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GEORGE MASON UNIVERSITY SCHOOL OF LAW  
JOURNAL OF INTERNATIONAL  
COMMERCIAL LAW

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**ARTICLES**

IS A HUNGARIAN TRUST A CLONE OF THE ANGLO-  
AMERICAN TRUST, OR JUST A TYPE OF CONTRACT?:  
PARSING THE ASSET-MANAGEMENT PROVISIONS OF THE  
NEW HUNGARIAN CIVIL CODE  
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BEYOND PRE-RECONSTRUCTION SLAVERY:  
AMERICA'S MODERN DAY TRADE PRACTICES AND  
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*Alyssa B. Coffey*

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SPRING ISSUE

NUMBER 2

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**CONTENTS**

**ARTICLES**

IS A HUNGARIAN TRUST A CLONE OF THE ANGLO-AMERICAN  
TRUST, OR JUST A TYPE OF CONTRACT?: PARSING THE  
ASSET-MANAGEMENT PROVISIONS OF THE NEW HUNGARIAN  
CIVIL CODE      *Prof. Charles E. Rounds, Jr. & István Illés, Esq.*      153

CONTENTIOUS MODES OF UNDERSTANDING  
CHINESE COMMERCIAL LAW      *Tianshu Zhou & Mathias Siems*      177

**NOTES**

BEYOND PRE-RECONSTRUCTION SLAVERY:  
AMERICA'S MODERN DAY TRADE PRACTICES AND  
CONFRONTING FORCED LABOR      *Alyssa B. Coffey*      201

THE ROAD TO NOWHERE: HOW BLOCKING STATUTES  
HAVE EXACERBATED BOOMERANG LITIGATION AND  
RENDERED FORUM NON CONVENIENS A MISNOMER FOR  
DBCP TORT LITIGANTS      *Alena Thomas*      227

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Cite as 6 GEO. MASON J. INT'L COM. L. \_\_\_\_ (2015)

The *George Mason Journal of International Commercial Law* is published three times per year. The *George Mason Journal of International Commercial Law* can be contacted as follows:

George Mason Journal of International Commercial Law  
3301 N. Fairfax Drive, Arlington, VA 22201  
<http://www.georgemasonjicl.org/>

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**IS A HUNGARIAN TRUST A CLONE OF THE ANGLO-AMERICAN TRUST, OR  
JUST A TYPE OF CONTRACT?: PARSING THE ASSET-MANAGEMENT  
PROVISIONS OF THE NEW HUNGARIAN CIVIL CODE**

Prof. Charles E. Rounds, Jr. & István Illés, Esq.

I. INTRODUCTION

On March 15, 2014, the Hungarian Parliament enacted into law the New Hungarian Civil Code (NHCC).<sup>1</sup> The NHCC creates out of whole cloth a civil law fiduciary asset-management vehicle (FAM) that in form and function bears some resemblance to the Anglo-American trust (A-A Trust). But is an FAM a true trust, or is it merely a contract variant? We conclude the latter.

The NHCC's legislative history confirms that the designers of the FAM had something akin to the A-A Trust in mind. An FAM is an arrangement between the FAM settlor and the FAM manager under which the FAM settlor transfers title to property to the FAM manager, who, either for compensation or gratuitously, manages the property for the benefit of the FAM beneficiaries.<sup>2</sup>

In this article we lay out in what respects the FAM and the A-A Trust are alike, and in what respects they are different. We conclude that the FAM is neither an A-A Trust nor its clone. Rather, it is a form of contract.<sup>3</sup> Although the FAM meets the definition of a trust as that term is defined in the Hague Convention on the Law Applicable to Trusts and Their Recognition,<sup>4</sup> it is in reality a partial statutory trust analogue operating in a legal environment that is not even remotely similar to English equity. The FAM, for example, has no complementary resulting trust and constructive trust analogues.

Functionally, there are critical differences as well. At the top of the list of deviations is the inability of the FAM to bestow property rights on

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<sup>1</sup> The full official name of the Code is: Act V of 2013 on the Civil Code.

<sup>2</sup> NHCC § 6:310(1).

<sup>3</sup> There is a general consensus among trust scholars that the A-A Trust is not a contractual relationship, but a *sui generis* legal/equitable relationship. See generally Charles E. Rounds, Jr. & Charles E. Rounds III, *Loring & Rounds: A Trustee's Handbook* §8.22 (2015 ed.), at 1310.

