of the actor's perception of what the applying person's perception of the actor's perception of its identity is in order to effectively predict the creation of an identity-based norm.[42] Together, the broad nature of the theory and the indeterminate nature of its factors can potentially lead to its over-application and yield self-confirming results.

But even as a post-hoc tool, the transnational legal theory may yield a high number of false positives due to the many actors, factors, and interactions at play. It thus straddles the line between a useful tool that could indicate when a state is likely to comply with a law or enforcement mechanism and an overly-descriptive theory that does not aid the real world person applying the theory. Koh's own description of the predictive power of the transnational legal process theory seems to place it into the latter category: "It predicts that nations will come into compliance with international norms if transnational legal processes are aggressively triggered by other transnational actors in a way that forces interaction in forums capable of generating norms, followed by norm-internalization."[43]

Anu Bradford and Omri Ben-Shahar have argued for a system of "Reversible Rewards" that provides an initial reward that turns into a sanction if a targeted state does not comply with the behavior the reward sought to enforce.[44] The sanctioning state would first offer an initial reward through a type of escrow account to the sanctioned state, payable upon the cessation of the sanctioned state's noncompliant behavior.[45] If the state refuses the reward or does not stop the noncompliant behavior, the sanctioning state then imposes a sanction equal to the value of the proffered reward against the sanctioned state.[46] The idea is that imposing a sanction would be too costly to the sanctioning state to stop the sanctioned state's noncompliant behavior.[47] While simply paying off the sanctioned state with a reward equal to the benefit the sanctioned state derives from its noncompliant behavior might be effective, Bradford and Ben-Shahar's Reversible Rewards system would be less costly to the sanctioning state.[48] Under their model, there is an assumed fixed cost to imposing sanctions and it is assumed that a targeted state will cease its noncompliant behavior if the benefit it receives from its behavior is less than the imposed sanction.[49]

Using their numbers, State A's noncompliant behavior gives it a benefit of 80 and harms State B by 100.[50] State B could only stop State A's noncompliant behavior by imposing a sanction of 80, but, assuming the fixed cost of imposing sanctions to be 30, this would cost State B 110, which is more than the current harm done by State A.[51] While a payoff of 80 to State A might work, offering a payoff of 60 to State A in the

42. Vizzini's analysis of how the Dread Pirate Robert's identity would influence which cup was poisoned in *The Princess Bride* is a good example of how ridiculous (and deadly) such an analysis can be. THE PRINCESS BRIDE (Act III Communications 1987).

43. Koh, *supra* note 9, at 206.

44. Bradford & Ben-Shahar, *supra* note 5, at 393–95.

45. *See id.* at 397 (suggesting "a precommitment of the Reversible Rewards into an irrevocable fund, managed by an independent trustee").

46. *Id.* at 397–98.

47. *Id.* at 394.

48. *Id.* at 395.

49. *Id.* at 394.

50. Bradford & Ben-Shahar, *supra* note 5, at 394.

51. *Id.*

form of a Reversible Reward would actually compel State A to cease its noncompliant behavior.[52] This is because State B could impose a sanction of 30—with the fixed cost of sanctions increasing the cost to State B to 60, the same amount as the reward—against State A if State A refused the payoff.[53] The sanction would lower the benefit State A derives from its noncompliant behavior to 50 (80 – 30).[54] Thus, it would be more profitable for State A to take the payoff—with a benefit of 60—than it would be to continue its noncompliant behavior—with a benefit of 50.[55]

This model is practically flawed by definitively quantifying benefits and costs imposed through the Reversible Rewards model. Their quantifiers are vague because the values they describe are indeterminate. How do we quantify the benefits and detriments to states in absolute numbers? How would a sanctioning state even make such a calculation in determining what reward to initially offer the sanctioned state? The complications in calculating the benefits and detriments to a noncompliant state are amplified when the behavior is something that is not economic in nature—the violation of weapons treaties for instance. Such considerations should make the practicability of the Reversible Rewards model questionable.

Bradford and Ben-Shahar also explicitly ignore the political costs associated with both sanctions and rewards.[56] Not only can a state receive value from engaging in the sanctioned behavior, but refusal to comply with external threats may also bolster its domestic political capital. For example, Iran's refusal to cave to external pressure to halt its nuclear programs allowed the leadership to promote an image of not folding to international threats to its sovereignty.[57] Additionally, Bradford and Ben-Shahar make the basic economic assumption that a sanctioned state will act rationally. North Korea, however, arguably acts irrationally from an economic standpoint when food aid is conditioned upon weapons development restrictions.[58] Any theory that relies on an assumption of rationality risks not effectively analyzing the underlying motivations of a state's noncompliant behavior.

Bradford and Ben-Shahar further note that a Reversible Rewards system would lose its efficacy where it encourages states to become bad actors in order to receive a reward.[59] They also identify a Reversible Rewards system as being best suited for "scenarios involving a one-of-a-kind violation by an ex ante identifiable Target."[60]

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52. *Id.* at 395.

53. *Id.*

54. *Id.*

55. *Id.*

56. Bradford & Ben-Shahar, *supra* note 5, at 385.

57. *See Iran Says IAEA Resolution 'Illegal'*, AL JAZEERA (Dec. 2, 2009), http://www.aljazeera.com/news/middleeast/2009/12/200912212431849517.html [https://perma.cc/H5XX-R77M] ("'The Zionist regime [Israel] and its [western] backers cannot do a damn thing to stop Iran's nuclear work,' [the president of Iran] said."). For a general history of Iran's nuclear program, see generally KENNETH M. POLLACK, UNTHINKABLE: IRAN, THE BOMB, AND AMERICAN STRATEGY (2013).

58. *See* Ulv Hanssen, *Explaining North Korea's Irrationality*, EAST ASIA FORUM (June 29, 2013), http://www.eastasiaforum.org/2013/06/29/explaining-north-koreas-irrationality/ [https://perma.cc/QW68-488T] (arguing that North Korea's behavior is irrational). *But see* Jim Walsh & John Park, *To Stop the Missiles, Stop North Korea, Inc.*, N.Y. TIMES (Mar. 10, 2016), http://www.nytimes.com/2016/03/10/opinion/to-stop-the-missiles-stop-north-korea-inc.html [https://perma.cc/MY7D-7SD3] (noting that North Korea continues to develop its nuclear program because the sanctions regime against North Korea is not consistently applied).

59. Bradford & Ben-Shahar, *supra* note 5, at 399.

60. *Id.*

D. The TPP Enforcement Model Within Enforcement Theory

The question remains how a TPP enforcement mechanism would fit within the existing body of international law enforcement theory. The TPP incorporates elements of the realist, liberalist, and constructivist theories explaining why states comply with international law. First, the TPP creates an economic benefit that can be taken away from a noncompliant state. In a realist sense, this is an exercise of a state's economic power over states with weaker economies. The TPP enforcement model would thus allow more powerful states to create and enforce international law through extensions of their economic power. The unilateral nature of a TPP also fits within the realist framework.

Through the liberalist theory, the use of a TPP enforcement model enforces an international legal norm, especially when used to enforce widely-accepted norms. Its application signals to other states that noncompliant behavior will be punished, which creates an incentive to adhere to the international norm the TPP enforcement model seeks to enforce. Similarly, under a constructivist theory, the use of a TPP to enforce an international law reinforces the legitimacy of that law, provided the international community accepts its application as appropriate.

The TPP enforcement model is weaker than the broad application of sanctions, provided those sanctions are actually implemented against a noncompliant state. If the noncompliant behavior generates the application of sanctions at an almost universal level, the power of the sanctions regime is stronger than the unilateral TPP enforcement model. But the weakness of sanctions is the need for collective action and the idea that the application of sanctions should only be used in cases of noncompliant behavior that approach the more-extreme pole of the noncompliant behavior spectrum. The TPP enforcement model thus benefits by being less severe than sanctions. It can be broadly applied toward noncompliant behavior that is on the less-extreme pole of noncompliant behavior without generating criticism for the international community. And while sanctions yield no benefit to the sanctioning state, the TPP enforcement model will benefit the implementing state through reducing trade restrictions on developing states in the initial period.

The TPP enforcement model is inherently stronger than shaming because there is a quasi-tangible coercive action that occurs when a state engages in noncompliant behavior, the removal of trade benefits. The penalty goes beyond mere words and can create economic harm within a noncompliant state. At the same time, the loss of a TPP's benefits can act as a signaling mechanism to the world that the noncompliant state's behavior is shame-worthy. But just as the TPP enforcement model can apply to less-extreme noncompliant behavior, there is a possibility that removing a TPP's benefits for the least-extreme noncompliant behavior might not be acceptable to the international community and it would, therefore, lose an element of its legitimacy. A pure shaming mechanism, then, would be most appropriate for the least-extreme noncompliant behavior.

Thus on the spectrum of enforcement actions, the TPP enforcement model falls in the middle. While its effect might be too minor to enforce compliance in most-extreme cases of noncompliant behavior, where comprehensive sanctions or use of force would be most appropriate, its effect is more coercive than shaming. The TPP enforcement model's less-severe nature will also increase the legitimacy of the

coercive action when applied to noncompliant behavior that is not extreme enough to warrant sanctions. A TPP enforcement model is thus best suited for noncompliant behavior in the middle of the spectrum.

When considered in this manner, a TPP enforcement model is similar to the Reversible Rewards model. They both provide a benefit that can be turned into a coercive act to correct noncompliant behavior. The limitations for a Reversible Rewards system, however, do not apply to a TPP enforcement model. TPPs are based on a specific region, which eliminates the concern that other states might seek its benefits by engaging in bad behavior. TPPs are also inherently focused on multiple states, where the consequences of a state's noncompliant behavior both affect that individual state and simultaneously warn other beneficiary states of the costs of noncompliance with the TPP's standards. Additionally, a TPP does not attempt to quantify the intersection of the enforcement-action and benefit spectrums. Rather, the TPP enforcement model focuses on the weaker side of the noncompliant-behavior spectrum and implements a middle-tier enforcement action, on the theory that there is a positive correlation between the degree of the noncompliant behavior and the degree of the benefit derived from it.

The TPP enforcement model also removes the temporary nature of a reward by creating a lasting framework that incentivizes domestic actors to specialize in the production of selected goods. The target government then benefits from increased production—and thus increased exports—in the selected products. Over time, the target government's economy will begin to specialize in the production of the TPP's selected goods because the target government's economy will have a comparative advantage[61] in the selected goods' production on a bilateral—or possibly even global—scale.[62] The removal of a target state from a TPP will thus remove the comparative advantage its economy previously enjoyed and cause domestic economic turmoil within the targeted state. This turmoil translates into internal pressure against the targeted government to take the necessary steps to make the targeted state the recipient of a TPP's benefits once again. In this manner, a TPP can create the same desired effect as a sanction.

A TPP enforcement model appears to accord with the transnational legal process theory. A TPP's application and removal provide a series of interactions through which normative behavior can be internalized. But a TPP enforcement model depends less on how a state identifies than it does on producing real economic punishments for noncompliant states. While a state that identifies as one that adheres to international law would most likely surrender to the removal of a TPP's benefits as an indication of its noncompliance, even a state that does not believe international law applicable to it will suffer economic penalties through the removal. The TPP enforcement model thus focuses less on the iterative nature of its interactions than on producing a coercive effect that is tangible within a noncompliant state.

61. *See generally* THOMAS A. PUGEL, INTERNATIONAL ECONOMICS 37–40 (15th ed., 2012).

62. *See generally id.* at 319–21.

II. BACKGROUND INFORMATION

Before delving into the case study, background information on the ILO, Swaziland, and the AGOA is necessary to fully understand the case study. The background information helps to situate the case study in a larger context as well as to provide a deeper analysis than a simple cause-effect conclusion might provide. I will begin by briefly describing the origins of the ILO, the ILO's functional mechanisms, and Convention 87. Next, I will address Swaziland, focusing on its institutions and society as well as its modern history divided into a pre- and post-independence period. Finally, I will discuss the AGOA under the U.S. legal system and how it functions.

A. The ILO and Convention 87

The ILO was established in the wake of World War I and became the "first permanent intergovernmental organization devoted specifically to improving conditions of social welfare."[63] Specifically, the ILO was created via the Treaty of Versailles through the incorporation of the ILO Constitution as a body of the League of Nations.[64] After the dissolution of the League of Nations, the ILO became the United Nations's first specialized agency in 1946.[65] The ILO's survival after the collapse of the League of Nations was due to the relocation of its headquarters from Geneva to Montreal during World War II—it has since reestablished its headquarters in Geneva.[66] Additionally, the Declaration of Philadelphia in 1944 reinvigorated the ILO in the international community.[67] Even though the ILO boasts that there are 1,357 ratifications of its fundamental Conventions, representing 91.7% of the possible ratifications,[68] the ILO's fundamental Conventions covered less than 50 percent of the world's workers in 2013.[69] Only nine new ratifications have occurred since then.[70]

The ILO consists of three bodies: A General Conference consisting of the representatives of its Members; a Governing Body; and an International Labour Office controlled by the Governing Body.[71] The Governing Body consists of 56 members: 28 governmental representatives; 14 employer representatives; and 14 worker representatives.[72] The members of the Governing Body may serve for no more

63. Koh, *supra* note 7, at 2612.

64. Treaty of Peace with Germany (Treaty of Versailles) pt. XIII, June 28, 1919, 225 C.T.S. 188.

65. *Origins and History*, INT'L LAB. ORG., http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm [https://perma.cc/U4HL-A8GM] (last visited May 10, 2016).

66. FRANCIS MAUPAIN, THE FUTURE OF THE INTERNATIONAL LABOUR ORGANIZATION IN THE GLOBAL ECONOMY 3 (2013).

67. *See generally* Int'l Lab. Org. [ILO], *Declaration Concerning the Aims and Purposes of the International Labour Organisation (Declaration of Philadelphia)*, ILO Constitution, annex (May 10, 1944).

68. *Conventions and Recommendations*, INT'L LAB. ORG., http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm [https://perma.cc/TF35-N9PJ] (last visited May 10, 2016).

69. Sir Bob Hepple, *Foreword* to FRANCIS MAUPAIN, THE FUTURE OF THE INTERNATIONAL LABOUR ORGANIZATION IN THE GLOBAL ECONOMY v, v-vi (2013).

70. *Ratifications of Fundamental Conventions and Protocols by Country*, INT'L LAB. ORG., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:0::NO::P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F [https://perma.cc/LL7D-4NCC] (last visited Apr. 4, 2016).

71. Int'l Lab. Org. [ILO] Constitution art. 2 (June 28, 1919).

72. *Id.* art. 7(1). Without going into more detail, the represented governments select their 28 members,

than three years.[73] One chairman and two vice-chairmen are elected by the Governing Body to lead it, and only one government representative, one employer representative, and one worker representative may be elected.[74] The International Labour Office is headed by a Director-General appointed by the Governing Body.[75] The International Labour Office functions as an administrative body for the ILO by facilitating the collection and distribution of information, examination of subjects proposed by the General Conference, and special investigations ordered by the General Conference or Governing Body.[76]

The ILO operates as a tripartite structure in that it represents the interests of governments, employers, and workers equally. The ILO's tripartite structure places employers and workers on the same level as governments in order to facilitate social dialogue and achieve compromises for the improvement of global labor rights.[77] According to Francis Maupain, a former employee at the ILO, "the ILO's unique ability to impact on living standards and working conditions is entirely dependent on two factors: [T]he *legitimacy* conferred by universal, tripartite debate, and its *institutional capacity* to ensure that those standards are actually translated into national legislation and practice."[78] Ultimately, however, the ILO's ability to enforce its Conventions is limited to its ability to persuade countries to adhere to the Conventions.[79]

The General Conference meets at least once a year at a proceeding called the International Labour Conference ("ILC"), and each Member sends four representatives to the ILC.[80] Two of the representatives are government delegates, one is an employers delegate, and one is a workers delegate.[81] The nomination of non-government delegates is done in agreement with the industrial organizations most representative of the country's employers and workers.[82] Each delegate is entitled to vote individually on all issues presented.[83] The Governing Body selects the agenda for the ILC.[84] During the ILC, the General Conference may adopt Conventions by a two-thirds majority,[85] and each Member must present the adopted Convention to the appropriate domestic body in order to decide whether the government will ratify the Convention.[86]

Once a Convention is ratified, the government must make a report on the implementation of that Convention every two years if it is a fundamental or priority

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the represented employers select their 14 members, and the represented workers select their 14 members. *Id.* art. 7(2)–(4).

73. *Id.* art. 7(5).
74. *Id.* art. 7(7).
75. *Id.* art. 8(1).
76. Int'l Lab. Org. [ILO] Constitution, *supra* note 71, art. 10.
77. MAUPAIN, *supra* note 69, at 8.
78. *Id.* at 7.
79. *Id.* at 8.
80. Int'l Lab. Org. [ILO] Constitution, *supra* note 71, art. 3(1).
81. *Id.*
82. *Id.* art. 3(5).
83. *Id.* art. 4(1).
84. *Id.* art. 14(1).
85. *Id.* art. 19(2).
86. Int'l Lab. Org. [ILO] Constitution, *supra* note 71, art. 19(5)(b).

Convention and every five years for all other Conventions.[87] The ILO has two bodies that examine the application of the Convention in law and practice by the Member: The Committee of Experts on the Application of Conventions and Recommendations (the "Committee of Experts") and the ILC's Tripartite Committee on the Application of Standards (the "CAS").[88] The Committee of Experts, composed of 20 jurists, reviews government reports on compliance with a ratified Convention.[89] The Committee of Experts makes two types of comments in reviewing the application of a ratified Convention: Observations and Direct Requests.[90] An Observation contains comments related to the fundamental application of a Convention, while a Direct Request contains more technical details or requests for further information.[91] Observations are considered more serious than Direct Requests.[92]

The CAS holds a general discussion on the application of ILO Conventions, Recommendations, and enforcement of a government's obligations based on the report of the Committee of Experts.[93] The CAS also reviews individual cases on the application of ILO Conventions based on the Committee of Experts's Observations.[94] The CAS selects individual cases based on the following criteria:

- The nature of the Committee of Experts's comments;
- The nature of the government's responses provided on the application of a Convention;
- The seriousness and persistence of the government's deficiencies in applying the Convention;
- The nature and urgency of the specific situation;

87. *Committee of Experts on the Application of Conventions and Recommendations*, INT'L LAB. ORG., http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm [https://perma.cc/7F8V-8JGE] (last visited Nov. 3, 2016). Convention 87 is a fundamental Convention. *Conventions and Recommendations*, *supra* note 68.