<sup>4</sup> Hague Conference on Private International Law, *Convention on the Law Applicable to Trusts and on their Recognition* (1985), available at: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=59](http://www.hcch.net/index_en.php?act=conventions.text&cid=59).

persons who have yet to be conceived. Also, unlike an A-A Trust, a FAM may not be created for charitable purposes, nor does it have a power of appointment feature. It is not even clear that one may settle an irrevocable FAM.

In Part II we give our North American readers a quick tour of the civil law environment into which the FAM has been released by Hungary's parliament. We explain why it determined that there was a need for an FAM.

In Part III, we discuss the practical aspects of introducing a partial trust analogue into a civil law jurisdiction. Unfortunately, there has been little thought given to servicing the analogue. Imagine buying a Boeing 747, but not the part-supply, employee-training, and operational support infrastructure that goes along with it. The A-A Trust, on the other hand, is supported by a system of thousands of courts world-wide, each drawing upon a general trust jurisprudence that has evolved by trial and error over many centuries. Hungarian judges should look to Anglo-American trust law for guidance when adjudicating FAM disputes, but will they?

In Part IV, we address the myriad practical implications of the FAM being a contract rather than an A-A Trust clone.

In Part V, we consider whether the creditors of the FAM settlor, of the FAM manager, and of the FAM beneficiary may gain access to the FAM property.

In Part VI, we zero in on the rights, duties, and obligations of the FAM manager. We conclude that there are critical differences between the two regimes when it comes to the scope and intensity of the fiduciary's duty of loyalty.

Part VII focuses on some of the remaining critical substantive differences between the FAM regime and the A-A Trust regime. The power of appointment, for example, is unknown in FAM jurisprudence. There are registration and licensure requirements unique to the Hungarian cultural/political environment. There is no such thing as a charitable FAM, whereas charitable A-A Trusts are ubiquitous in the common law jurisdictions. An FAM for the benefit of persons yet to be conceived is out of the question. In the common law jurisdictions, A-A Trusts for the benefit of such persons are the rule rather than the exception in the estate planning context.

Part VIII addresses the intersection of FAM law and Hungarian succession law.

## II. BACKGROUND – HISTORICAL, POLITICAL AND JURISPRUDENTIAL ASPECTS

As the FAM is a civil law construct, we begin with a general primer on the critical differences between the common law and the civil law approach to the regulation of legal relationships. We then place the FAM in its historical context. Finally, we consider in this section the political forces in Hungary that turned the FAM from a dream into a reality.

### *a. The Common Law and Civil Law Regimes Have Fundamental Structural and Conceptual/Doctrinal Differences*

Civil law jurisdictions have generally not been receptive to the trust concept. This is because attributes of the Anglo-American trust were considered to be incompatible with certain foundational civil law principles.<sup>5</sup>

#### *i. Structural Differences*

Civil law is first and foremost statutory law. Common law as enhanced by equity is, for the most part, judge-made. Hungary is a civil law jurisdiction. Since the 19<sup>th</sup> Century, Hungarian courts have not been bound by *stare decisis*.

To be sure, the decision of a Hungarian appellate court in a given matter will bind the trial court. Still, the appellate court's function is to interpret and apply pre-existing statutory law, not to create new law.<sup>6</sup> Thus, the Hungarian judiciary could not create a new legal relationship out of whole cloth. The English judiciary, specifically its courts of equity, did just that when it invented the A-A Trust.

This is not to say that the Hungarian parliament may not promulgate a principles-based regime, leaving it to the Hungarian judiciary to flesh out the skeleton over time. In fact, that is just what it did when it launched the FAM.

Civil law jurisdictions, such as Hungary, however have not developed an equity jurisprudence. Thus, the Hungarian parliament in designing the FAM had to come up with a *functional* equivalent of the equitable or

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<sup>5</sup> See generally Vera Bolgár, *Why No Trusts in the Civil Law?* 2 Am. J. Comp. L. 204 (1953).

<sup>6</sup> See A Magyar Köztársaság Alkotmánya [Constitution of the Republic of Hungary] §§ 25, 28, available at: <http://www.kormany.hu/en/news/the-new-fundamental-law-of-hungary>.

beneficial property interest that was compatible with civil law principles, particularly the civil law's indivisibility of ownership principle and the *numerus clausus* of proprietary rights. Recall that in the case of an A-A Trust, the legal title is in the trustee; as to the world the trustee is the legal owner of the entrusted property. The trust beneficiary, however, simultaneously possesses the equitable property interest in the entrusted property. That two people can simultaneously possess a different collection of ownership rights in the same asset is anathema to the civil law's indivisibility of ownership principle. We explain how the Hungarian Parliament managed to thread the needle later.