88. *Applying and Promoting International Labour Standards*, INT'L LAB. ORG., http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm [https://perma.cc/DX24-222H] (last visited May 10, 2016).

89. *Committee of Experts on the Application of Conventions and Recommendations*, *supra* note 87. Reports submitted by the government are confidential. They may be supplemented by independent, confidential reports on the application of a Convention from the employers' or workers' representative. Governments must submit copies of reports to employers and workers' organizations. *Id.*

90. *Id.*

91. *Id.*

92. In the past, Direct Requests were private communications to the governments while Observations were published to the General Conference. *Id.* Direct Requests are now, however, publicly available online through NORMLEX, the ILO's information system. *See generally* NORMLEX, INT'L LAB. ORG., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1: [https://perma.cc/PZ56-JPUQ].

93. INT'L LAB. OFFICE, INTERNATIONAL LABOUR CONFERENCE: ONE HUNDRED AND FIFTH SESSION, RECORD OF THE PROCEEDINGS annex III, at 3 (2016), http://www.ioe-emp.org/fileadmin/ioe_documents/publications/ILO_ILC/2016_ILC/EN/_2016-05-02__C-437_2016_ILC_-_CAS_Work_of_the_Committee_Doc._D.1.pdf [https://perma.cc/2F96-X75F].

94. *Id.* at 4.

- The Employers' and Workers' organizations' comments;
- The CAS's discussions and conclusions in previous sessions;
- The likelihood that discussing the case would have a tangible impact;
- The desire to maintain a balance between Fundamental, Governance, and Technical Conventions;
- The desire to maintain a geographical balance; and
- The desire to maintain a balance between developed and developing countries.[95]

In analyzing an individual case, the CAS allows the examined country's Government, Employers, and Workers representatives the opportunity to address the CAS.[96] The Government, Employers, and Workers representatives from other countries are also allowed to address the CAS on the examined country's application of the specific Convention.[97] The purpose of the examination of individual cases is "to provide a tripartite forum for dialogue on outstanding issues relating to the application of ratified international labour Conventions."[98] Currently, the ILO's only enforcement mechanism is limited to shaming actions before the CAS, and the CAS can act as a "shame reference group" for the ILO Members or the international community generally.[99]

Convention 87 was created in 1948, two years after the ILO became the United Nations's first specialized agency.[100] Convention 87 allows workers and employers to join or create any type of union that they wish, including international unions.[101] These unions may not be dissolved or suspended by administrative authority.[102] States that ratify Convention 87 must "undertake[] to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise."[103]

95. *Id.* at 5.

96. *Id.* at 8.

97. *Id.*

98. *Id.* at 7.

99. *See* Gopalan & Fuller, *supra* note 26, at 78 (discussing the operation of shame sanctions in the international community).

100. *Origins and History*, INT'L LAB. ORG., *supra* note 65.

101. Freedom of Assembly and Protection of the Right to Organise Convention, 1948 (No. 87) arts. 2, 5, July 9, , 1948, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232 [https://perma.cc/EW3D-F5RU].

102. *Id.* art. 4.

103. *Id.* art. 11.

B. Swaziland

1. Institutions and Society

Swaziland is ruled by a traditional monarchy in which all power resides in the monarchy, despite the existence of a Parliament and judiciary established by a constitution.[104] As will be discussed later, the constitution establishing the Parliament and judiciary is still overruled by the 1973 Proclamation that vests all power in the king.[105] Traditionally, the king shares several important ritualistic and administrative functions with the queen mother.[106] In selecting a successor, a potential queen mother's background and skills are extremely relevant—a king's power is often derived, at least initially, through the queen mother.[107] The actual distribution of this power depends on the personalities of both the king and the queen mother.[108] An irregularly assembled inner council, or *liqoqo*, composed of the aristocracy advises the king on matters of the state.[109] Additionally, a more informal council, the *libandla*, composed of any eligible male discusses any issue presented, with the king and queen mother usually in attendance.[110]

Polygyny, levirate, and sororate are still present in Swazi society.[111] Interestingly, queen mothers and their clans are highly respected despite the male-dominated nature of Swazi society.[112] Swazis give their elders great respect,[113] and this respect is reflected in the traditional worship of ancestors.[114] Recently, however, Swazis have begun converting to Christian religions in large numbers.[115] Labor is traditionally divided along gender lines, with men being responsible for plowing, building, and herding while women are responsible for domestic chores, cultivation, and weaving.[116]

In spite of a strong presence of tradition, it no longer makes economic sense for many Swazis to follow tradition because wages earned from modern, urban labor now exceed profits from traditional agricultural labor.[117] Nevertheless, King Sobhuza II stated in 1981 that "a nation will take steps to revive the customs which made [it] whole in the past."[118]

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104. ALAN R. BOOTH, SWAZILAND: TRADITION AND CHANGE IN A SOUTHERN AFRICAN KINGDOM 44 (1983).

105. Proclamation by His Majesty King Sobhuza II 12th April 1973, https://eisa.org.za/pdf/swa1973proclamation.pdf [https://perma.cc/9KXC-4ME8] [hereinafter 1973 Proclamation].

106. BOOTH, *supra* note 104, at 44–45. A "queen mother" is one whose rank and status determines the king's selection.

107. *Id.* at 47.

108. *Id.* at 45.

109. *Id.*

110. *Id.* at 46.

111. *Id.* at 43.

112. *See* BOOTH, *supra* note 104, at 39 (describing the elevation of Gwamile Mdluli's clan during her reign as queen mother).

113. *Id.*

114. *Id.* at 48–49.

115. *Id.* at 50–51.

116. *Id.* at 52.

117. *Id.* at 55.

118. BOOTH, *supra* note 104, at 78.

2. The Concessions Period

Swazi history began when the leader of the Dlamini clan, Sobhuza I, established Lobamba—which later became the royal capital of Swaziland—in 1820 during the time of Zulu expansionism and British imperialism in southern Africa.[119] Sobhuza I solidified his clan's preeminence among the other clans in the Mdzimba Mountains region.[120]

Under Sobhuza I's successor, Mswati, Swazi society truly began to flourish.[121] Mswati consolidated all power in the king by centralizing the military, claiming all cattle and captives captured during war, and claiming title to all lands and pasturage.[122] The king would distribute captives, cattle, and access to pasturage to war heroes and other favored subjects.[123] Since wealth in Swaziland was measured in the number of women, children, and cattle to which a man had claim,[124] the king essentially controlled all aspects of Swazi society.

The period after Mswati's death in 1865 was marked by competition for the Swazi kingship and foreign incursions from the Boers.[125] Eventually, Mbandzeni emerged as the king, but he initiated the concession period that gave away Swazi land rights to British agents and other foreigners seeking to cash in on the gold and mineral rush that boomed in the late nineteenth century.[126] Consequently, foreigners began appearing in Swaziland in greater numbers.[127] After the conclusion of the Anglo-Boer War in 1902, Swaziland had essentially become a British protectorate despite Britain's recognition of Swaziland's sovereignty in the Pretoria Convention of 1881,[128] the London Convention of 1884,[129] and the Convention of 1890.[130]

In 1899, the infant Sobhuza II was selected as the successor—his grandmother, Gwamile, acted as regent.[131] Gwamile was unable to resist the 1909 British partition that awarded nearly two-thirds of the Swazi's land to foreigners—the Swazis were left with 3,872 square kilometers of "Native Areas" out of the 10,485 square kilometers of the Swazi's land.[132]

When Sobhuza came of age in 1921, his main concern was reclaiming the Swazi's land from foreign settlers.[133] By the time of Swaziland's independence in 1968, 56% of the land had been returned to Swazis—partly due to Britain's 1946 Native Land Settlement Scheme and partly due to Sobhuza's Lifa fund, which levied Swazi cattle

119. *Id.* at 8.
120. *Id.* at 9.
121. *Id.* at 10.
122. *Id.* at 10–11.
123. *Id.* at 11.
124. BOOTH, *supra* note 104, at 8.
125. *Id.* at 11.
126. *Id.* at 11–16.
127. *See generally id.*
128. Pretoria Convention, Rep. Transvaal-U.K., art. 24, Aug. 3, 1881.
129. London Convention, S. African Rep.-U.K., art. 12, Feb. 27, 1884.
130. BOOTH, *supra* note 104, at 16–17.
131. *Id.* at 17.
132. *Id.* at 21. The partition did not go into effect until 1914. *Id.* at 20–21.
133. *Id.* at 29.

and cash for land repurchase.[134] But by 1962, an oversupply of labor resulted in a large number of strikes in the robust timber, sugar, and asbestos industries.[135] In 1963, a British army battalion was deployed to keep the peace, and it remained in Swaziland until independence.[136] Nevertheless, the monarchy was able to regain some of its pre-protectorate powers, enabling it to have a louder voice during the transition to independence.[137]

3. Post-Independence

Prior to independence, Sobhuza wielded enormous power as king. He held the land acquired by the Lifa fund in trust for the nation, and he distributed the land to his favorites.[138] Sobhuza and Gwamile had focused on centralizing the British protectorate's waning powers under the Swazi monarchy.[139] A joint Swazi and European council began drafting what would become Swaziland's first constitution in the early 1960s.[140] Sobhuza's position, which would vest more powers in the monarchy, was at odds with the foreigners' position, which sought to preserve economic power in the hands of European settlers.[141] One of the main points of contention was the disposition of subsurface mineral rights, which had previously enriched European settlers.[142] Against this backdrop, Sobhuza created the Imbokodvo National Movement to foment the monarchy's position amongst the populace.[143] Due to the popularity of the Imbokodvo National Movement, the king won 99.9% of Swazi's votes during a 1964 plebiscite in favor of his constitutional position.[144] Sobhuza's success in the plebiscite ultimately led to a redraft of the constitution that allowed the increase of the monarchy's power in practice and vested control over Swaziland's mineral rights in the king.[145] The new constitution was promulgated in February 1967, and Swaziland became independent on September 6, 1968.[146]

The immediate post-independence period was marked by a shaky transition, as poorly-trained Swazis began to replace highly-skilled foreign workers.[147] In 1972, Swaziland adopted the Land Speculation Control Act to regulate when non-citizens could acquire land.[148] In effect, this allowed the king to benefit from foreign investment by granting land to foreigners instead of Swazis.[149] By the 1980s, the king directly

134. *Id.* at 31.

135. *Id.* at 32.

136. BOOTH, *supra* note 104, at 32

137. Specifically, the king regained criminal jurisdiction and independent authority over a portion of the tax on Swazi natives. *Id.* at 33.

138. *Id.* at 65.

139. *Id.*

140. *Id.* at 63.

141. *Id.* at 66–67.

142. BOOTH, *supra* note 104, at 66.

143. *Id.* at 66–67.

144. *Id.* at 67.

145. *Id.* at 68–69, 105–06.

146. *Id.* at 69.

147. *Id.* at 70.

148. *See generally* Land Speculation Control Act (1972).

149. BOOTH, *supra* note 104, at 71.

controlled about 60% of the land, where 70% of the Swazi population lived.[150] The rest of the land originally remained in foreign hands, but gradually the Swazi government gained control of it.[151] As urbanization increased, however, the rural homestead was still "a principal locus of domestic life for most Swazis, including professionals, civil servants, traders, and workers in the modern sector of the economy."[152]

Sobhuza also reintroduced the traditional *induna* system, which mandated that a king's representative, salaried by a company, handle all labor disputes.[153] By 1973, workers were striking at the Havelock asbestos mine.[154] The unrest allowed the Ngwane National Liberatory Congress ("NNLC") to gain support as an opposition group to the king's political party.[155] In the political aftermath of the NNLC's success, Sobhuza suspended the constitution, dissolved the Swazi parliament, and banned all political parties on April 12, 1973.[156] Sobhuza became the absolute ruler of Swaziland: "I, Sobhuza II, King of Swaziland, . . . have assumed supreme power in the Kingdom of Swaziland and . . . all Legislative, Executive and Judicial power is vested in myself."[157]

In 1975, police tear-gassed Swazi railroad workers who marched on the royal residence.[158] In 1977, the Teachers' Association was dissolved, causing riots in Mbabane and Manzini where the police were ordered to shoot the rioters.[159] Mass arrests and tear gas halted a strike by sugar workers in 1978.[160] Work stoppages halted the Ezulwini hydroelectric project in 1982.[161]

The 1980s Swazi government made a point of advertising its lack of trade unions and low wages to encourage potential foreign investors,[162] but found it hard to balance pressure from the newly educated class of Swazis demanding higher roles in the economy and the need for foreign investment from companies that preferred to leave Swazis in middle management.[163]

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150. *Id.* at 91.

151. *Id.*

152. *Id.* at 39.

153. *Id.* at 72. This had been the cause of labor grievances in the 1963 strikes. *Id.*

154. *Id.*

155. BOOTH, *supra* note 104, at 72.

156. 1973 Proclamation, *supra* note 105; BOOTH, *supra* note 104, at 73. One of the NNLC's prominent leaders was deported to South Africa. Following a successful appeal to the High Court by the NNLC, the Parliament divested the High Court of disputed citizenship matters through an amendment to the Immigration Act. The High Court, unsurprisingly, found this to be unconstitutional. Sobhuza immediately reacted to the High Court's ruling. *Id.*

157. 1973 Proclamation, *supra* note 105, art. 3.

158. BOOTH, *supra* note 104, at 75.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 103.

163. *Id.* at 60.

Sobhuza died on August 21, 1982, having been the world's longest-ruling monarch at the time.[164] He left behind a mixed legacy to Swaziland.[165] Sobhuza consolidated power into a strong, centralized Swazi government. Unfortunately, that centralization led to abuses and corruption that created a wealthy political elite that served at the leisure of an absolute monarch. But Sobhuza had also successfully negotiated a transfer of colonial rule into Swazi hands without revolution.

After Sobhuza's death, the *liqoqo* supplanted the Parliament as the main policy-making body.[166] Prince Makhosetive was to be king, while the queen regent, Dzeliwe, would rule until Makhosetive came of age.[167] In a shocking move, the *liqoqo* dismissed Dzeliwe from the queen regency and replaced her with Ntfombi Tfwala, Makhosetive's birth mother, after Dzeliwe requested to see the financial statements of the *liqoqo*'s holdings.[168] On April 25, 1986, Makhosetive was crowned King Mswati III in a private ceremony at the age of 18, and he rules Swaziland to this day.[169]

4. The Modern Era

Mswati's reign has been just as, if not even more, turbulent than Sobhuza II's reign.[170] Adding to Swaziland's instability, Mswati has earned a reputation as a playboy polygamist who spends lavishly on himself.[171] As king, Mswati has direct control over the Tibiyo Taka Ngwane fund, and he has been criticized of misusing the fund's wealth, meant to reinvigorate the Swazi economy, for his own personal gain.[172]

Under Mswati, labor unrest has persisted. The most infamous strike occurred in Manzini on April 12, 2011, the anniversary of the 1973 Proclamation that revoked the

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164. Wolfgang Saxon, *King Sobhuza of Swaziland Dies, Reigned 82 Years*, N.Y. TIMES (Aug. 23, 1982), http://www.nytimes.com/1982/08/23/obituaries/king-sobhuza-of-swaziland-dies-reigned-82-years.html [https://perma.cc/TQ85-NT4G]. It had been noted earlier that "[i]t is widely assumed that the succession will go smoothly, but what cannot be assumed is that the new King will inherit Sobhuza's tact or prestige. Indeed, since no Swazi under 90 is likely to remember another king, it was unclear today whether it was Sobhuza the man or the institution of the monarchy that was really being celebrated at his jubilee." Joseph Lelyveld, *The Lion of Swaziland Celebrates 60 Years as King*, N.Y. TIMES (Sept. 5, 1981), http://www.nytimes.com/1981/09/05/world/the-lion-of-swaziland-celebrates-60-years-as-king.html?pagewanted=all [https://perma.cc/Z99Z-EJBJ].

165. Lelyveld, *supra* note 164.

166. BOOTH, *supra* note 104, at 46.

167. *Id.* at 78.

168. Jonathan W. Rosen, *Last Dance for the Playboy King of Swaziland?*, NAT'L GEOGRAPHIC (Oct. 3, 2014), http://news.nationalgeographic.com/news/2014/10/141003-swaziland-africa-king-mswati-reed-dance/ [https://perma.cc/4ZCQ-CZSD]. Tfwala, who had never married Sobhuza, was wed to his corpse to legitimize her over Dzeliwe. *Id.*

169. *A Swazi, 18, Goes Home to Be King*, N.Y. TIMES (Apr. 26, 1986), http://www.nytimes.com/1986/04/26/world/a-swazi-18-goes-home-to-be-king.html [https://perma.cc/MXG4-TFMG].

170. As Alan Booth noted in 1983, "[i]t falls to a new generation of leadership to ensure the continuity of [Sobhuza's] control in the even more treacherous era that is just beginning." BOOTH, *supra* note 104, at 132.

171. Rosen, *supra* note 168. Interestingly, Sobhuza II had as many as 70 wives while Mswati has only 15. Nevertheless, Sobhuza was regarded as a strong leader who consolidated the king's power while Mswati has largely been seen as an ineffectual partyer. At least three of Mswati's wives have fled the country, claiming physical and emotional abuse at the king's hands. *Id.*

172. Particularly damning was Mswati's acquisition of a 17 million USD private jet. *Id.*

original constitution.[173] Police used tear gas and water cannons to disperse crowds protesting the lack of workers' rights and the prohibition on political parties.[174] This demonstration had been a follow-up protest of one that occurred in Mbabane just one month earlier.[175] In the aftermath, at least seven labor leaders were arrested.[176] Before the protest commenced, the state-owned *Times of Swaziland* called on Swazis to "ignore the April 12th, 2011 'uprising,' and celebrate the [2005] Swazi Constitution on the same day instead!"[177] It labeled the protestors as "forces within Swaziland yearning to destroy this beautiful mountainous kingdom by orchestrating an uprising comparable to those of Tunisia, Egypt and Libya."[178]

Labor leaders are often subject to arrest and arbitrary detention.[179] Thulani Maseko, a leading labor activist and human rights lawyer, has been frequently jailed for his advocacy for Swazi trade unions.[180]

The 2005 Constitution had not actually overruled the 1973 Proclamation that vested all executive, legislative, and judicial power in the king.[181] But the Swazi government's position is that the 1973 Proclamation does not need to be abrogated because the 2005 Constitution is still in force.[182] The Swazi government did not assert, however, that the 2005 Constitution actually repealed the 1973 Proclamation, and draft language to repeal the 1973 Proclamation has been rejected. Thus, the 1973 Proclamation still remains operable, leading many to call King Mswati III Africa's only absolute monarch.