*ii. Conceptual/Doctrinal Differences*

We begin with a discussion of the civil law's indivisibility of ownership principle. Since the Napoleonic era, "ownership" or its equivalent "legal title" has been defined in civil law jurisdictions as an absolute right that cannot be divided into 'legal' and 'beneficial' parts.<sup>7</sup> Thus, it cannot be said that one "owns" an item of property unless one possesses three fundamental rights with respect to the property: (1) the right to use the property (*usus*); (2) the right to benefit from it (*fructus*) and (3) the right of disposition (*abusus*).<sup>8</sup> Ownership is an indivisible right in every civil law jurisdiction. That X holds the legal title to an item and Y owns the equitable or beneficial interest in it, as is the case with the A-A Trust, is incompatible with civil law's indivisibility of ownership principle.

The principle of *numerus clausus* of proprietary rights is statute-based. Neither the judiciary nor private parties may invent new proprietary rights, or manipulate those that have been created by statute. The *numerus clausus* of proprietary rights is a set menu.<sup>9</sup>

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<sup>7</sup> See generally Stathis Banakas, *Understanding Trusts: A Comparative View of Property Rights in Europe*, InDret, Vol. 323, No. 1/2006, 1-9, (2006), available at: <http://ssrn.com/abstract=1400130>.

<sup>8</sup> This does not mean that one's ability to exercise these three fundamental rights of ownership, such as the right to use the property, cannot be encumbered. A lease agreement, for example, shifts the right of possession from the lessor to the lessee. But when the lease terminates, the lessor will be the one who becomes entitled again to use and possess the subject property. See generally René David & John E. C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (1978) at 325-26.

<sup>9</sup> See generally Vera Bolgár, *supra* note 5, at 212-13.



*b. History & Politics – How the ‘Proxy-management Idea’ Took Root in Hungary?*

In the words of Professor Frederick William Maitland, “If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely the development from century to century of the trust idea.”<sup>10</sup> He was extolling the A-A Trust’s elasticity, that is to say its protean attributes. What other single legal relationship can serve as a securitization vehicle, think mutual fund; an asset-securing vehicle, think a corporate bond issue; or a vehicle for securing the economic welfare of yet-to-be-conceived grandchildren, think a garden-variety discretionary family trust? In a civil law jurisdiction, it would require a cocktail of partial trust analogues to perform these various tasks. Moreover, some tasks would still not be performable under the civil law, such as the creation of property rights in persons unborn and unascertained. As we shall see, introducing a full-blown trust analogue into Hungary’s jurisprudence turned out to be easier said than done.

*i. No Need for a Civil Law A-A Trust Analogue under the Soviet Union’s Sphere of Influence*

Why only now are the Hungarians turning their attention to asset management? The simple answer is that Hungary fell within the USSR’s sphere of influence after WWII. Though Hungary had managed to preserve her territorial integrity and formal sovereignty, her political and economic systems were forced to adapt to the socialist ideology. Needless to say, there was not a lot of demand in Hungary in the years before the Wall fell for innovative legal vehicles designed to facilitate the private proxy management of accumulated private wealth. With the fall of the Wall however, that issue became moot.

*ii. Market Economy Created Need for FAMs*

In the years immediately after the Wall fell, wealth management by proxy was looked upon with suspicion by those Hungarians who were accumulating private wealth. These first-generation wealth accumulators were loath to relinquish the management of that new-found wealth to others. It was “hands on” when it came to building one’s nest egg; it was “hands on” when it came to protecting and managing it.

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<sup>10</sup> D. J. Hayton, *The Law of Trusts*, Sweet & Maxwell, London, 1989 at p. 2.

Now that these first-generation wealth accumulators are getting on in years, the need for proxy wealth management is becoming self-evident, even to them. Their physical and mental capacities will not remain intact forever. And not everyone in the second and third generations has the ability and/or inclination to prudently manage accumulated private wealth. In addition, Hungarian succession law has needed to be updated to facilitate the inevitable inter-generational transfer of this accumulated private wealth.