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173. Xan Rice, *Swaziland Pro-Democracy Protests Met by Teargas and Water Cannon*, GUARDIAN (Apr. 12, 2011), http://www.theguardian.com/world/2011/apr/12/swaziland-riot-police-attack-democracy-protesters [https://perma.cc/5E9N-JEKQ].

174. *Id.*

175. *Id.*

176. *Id.*

177. Dumezweni Dlamini & Shiselweni Mbelebeleni, *Celebrate the Constitution on April 12th*, TIMES OF SWAZ. (Apr. 12, 2011, 12:00 AM), http://www.times.co.sz/index.php?news=63709&vote=5&aid=63709&Vote=Vote [https://perma.cc/5KZ4-LSQS].

178. *Id.*

179. *See, e.g.*, *Swaziland Cracks Down on Labor Advocates*, FREEDOM HOUSE (Sept. 6, 2013), https://freedomhouse.org/article/swaziland-cracks-down-labor-advocates [https://perma.cc/8FPG-SYZF] (condemning Swaziland's arrest of Jay Naidoo, a founder of the Congress of South African Trade Unions, who was attending an inquiry into the problems faced by Swaziland's labor unions).

180. *See, e.g.*, *Swaziland: New Arrest of Mr. Thulani Rudolf Maseko and Mr. Bheki Makhubu*, WORLDWIDE MOVEMENT FOR HUM. RTS. (Apr. 11, 2014), https://www.fidh.org/en/region/Africa/swaziland/15120-swaziland-new-arrest-of-mr-thulani-rudolf-maseko-and-mr-bheki-makhubu [https://perma.cc/V2ZG-SQDR] (reporting Thulani Maseko's arrest a few days after having been released from a previous arrest).

181. *See Swaziland: 1973 Decree is Alive, Activists Tell UN*, ACTION FOR S. AFR. (Oct. 14, 2011), http://www.actsa.org/newsroom/2011/10/swaziland-1973-decree-is-alive-activists-tell-un/ [https://perma.cc/M5BP-LXT7] (noting that the 1973 decree allows the king to override the Swazi constitution's protection of freedom of assembly).

182. Mfanukhona Nkambule, *The 1973 Decree Puzzle*, TIMES SWAZ. (Dec. 8, 2013, 3:25 AM), http://www.times.co.sz/news/94017-the-1973-decree-puzzle.html [https://perma.cc/GWF6-4252].

C. *The AGOA*

President Bill Clinton signed the AGOA into law on May 18, 2000.[183] Congress renewed the AGOA on June 25, 2015, and President Barack Obama signed the renewed AGOA into law on June 29, 2015.[184] The renewal extends the AGOA for ten years and seeks to provide security for investors in sub-Saharan Africa.[185]

Overall, the AGOA is a TPP that aims to develop sub-Saharan African countries[186] that are committed to the rule of law, economic reform, and the eradication of poverty, among other goals.[187] Accordingly, the President is authorized to designate a sub-Saharan African country as eligible for AGOA benefits, so long as the President determines that the country has established or is making substantial progress towards establishing the following: (1) A market-based economy; (2) the rule of law, political pluralism, and the right to due process, a fair trial, and equal protection under the law; (3) the elimination of barriers to U.S. trade and investment; (4) economic policies to reduce poverty, increase the availability of healthcare and educational opportunities, expand physical infrastructure, promote the development of private enterprise, and encourage the formation of capital markets through micro-credit or other programs; (5) a system to combat corruption and bribery; and (6) protection of internationally-recognized worker rights.[188] If the President determines that an eligible sub-Saharan African country is not making continual progress to meet the above requirements, the President will terminate that country's eligibility under the AGOA. Additionally, in order for a sub-Saharan African country to be designated eligible, the President must determine that the country is not engaged in activities that undermine U.S. national security or foreign policy[189] or supports gross violations of internationally-recognized human rights or international terrorist acts.[190]

Once a sub-Saharan African country is designated AGOA-eligible, the AGOA allows certain textiles and apparels to be imported into the United States without any duty or quantitative restriction,[191] provided the sub-Saharan African country complies with the AGOA's transshipment-prevention provisions.[192] The AGOA also requires the President to develop a plan to negotiate free-trade agreements with interested AGOA-eligible countries.[193] Regardless of AGOA-eligibility, the President must

183. *African Growth and Opportunity Act*, INT'L TRADE ADMIN., http://trade.gov/agoa/index.asp [https://perma.cc/A8P6-WFE7] (last visited June 30, 2015).

184. *AGOA Legislation*, AFR. GROWTH OPPORTUNITY ACT FORUM, http://agoa.ga/infos-agoa/nouvelle-loi-sur-lagoa [https://perma.cc/7TAC-Z6FC] (last visited Oct. 5, 2016).

185. *FACT SHEET: President Obama Signs Two Bills into Law to Rewrite the Rules of Global Trade*, WHITE HOUSE, https://www.whitehouse.gov/sites/default/files/docs/trade_bills_fact_sheet.pdf [https://perma.cc/S9Q9-RCF4] (last visited May 7, 2016).

186. 19 U.S.C.A. § 3706 (Westlaw through Pub. L. No. 114-244).

187. *Id.* § 3702.

188. *Id.* § 3703(1)(F).

189. *Id.* § 3703(2).

190. *Id.* § 3703(3).

191. 19 U.S.C.A. § 3721(a).

192. *See id.* § 3722 (detailing qualifications for preferential treatment of shipments and customs procedures and enforcement regulations).

193. *Id.* § 3723(b)(1).

target technical assistance towards sub-Saharan African countries.[194] Additionally, under the Generalized System of Preferences, the President may extend duty-free status to import-sensitive articles from AGOA-eligible countries after consultation with the International Trade Commission.[195] Over 1,800 tariff line items have gained duty-free treatment through this provision.[196]

III. THE CASE STUDY

A. Swaziland's Compliance with Convention 87

Swaziland became a member of the ILO in 1975 and ratified Convention 87 on April 26, 1978.[197] Since its independence in 1968, Swaziland participated in ILO proceedings as an observer.[198] The Government representative, Minister of Labor Prince Bhekimpi A. Dlamini, first addressed the ILC, stating "[t]hrough the wise leadership of His Majesty King Sobhuza II, the Government of Swaziland strongly believes that economic development programmes are a means of achieving social goals giving man freedom, dignity, equality of opportunity and social justice."[199] He further stated that while "Swaziland is undergoing a constitutional change . . . workers and employers are all free to form their individual organisations or associations or trade unions."[200]

In spite of this optimistic language, the CAS has examined Swaziland's application of Convention 87 eleven times during the AGOA's 17-year existence: In 2000, 2001, 2002, 2005, 2009, 2010, 2011, 2013, 2014, 2015, and 2016.[201] There is a high

194. *Id.* § 3732(b).

195. 19 U.S.C.S. § 2466a(b)(1) (LEXIS through Pub. L. No. 114-219).

196. *Determining the AGOA-Eligibility of a Specific Product*, INT'L TRADE ADMIN., http://trade.gov/agoa/eligibility/product-eligibility.asp [https://perma.cc/DK3G-F95M] (last visited July 1, 2015).

197. *Ratifications for Swaziland*, INT'L LAB. ORG., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103336 [https://perma.cc/PA4R-ZV4V] (last visited Apr. 13, 2016).

198. INT'L LAB. OFFICE, INTERNATIONAL LABOUR CONFERENCE: SIXTIETH SESSION, RECORD OF PROCEEDINGS 142 (1975) [hereinafter 1975 RECORD OF PROCEEDINGS].

199. *Id.*

200. *Id.*

201. INT'L LAB. OFFICE, INTERNATIONAL LABOUR CONFERENCE: EIGHTY-EIGHTH SESSION, RECORD OF THE PROCEEDINGS 23/80–23/84 (2000) [hereinafter 2000 RECORD OF THE PROCEEDINGS]; INT'L LAB. OFFICE, INTERNATIONAL LABOUR CONFERENCE: EIGHTY-NINTH SESSION, RECORD OF THE PROCEEDINGS 19 pt. 2/54–2/56 (2001) [hereinafter 2001 RECORD OF THE PROCEEDINGS]; INT'L LAB. OFFICE, INTERNATIONAL LABOUR CONFERENCE: NINETIETH SESSION, RECORD OF THE PROCEEDINGS 28 pt. 2/30–2/33 (2002); INT'L LAB. OFFICE, INTERNATIONAL LABOUR CONFERENCE: NINETY-THIRD SESSION, RECORD OF THE PROCEEDINGS 22 pt. 2/41–2/43 (2005); INT'L LABOUR OFFICE, INTERNATIONAL LABOUR CONFERENCE: NINETY-EIGHTH SESSION, RECORD OF THE PROCEEDINGS 16 pt. Two/64–Two/68 (2009); INT'L LAB. OFFICE, INTERNATIONAL LABOUR CONFERENCE: NINETY-NINTH SESSION, RECORD OF THE PROCEEDINGS 16 pt. II/42–II/48 (2010); INT'L LAB. OFFICE, INTERNATIONAL LABOUR CONFERENCE: ONE HUNDREDTH SESSION, RECORD OF THE PROCEEDINGS 18 pt. II/46–II/52 (2011); INT'L LAB. OFFICE, INTERNATIONAL LABOUR CONFERENCE: ONE HUNDRED AND SECOND SESSION, RECORD OF THE PROCEEDINGS 16 pt. II/64–II/71 (2013); INT'L LAB. OFFICE, INTERNATIONAL LABOUR CONFERENCE: ONE HUNDRED AND THIRD SESSION, RECORD OF THE PROCEEDINGS 13 pt. II/63–II/70 (2014) [hereinafter 2014 RECORD OF THE PROCEEDINGS]; INT'L LAB. OFFICE, INTERNATIONAL LABOUR CONFERENCE: ONE HUNDRED AND FOURTH SESSION, RECORD OF THE PROCEEDINGS 14 pt. II/78–II/84

probability that the CAS will examine the case again in 2017.[202] The Swazi government has been frequently criticized for the various permutations of its Industrial Relations Act, Public Order Act, Suppression of Terrorism Act, and, perhaps most importantly, the 1973 decree that vested all power in the Swazi king.[203] Swaziland's representative to the ILO would frequently announce that amendments or modifications to questioned legislation had been passed just before the ILC.[204] Other members of the ILC bemoaned that this practice prevented adequate review of Swaziland's compliance with Convention 87.[205]

In 1994, 1996, and 2000, the Swazi government interfered with the selection of the Swazi workers' representative before the ILC, in blatant attempts to prevent Jan Sithole of the Swaziland Federation of Trade Unions from addressing the ILC.[206] Given Sithole's testimony of the abuses suffered by Swazi workers and his own mistreatment,[207] the Swazi government's actions attempted to circumvent the ILC's review of its application of Convention 87.

The U.S. Government representative has consistently petitioned the Swazi government to seek out and comply with the ILO's technical assistance in modifying Swazi national legislation practice.[208] As early as 2000, however, the tripartite discussions before the CAS noted that the ILO's technical assistance to Swaziland did not prompt the government to comply with Convention 87.[209] Indeed, despite numerous conclusions adopted by the CAS that the Swazi government should request further ILO technical assistance, little had substantially changed with respect to the Swazi government's compliance with Convention 87 in both its national legislation and practice between 2000 and 2014.

(2015) [hereinafter 2015 RECORD OF THE PROCEEDINGS]; INT'L LAB. OFFICE, INTERNATIONAL LABOUR CONFERENCE: ONE HUNDRED AND FIFTH SESSION, PROVISIONAL RECORD THE PROCEEDINGS 16 pt. II/79–II/86 (2016).

202. 2000 RECORD OF THE PROCEEDINGS, *supra* note 201, at 23/83.

203. *See, e.g.*, 2015 RECORD OF THE PROCEEDINGS, *supra* note 201, at pt. II/80 (recording criticism of the Industrial Relations Act, the Public Order Act, the Suppression of Terrorism Act, and the 1973 Proclamation).

204. *See, e.g.*, 2000 RECORD OF THE PROCEEDINGS, *supra* note 201, at 23/80 (describing the Swazi Parliament announcement of amendments to its legislation that went into effect just before the beginning of the ILC).

205. *See, e.g.*, *id.* at 23/81 (describing the Employer members calling for the Committee to note the modifications had been introduced before they could be adequately reviewed).

206. INT'L LAB. OFFICE, INTERNATIONAL LABOUR CONFERENCE: EIGHTY-FIRST SESSION, RECORD OF THE PROCEEDINGS 20/40 (1994); INT'L LAB. OFFICE, INTERNATIONAL LABOUR CONFERENCE: EIGHTY-THIRD SESSION, RECORD OF THE PROCEEDINGS 5/12–5/13 (1996); 2000 RECORD OF THE PROCEEDINGS, *supra* note 201, at 23/81.

207. *See, e.g.*, INT'L LAB. OFFICE, INTERNATIONAL LABOUR CONFERENCE: NINETY-SECOND SESSION, RECORD OF THE PROCEEDINGS 19/33–19/34 (2004) (describing the abuses of the Swazi government); 2000 RECORD OF THE PROCEEDINGS, *supra* note 201, at 23/81 (noting the worker members' report of Sithole's abuse by, allegedly, Swazi government forces).

208. *See, e.g.*, 2001 RECORD OF THE PROCEEDINGS, *supra* note 201, at pt. 2/56 (describing the U.S. Government representative's request to the Swazi government to continue to seek ILO technical assistance).

209. *See, e.g.*, 2000 RECORD OF THE PROCEEDINGS, *supra* note 201, at 23/83 (describing the Norwegian Worker member's statement that technical assistance was not increasing the Swazi government's compliance with Convention 87).

B. Removal from the AGOA Eligibility List

During the 2014 ILC, the U.S. government delegate expressed grave concern regarding Swaziland's noncompliance with Convention 87, specifically within the context of Swaziland's AGOA eligibility.[210] On June 26, 2014, President Obama removed the Kingdom of Swaziland from the AGOA's eligibility list for failing to protect workers' rights to freely associate and organize.[211] The removal came into effect on January 1, 2015.[212] Obama announced the removal two weeks after the conclusion of the 2014 ILC.[213] U.S. Trade Representative Michael Froman stated, however, "[w]e hope to continue our engagement with the Government of the Kingdom of Swaziland on steps it can take so that worker and civil society groups can freely associate and assemble and AGOA eligibility can be restored."[214]

Prior to Swaziland's removal from the AGOA-eligibility list, the United States had set five benchmarks that Swaziland needed to meet in order to retain AGOA's benefits.[215] The five benchmarks were:

> (1) Full passage of the amendment to the Industrial Relations Act allowing for the registration of trade unions and employer federations; (2) Full passage of the amendment to the Suppression of Terrorism Act; (3) Full passage of the amendment to the Public Order Act allowing for the full recognition of the freedom of assembly, speech, and organization; (4) Full passage of the amendments to sections 40 and 97 of the Industrial Relations Act; and (5) Dissemination and implementation of the Code of Good Practice on Protest and Industrial Action.[216]

During the 2014 ILC, the CAS examined Swaziland's application of Convention 87.[217] The government representative of Swaziland claimed the dissolution of the Swazi Parliament made it impossible for the Industrial Relations Act's amendments to be passed.[218] The amendment to the Suppression of Terrorism Act also awaited Parliamentary approval.[219] Lastly, the government representative requested further technical assistance from the ILO to finalize the draft Code of Good Practice on

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210. 2014 RECORD OF THE PROCEEDINGS, *supra* note 201, at pt. II/69.

211. *General Country Eligibility Provisions*, INT'L TRADE ADMIN., http://trade.gov/agoa/eligibility/index.asp [https://perma.cc/AK4A-2EMR] (last visited June 30, 2015); *President Obama Removes Swaziland, Reinstates Madagascar for AGOA Benefits*, OFFICE OF U.S. TRADE REP. (June 2014), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/June/President-Obama-removes-Swaziland-reinstates-Madagascar-for-AGOA-Benefits [https://perma.cc/GKC9-WKBC].

212. *President Obama Removes Swaziland, Reinstates Madagascar for AGOA Benefits*, *supra* note 211.

213. 3 C.F.R. § 9145 (2014).

214. *President Obama Removes Swaziland, Reinstates Madagascar for AGOA Benefits*, *supra* note 211.

215. Stanley Khumalo, *Swaziland Attending to AGOA Recommendations – Prime Minister*, AGOA.INFO (June 2, 2014), https://agoa.info/news/article/5420-swaziland-attending-to-agoa-recommendations-prime-minister.html [https://perma.cc/TT8Y-ZR9X].

216. *Id.*

217. *See* 2014 RECORD OF THE PROCEEDINGS, *supra* note 201, at pt. II/63 (noting Swaziland's commitment to implementing Convention No. 87 and the problems the country's government faced in doing so).

218. *Id.* at pt. II/64.

219. *Id.* at pt. II/66.

Protest and Industrial Action.[220] Speaking on the loss of AGOA-eligibility, Jan Sithole, a member of the Swazi Parliament and a former leader of the Swaziland Federation of Trade Unions, stated that the Industrial Relations Act had not been sufficiently amended to meet the United States's five benchmarks.[221] When the Parliament returned the bill amending the Act to the minister in order to include all five benchmarks, however, the minister never returned the bill to Parliament.[222] Swaziland thus failed to meet the United States's benchmarks.