The collapse of the Cypriote bank system in 2013<sup>11</sup> and the increasing pressure from the US/EU and the OECD to eliminate offshore tax havens are supercharging these reform efforts.<sup>12</sup> Hungary's Parliament realized that a proxy asset-management vehicle (accompanied by a favorable tax regime) might not only be attractive to domestic entrepreneurs, but also stimulate foreign investment and the repatriation of Hungarian wealth from the offshore jurisdictions.

*c. The FAM's Political/Legislative History*

An earlier version of the NHCC,<sup>13</sup> which, in part, authorized Hungarians to establish FAMs, post-enactment was declared unconstitutional by Hungary's Constitutional Court on procedural grounds.<sup>14</sup> A fine-tuned NHCC text was re-submitted to the Parliament in a way that passed constitutional muster. It became law in 2013. In the interim, the NHCC's FAM provisions had been fine-tuned as well, so perhaps the delay was a good thing.

*i. The FAM's civil law Competitors*

It was not a foregone conclusion that Hungary needed an FAM to facilitate the management and postmortem succession of private wealth. The civil law already had numerous partial trust analogs. What follows is a brief description of the three most serious contenders.

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<sup>11</sup> See Paul Mason, *Cyprus crisis: Clouds of uncertainty as banks reopen*, BBC (Mar. 28, 2013), <http://www.bbc.com/news/world-21966775>.

<sup>12</sup> See *Standard for Automatic Exchange of Financial Account Information*, Organisation for Economic Co-operation and Development, <http://www.oecd.org/ctp/exchange-of-tax-information/Automatic-Exchange-Financial-Account-Information-Common-Reporting-Standard.pdf> (last visited Apr. 8, 2015).

<sup>13</sup> 2009. évi CXX. törvény a Polgári Törvénykönyvről (Act CXX of 2009 on the Civil Code) (Hung.).

<sup>14</sup> Alkotmánybíróság (AB) [Constitutional Court], Apr. 26, 2010, 436/B/2010 (Hung).

### 1. *The Mandate*

The mandate is a civil law agency, the subject of which may be property.<sup>15</sup> The mandator is the principal; the mandatee is the agent. A civil law mandate may either be gratuitous or contractual. Title to the subject property remains with the mandator. The mandatee is at all times subject to the control of the mandator. Should title to the property pass to the mandatee, the legal status of the mandator with respect to the property would be merely that of a general creditor of the mandatee. There would be no greater interest in the property itself.<sup>16</sup> On the other hand, were the mandatee a true trustee of the property and the mandator the trust beneficiary, then the mandator would enjoy a much more intense proprietary relationship with the subject property. The Anglo-Americans refer to it as an equitable interest incident to a trust relationship. It is functionally an enhanced security interest. The mandate is not an attractive vehicle for proxy private wealth management, in large part because it lacks a comparable security feature.

### 2. *Usufruct*<sup>17</sup>

How about dusting off the civil law *usufruct*? The property-administration powers of the holder of a *usufruct* are broader than those of the holder of a mandate, making the former relationship somewhat more suited to the facilitation of wealth management. For all intents and purposes, the only power lacking is the power of encumbrance and disposition. The problem is that usufruct cannot be a vehicle for *proxy* wealth management. Not only is the holder of the *usufruct* a beneficiary of the *usufruct*, the holder also owes no fiduciary-type duties to anyone else. This is a poor excuse for a trust analog.

### 3. *The Foundation*<sup>18</sup>

The third competitor was the (private) foundation, a *sui generis* civil law wealth-management vehicle that was invented by the Germans (“*Privatstiftung*”).<sup>19</sup> The civil law foundation has corporate and trust aspects

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<sup>15</sup> 2013. évi V. törvény a Polgári Törvénykönyvről (Act V of 2013 on the Civil Code) (Hung.).

<sup>16</sup> See also Norbet Csizmadia & István Sándor, *A bizalmi (fiduciárius) vagyonkezelés modelljei és a Ptk. reformja. [The fiduciary (trustee) asset management models and the Civil Code reform]* 4 Polgári jogi kodifikáció 10, 10.

<sup>17</sup> See NHCC §§ 5:146-5:158.

<sup>18</sup> See NHCC §§ 3:378-3:404.

<sup>19</sup> A foundation in the German and Hungarian legal traditions is a distinct legal person without shareholders. The creator of a foundation transfers property to the foundation, which is a juristic entity. The creator appoints a managing council or a board. The entity’s purpose can

to it, but it is neither a corporation nor a trust. Like a corporation, it is managed by a board of fiduciaries, but unlike a corporation, it has no shareholders. Instead it exists for a specified purpose or for designated beneficiaries. In this respect, it resembles the A-A Trust, except for the fact that foundation beneficiaries have no enforceable property rights in the foundation's assets. The foundation being a creature of statute, it is less nimble when it comes to adapting to changed circumstances on the ground than is the A-A Trust, a principles-based creature of the Anglo-American judiciary.<sup>20</sup> Hungary has its own foundation jurisprudence, but its practical application is constrained by statute to a few specialized tasks.<sup>21</sup>

*ii. Characteristics of the FAM*

Having found these various civil law relationships wanting as effective wealth management and succession vehicles, the Hungarians set about inventing a civil law relationship that would be an effective vehicle for such purposes. The vehicle would be a creature of statute.

One learned jurist and commentator has suggested that legislative tampering tends to have a stultifying effect on the A-A Trust, a creature of the equity courts. It actually makes the A-A Trust less protean and less adaptable to changed circumstances on the ground. If the FAM owes its very existence to statute, then is there any room for it to organically evolve over time via court decision?

The FAM provisions of the NHCC are not that detailed for a reason. The Hungarian Parliament intended that the FAM be as principles-based as possible, taking into account the statutory focus of the civil law legal tradition. With any luck, the relationship will evolve over time incrementally and efficiently via judicial decision in response to changes in the asset management environment.

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be either charitable or non-charitable (private foundation). Even beneficiaries can be appointed, but they lack the enforceable legal or quasi-equitable property rights in the foundation assets. See Rounds Jr. & Rounds III, *supra* note 3 at 1533-34.

<sup>20</sup> In Hungary, the functions of the foundation and the FAM generally do not overlap. The foundation, due to its legal personality, lacks the FAM's flexibility and nimbleness. The foundation, for example, unlike the FAM, is heavily regulated by the state.

<sup>21</sup> See NHCC §§ 3:383(1)-(2). (Under § 3:383(1), the creator can be the beneficiary of a foundation only if its purpose is to take care of the creator's scientific, literary, or artistic works. This is the same for the creator's relatives with the exception that, under § 3:383(2), the purpose of the foundation can also be to provide for the welfare or support of the creator's relatives (e.g. covering educational or health care expenses etc.).)

III. HUNGARY CURRENTLY LACKS A JUDICIAL/CULTURAL ENVIRONMENT THAT WOULD ALLOW THE FAM TO FLOURISH

Again, a trust is a creature of English equity that is sustained by equity. Hungary has no equity jurisprudence. The FAM, for the moment at least, is very much a fish out of water.

*a. The Hungarian Bar's Lack of Expertise with Equity Jurisprudence*

While the Hungarian bar is receptive to the idea of a Hungarian partial trust analog, most of its members have only a vague understanding of what goes on under the hood of an FAM. With time this will change. The Hungarian lawyer who endeavors to become a serious student of the A-A Trust and the equity doctrine that supports it will have a competitive advantage over his or her brothers and sisters at the bar in that equity has centuries of experience regulating the fiduciary management of wealth. Hungarian law schools should and have taken note: Comparative jurisprudence now has a powerful practical application.

*b. The Hungarian Bench's Lack of Expertise with Equity jurisprudence*

The Hungarian judicial system is yet to accumulate experience with applying equitable principles. If the FAM is to get off the ground in Hungary anytime soon, her judicial system will need to get itself up to speed, and sooner rather than later. The Anglo-American system of equity jurisprudence has evolved by trial and error over centuries. The Hungarians would be ill-advised not to exploit the lessons that have been learned along the way.

IV. THE CONTRACTARIAN APPROACH – HOW HUNGARIAN LAW SAFEGUARDS THE VARIOUS INTERESTS?

As we have already noted, the A-A Trust is *sui generis*. It is not a type of contract. The trust is a substantive product of the coexistence of common law and equity in the Anglo-American legal tradition. That legal title to an item of property can be in X and the equitable ownership can be in Y at the same time is the juristic phenomenon that makes the A-A Trust *sui generis*. It means that a beneficial interest under a trust is more than just a collection of *in personam* rights against the trustee. This bifurcation is generally incompatible with civil law principles, as we have already noted. Thus, a civil law court is tempted to construe the interests of an A-A Trust

beneficiary either as a limited property right (like the *usufruct*) or as a complex set of contractual rights against the trustee.<sup>22</sup>