Thanks largely to the AGOA's creation of duty-free garment exports, Swaziland developed a 100 million USD garment industry employing roughly 17,000 workers.[223] The removal of AGOA-eligibility has caused many to predict the collapse of the industry.[224]

C. Swaziland's Actions After Removal Before the ILO

After the announcement of Swaziland's removal from the AGOA eligibility list, however, the Swazi government began implementing a series of amendments to its national legislation, designed to pursue the United States's five benchmarks for Swaziland to retain AGOA benefits.[225] The Swazi government delegate announced at the ILC that amendments had been passed to sections 40 and 97 of the Industrial Relations Act, and that trade unions would now be duly registered.[226] Following the passage of the amendments, the Trade Union Congress of Swaziland, the Federation of Swaziland Employers and Chamber of Commerce, and the Federation of the Swaziland Business Community became duly registered trade unions.[227] The draft amendments to the Suppression of Terrorism Act had been sent to the king's cabinet for review to ensure that law and order would not be compromised.[228] Swaziland requested ILO consultations for the amendment of the Public Order Act.[229] The Code of Good Practice had been sent to the Swazi attorney general for review.[230] The Swazi government delegation thus tracked every one of the United States's five benchmarks in its address before the 2015 ILC.

Yet in spite of registering these trade unions, Swaziland still faced pressure to fully comply with Convention 87. Several delegates called on Swaziland to free

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220. *Id.* at pt. II/64.

221. Welcome Dlamini, *Where is Jan Sithole – 8 Months Later?*, SWAZI OBSERVER (July 6, 2014), http://www.observer.org.sz/news/63641-where-is-jan-sithole-8-months-later.html [https://perma.cc/8CJ7-WVBF].

222. *Id.*

223. Rosen, *supra* note 168.

224. Disturbingly, the unemployment rate in Swaziland neared 40%. Increased unemployment does not bode well for the struggling domestic economy. *Id.*

225. *See* 2015 RECORD OF THE PROCEEDINGS, *supra* note 201, at pt. II/78 (2015) (describing the progress Swaziland has made in implementing amendments to its national legislation to achieve compliance with Convention 87).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

Thulani Maseko from imprisonment.[231] The Employers delegate noted that the registration of unions had taken six months after the amendments to the Industrial Relations Act had passed, with registration occurring the month before the 2015 ILC.[232] The Workers delegate declared that this was the sixth consecutive year that Swaziland had totally failed to adhere to Convention 87.[233] Moreover, the Industrial Relations Act still did not adhere to Convention 87 because it prohibited the formation of unions without prior authorization, which still had not been granted to some unions.[234]

At the 2015 ILC, Swaziland justified its arrest of Thulani Maseko because he allegedly made "a scurrilous attack on the judiciary, calculated to undermine the rule of law in Swaziland."[235] The Swazi government delegate also claimed that the Industrial Relations Act allowed unions to address public policy and administration, but did not allow them to engage in "issues which are of a purely political nature (including advocating for regime change through violent means)."[236] The Swazi government delegate condemned the subversion of unions by "a political agenda at the expense of [the unions'] core and primary mandate, which is the advance of socio-economic interests of workers."[237] Moreover, the Swazi government delegate claimed that its police were justified in its harsh treatment of unionists because of their violent assaults against the police force.[238] The CAS closed the examination of Swaziland and Convention 87 by urging Swaziland to unconditionally release Thulani Maseko; to register the Amalgamated Trade Union of Swaziland; to amend section 32 of the Industrial Relations Act; to amend the 1963 Public Order Act and the Suppression of Terrorism Act; to adopt the Code of Good Practice; and to cease interference in unions' activities.[239]

After the 2015 ILC, Swaziland's Supreme Court ordered the release of Thulani Maseko.[240] The Committee of Experts noted with satisfaction that the Swazi government had registered an additional union, the Federation of Swaziland Trade Unions, in June 2015.[241] Swaziland had not, however, registered the Amalgamated Trade Union of Swaziland, despite its application for authorization pending for over two years.[242] The Committee of Experts noted that the amendments to the 1963 Public Order Act will soon be presented to the Government and the social partners after a

231. *See, e.g.*, 2015 RECORD OF THE PROCEEDINGS, *supra* note 201, at pt. II/79 (2015) (noting the Swazi Employer members' concern about Thulani Maseko's imprisonment and the Swazi government's questionable justification for his detention).

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at pt. II/78.

236. *Id.*

237. 2015 RECORD OF THE PROCEEDINGS, *supra* note 201, at pt. II/78.

238. *Id.*

239. *Id.*

240. *HRF Welcomes the Release of Swazi Lawyer Thulani Maseko*, HUM. RTS. FOUND. (July 1, 2015), https://humanrightsfoundation.org/news/hrf-welcomes-the-release-of-swazi-lawyer-thulani-maseko-00443 [https://perma.cc/3ZSX-U4SQ].

241. INT'L LAB. OFFICE, REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS 137 (2016).

242. *Id.*

period of ILO technical assistance.[243] The Code of Good Practice had also been approved by the king's cabinet and would automatically pass through Parliament if it was not debated.[244] The Committee of Experts noted, however, that the Industrial Relations Act still permitted the Commissioner of Labour to prohibit the registration of a union at will.[245] The Swazi government had not provided the Committee of Experts with any information on the amendments of the Suppression of Terrorism Act.[246]

IV. ANALYSIS

One may look at the immediate results of Swaziland's removal from the AGOA-eligibility list and conclude that it had no effect on the national practice of noncompliance with Convention 87, but such a conclusion would be premature. The removal has been effective for less than two years, and only one ILC has been held. But during the 2015 ILC, the Swazi government representative addressed each of the United States's five benchmarks for retaining AGOA-eligibility status. The Swazi government has taken some action to reform its government—or at least its appearance—so as to comply with the eligibility provisions of the AGOA. While it may be too early to affirmatively conclude that the AGOA coerced the Swazi government to take action, it appears that it was the motivating factor for at least *some* action, especially in the context of almost total noncompliance with Convention 87 since Swaziland's ratification and prior to its removal from the AGOA-eligibility list.

But what contributed to the effectiveness—or potential effectiveness—of the loss of AGOA-eligibility in coercing the Swazi government to comply with Convention 87? Recognizing the limitations of enforcement regimes in the environmental context, David Zalob stated "[t]he selection of a given form or technique of enforcement will necessarily depend on the characteristics of the specific [] situation. One could refer to these characteristics as 'enforcement factors.'"[247] Zalob identifies environmental enforcement factors as (1) the type and degree of environmental degradation; (2) the complexity of the technology necessary to abate the problem; (3) the nature of the noncompliant entity and its economic power; and (4) the economic and social ramifications of enforcement.[248] Adapted to Swaziland and the AGOA, Zalob's enforcement factors can be described as (1) the type and degree of Swaziland's human rights' violations; (2) the complexity of reforming Swaziland's noncompliance; (3) Swaziland's economic power; and (4) the acceptability of coercing Swaziland to comply with Convention 87.

Reflected within these enforcement factors are the four spectra mentioned in Part I. The first factor corresponds to the noncompliant-behavior spectrum; the second factor involves the benefit spectrum; the third factor is related to the enforcement action spectrum; and the fourth factor corresponds to the acceptability spectrum. The

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. David S. Zalob, *Approaches to Enforcement of Environmental Law: An International Perspective*, 3 HASTINGS INT'L & COMP. L. REV. 299, 305 (1979).

248. *Id.* at 305–09.

following paragraphs will analyze the effectiveness of the TPP enforcement model through these enforcement factors and the four spectra.

Looking to the first factor, Swaziland's violation of the right to organize was severe and systemic. Its actions are in the center of the noncompliant-behavior spectrum because they were the violation of a general international obligation, rather than a severe violation, such as the crime of genocide, or a minor violation, such as violating a procedural obligation. Such a placement along the noncompliant-behavior spectrum warranted an enforcement action, as evidenced by the ILO frequently invoking its shaming mechanism against Swaziland, the CAS's review of Swaziland's compliance. This review allowed Government, Workers, and Employers delegates from a multitude of states to criticize Swaziland's noncompliance with Convention 87.[249] Nevertheless, the most severe enforcement action taken against Swaziland, aside from the CAS review, was the inclusion of special paragraphs in the Committee of Experts's reports.[250] The lack of other enforcement actions potentially reveals an interesting dilemma of using international bodies to enforce international law. It is possible that the ILO forum actually discouraged other states from taking any enforcement action. In other words, states may have believed that noncompliant behavior should be handled within the forum. Because the ILO's enforcement powers are limited to shaming, via selection for CAS review and the use of special paragraphs, the benefit Swaziland derived from noncompliance with Convention 87 was not outweighed by shaming's signaling effect.

Analyzing the benefit Swaziland derived from noncompliance invokes the second enforcement factor and the benefit spectrum. To understand the difficulty of coming into compliance with Convention 87, one must understand how Swaziland benefitted from noncompliance. Swaziland's autocratic nature and historically-justified mistrust of foreigners explain these benefits. As discussed in Part II.B, Swaziland suffered a disastrous concession period at the hands of foreigners seeking to exploit its natural resources. In recovering from this period, Sobhuza II centralized power under the monarchy in order to directly control the distribution of land and resources—which, as a second-order effect, required the king to control Swaziland's labor, since it was largely concentrated in the resource-extraction entities. Sobhuza's power and his monarchy's stability largely rested on this ability. Mswati III's monarchy is also heavily dependent on his ability to control Swaziland's land and its labor. Importantly, the ability to control the distribution of land—and labor—has greatly enriched the royalty and its favorites. Consequently, challenges to Swaziland's labor regime are challenges to the monarchy's stability. Because of this, Swaziland has reacted harshly to internal protestations of its international labor rights violations.[251]

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249. *See, e.g.*, 2014 RECORD OF THE PROCEEDINGS, *supra* note 201, at pt. II/67–70 (noting the government delegates of Albania, all EU states, Iceland, Macedonia, Moldova, Montenegro, Norway, Serbia, Turkey, and the United States; workers' delegates of Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Nigeria, South Africa, the United Kingdom, the United States, Zambia, and Zimbabwe; and the employers' delegate of Zimbabwe criticizing Swaziland's noncompliance with Convention 87).

250. *See, e.g.*, 2015 RECORD OF THE PROCEEDINGS, *supra* note 201, at pt. II/78 (including Swaziland in the 2015 ILC special paragraphs due to continuous noncompliance with Convention 87).

251. For more information on Swaziland's harsh reactions to internal protests, see *2014 Human Rights Reports: Swaziland*, U.S. DEP'T OF STATE, http://www.state.gov/j/drl/rls/hrrpt/2014/af/236412.htm [https://perma.cc/2VBK-7XQV] (last visited Oct. 8, 2016).

Externally, Swaziland is still suspicious of foreign actors that attempt to interfere in its internal affairs, as a consequence of its concessions period.[252] This is not an attitude unique to Swaziland in Africa, as many former European colonies look askance at foreigners that attempt to meddle in their domestic affairs.[253] But Swaziland's continued insistence before the ILO that it is attempting to comply with Convention 87 suggests a desired immersion into the international system. Swaziland's actions reveal a dilemma that many non-democratic states have when they attempt to enter the traditional international arena: How to maintain the state's non-democratic bases of power while complying with the essentially Western, democratic ideals that make up the international order and most of international law. This dilemma will not be discussed further here, but it is noted because it conditions the benefit that Swaziland derives from noncompliance with Convention 87. Noncompliance negatively affects Swaziland's standing in the international order, so it has attempted to create the appearance of compliance—revealing that noncompliance is not completely beneficial.

When both the internal and external factors combine, the benefit Swaziland derives from noncompliance with Convention 87 is great. By preventing workers from freely associating, the Swazi monarchy prevents challenges to its traditional power base. The Swazi monarchy also attempts an appearance of compliance before the ILO while at the same time avoiding direct foreign interference in its domestic affairs.

Considering the third factor, it is important to recall that superior economic power of an enforcing state is necessary for a TPP enforcement model to be effective. Applied to the present case, the United States has vastly greater economic power over Swaziland as Swaziland simply is not a large market for U.S. exports, nor are imports from Swaziland an essential component of the U.S. economy.[254] This comparison of economic power is necessary to determine whether the TPP enforcement model will be effective. If Swaziland had more economic power in the relationship, the removal of TPP benefits would likely not create an incentive for Swaziland to reform its noncompliant behavior. The United States's economic power, however, had the effect of creating employment for roughly 9.5% of Swaziland's active workforce through the AGOA.[255] In an economy with around 40% unemployment, the number of jobs created by the AGOA's textile duties exemption stabilized a large percentage of the labor force.[256] The removal of the AGOA's benefits thus had a highly coercive effect. The removal lies in the middle of the enforcement-action spectrum, surpassing the ILO's weaker shaming enforcement action.

Finally, the fourth factor relates to the acceptability spectrum. This factor and spectrum are inherently linked to the first and third factors and the noncompliant-

252. *Supra* Part II, B, 2.

253. *See* Antony Otieno Ong'ayo, Political Instability in Africa Where the Problem Lies and Alternative Perspectives (Sept. 19, 2008), http://www.diaspora-centre.org/DOCS/Political_Instabil.pdf [https://perma.cc/7XXK-WLRH] (explaining that in many cases instability in African countries is caused by external interference in internal affairs).

254. *See Swaziland*, OFFICE OF U.S. TRADE REPRESENTATIVE, https://ustr.gov/countries-regions/africa/southern-africa/swaziland [https://perma.cc/GQ54-C5AQ] (last visited June 20, 2016) (noting that Swaziland was the 136th supplier of goods to the United States and the 185th export market in 2013).

255. *Swaziland*, CIA WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/wz.html [https://perma.cc/HPN7-XUM9] (last visited May 11, 2016).

256. *Id.*

behavior and enforcement-action spectra. If the enforcement action is too extreme as compared to the noncompliant behavior, the enforcement action will be less acceptable to the international community. For example, enforcing Convention 87 by using military force would be unacceptable. In this case, Swaziland's violation of Convention 87 was severe enough to merit an enforcement action, as evidenced by the CAS's frequent review of Swaziland. There appears to have been no criticism from the international community on the United States's removal of AGOA benefits from Swaziland.[257] This implies that the enforcement action was highly acceptable to the international community.

An additional element to consider under this factor and spectrum is the internal acceptability of the removal of AGOA benefits. As mentioned in Part I, an enforcement action will be less effective if a state is able to derive domestic approval by not folding to international pressure, as exemplified by the case of the former sanctions against Iran. In this case, the removal of AGOA-eligibility operated differently from other types of enforcement mechanisms. The AGOA initially provided a direct benefit to Swazi workers as evidenced by the creation of employment for roughly 9.5% of Swaziland's active workforce. The AGOA's benefits likely created internal approval for its provisions. Coupled with the United States's clear warnings about removal and its provision of five concrete steps to retain the AGOA's benefits, the actual removal was likely internally viewed as legitimate, as evidenced by Jan Sithole's statements.[258] The removal of the AGOA's benefits thus defeated the possibility that Swaziland could derive domestic approval by claiming it was not folding to international pressure.

When looking at the whole of the case study, the removal of AGOA benefits as an enforcement action correlates well with the enforcement factors and analytical spectra. Swaziland's noncompliant behavior was a moderate violation of its international obligations and the violation was systemic enough to merit an enforcement action. Previous ILO attempts to enforce Convention 87 were ineffective because they did not outweigh the benefits Swaziland derived from noncompliant behavior—namely, the control over the monarchy's internal bases of power and skepticism of external interference. The United States's removal of AGOA benefits had the potential to be more effective because of the large economic power it wielded in comparison to Swaziland and Swaziland's textile sector's dependence on the AGOA benefits. Given the severity of Swaziland's noncompliant behavior and the previous inability to enforce compliance, the United States's enforcement action appeared legitimate both internationally and domestically within Swaziland.

All of these conclusions suggest that the removal of AGOA benefits will effectively coerce Swaziland to comply with Convention 87. In spite of this, Swaziland's compliance has not been immediately forthcoming. It has taken some steps to meet the United States's five benchmarks to regain AGOA eligibility, but Swaziland's actions have not yet been determinative.

Nevertheless, it appears too early to conclude that the removal of the AGOA's benefits did not effectively enforce Swaziland's compliance with Convention 87. The

257. *See President Obama Removes Swaziland, Reinstates Madagascar for AGOA Benefits*, *supra* note 211 (explaining that the U.S. action was reasonable because the U.S. will continue to work with Swaziland and once Swaziland complies with the convention, it can become eligible for AGOA benefits).

258. *See* Dlamini, *supra* note 221 (admitting that Parliament failed to bring a bill for Swaziland to meet the United States' five benchmarks).

fact that Swaziland has been acting to address the United States's five benchmarks indicates that the removal of the AGOA's benefits had at least some effect. Additionally, the Swazi government, after years of not even attempting to comply with Convention 87, began implementing a series of measures to bring its domestic law and practice in line with the Convention. What remains to be seen is just how far Swaziland will go in order to regain AGOA eligibility.

CONCLUSION AND OTHER CONSIDERATIONS

As for my assertion that a TPP enforcement model is an effective tool for enforcing international law, the case study of Swaziland, the AGOA, and ILO Convention 87 is thus inconclusive as yet. Perhaps in this year's ILC, Swaziland will introduce evidence of new measures and steps it has taken to regain AGOA-status. But the strong correlation between the enforcement factors and my analytical spectra suggests that the removal of AGOA benefits will ultimately coerce Swaziland to comply with Convention 87, assuming of course that the benefits are not reinstated until Swaziland has met the United States's five benchmarks. Once this occurs, this case study will be an exemplary demonstration of a TPP enforcement model in action.

Other considerations should be also taken into account when contemplating the TPP enforcement model. Is it morally correct for developed states to use their economic leverage to coerce developing states to comply with international law? Could its use actually be a violation of a developing state's sovereignty? How would a TPP enforcement model be effective in enforcing international laws that do not have international forums of review like the ILO provides for Convention 87? These questions remain unanswered as they are beyond the scope of this Note.

In spite of the remaining questions, the TPP enforcement model presents a unique alternative to enforcing international law against state regimes that systemically do not comply with their international obligations, particularly where the violations are not extreme enough to warrant more extreme enforcement actions.


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