Hungary was not the first civil law jurisdiction to adopt a regime that had some A-A Trust attributes. There is the Québec trust, for example. The trustee of a Québec trust, however, does not hold the legal title in the subject property. Neither does the trustee of a South African *bewind*.<sup>23</sup>

Scotland has a quasi-trust regime that, instead of bifurcating ownership into the legal and the equitable, segregates out from the aggregate inter vivos estate of the trustee the entrusted property from the rest of the estate, which would include the property that the trustee personally owns. The segregation is so complete that virtually the only nexus between the entrusted property and the trustee's own property is that legal title to each class of property is lodged in the trustee. In every other respect the two *patrimonia*<sup>24</sup> are independent. This is the principle of *patrimonia*-separation. The Scottish term is "dual patrimony."

a. *The FAM Beneficiary's Interest is a "Reinforced" in Personam Right*

The Hungarian FAM most closely resembles the Scottish model, although it has some French *fiducie* attributes to it.<sup>25</sup> Recall that the FAM by statute is a *sui generis* contract between the settlor and the trustee. The FAM settlor transfers property to the FAM manager who undertakes to administer the property for the benefit of one or more beneficiaries.<sup>26</sup> The FAM manager receives full title to the property, but the settlor retains and the beneficiaries are granted extensive monitoring and supervisory rights.<sup>27</sup> In addition, the FAM arrangement reserves to the settlor and bestows on the beneficiary rights as against good faith purchasers for value (BFPs) should

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<sup>22</sup> M.J. de Waal, *The Uniformity of Ownership. Numerus Clausus and the Reception of the Trust Into South African Law*, 8 EUR. REV. OF PRIVATE LAW 439, 448-49.

<sup>23</sup> *Id.*

<sup>24</sup> See 1 Bouv. Inst. n. 421 to 446, available at <http://legal-dictionary.thefreedictionary.com/patrimonium>. (*Patrimonium* is a civil law specific term. Things capable of being possessed by a single person exclusively of all others, are, in the Roman or civil law, said to be in *patrimonio*; when incapable of being so possessed they are *extra-patrimonium*. Today, a *patrimonium* is generally understood as a dedicated aggregation of assets within a larger aggregation.)

<sup>25</sup> See Julien Saïac & Daniel Gutman, *The French "Fiducie": A Missed Opportunity or a Work in Progress?*, European Taxation, Apr. 2010.

<sup>26</sup> NHCC § 6:310(1).

<sup>27</sup> NHCC §§ 6:318(1), 6:315,6:320.

the subject property be wrongfully alienated.<sup>28</sup> Thus, the beneficiary's interest under a FAM, as is the case with a beneficiary's interest under a Scottish trust, is a quasi-proprietary contractual right.

*i. Elements of the FAM Beneficiary's 'Reinforced' Personal Right*

Although the beneficiary's property interest in an FAM is contract-based, the interest is more than just an aggregation of *in personam* rights against the FAM manager.

*1. Segregation of FAM Assets*

Unlike, say, the life insurance premium paid to an insurance company under a life insurance contract that is commingled with the general assets of the company, the property subject to an FAM is segregated from the personal assets of the FAM manager. The assets of each FAM are segregated in separate funds and separately accounted for by its manager.<sup>29</sup>

Again, the segregated FAM fund is a separate *patrimonium*.<sup>30</sup> Though the FAM is not a juristic entity, its assets are beyond the reach of the creditors of the FAM manager in whom legal title is lodged. His or her spouse and children also would have no access to the subject property.<sup>31</sup>

Death of the FAM manager (or its corporate dissolution) does not prevent the surviving co-managers from continuing to administer the FAM.<sup>32</sup> Should a vacancy in the office of FAM manager occur, the settlor or the beneficiary may appoint someone to fill the vacancy.<sup>33</sup> Each has standing to seek judicial enforcement of the terms of the FAM. The FAM manager is saddled with an affirmative duty of full disclosure.<sup>34</sup> Otherwise, this right of action would be illusory.

*2. The Bona Fide Purchaser Rule – Possible Inapplicability of Tracing*

Asset segregation and *patrimonia* separation are not the only features of the FAM that are non-contractual. The beneficiary of an FAM, as is the

<sup>28</sup> NHCC § 6:318(3).

<sup>29</sup> NHCC § 6:312(1).

<sup>30</sup> See Kenneth G.C. Reid, *Patrimony Not Equity: the trust in Scotland*, 8 Eur. Rev. Private L., 427, 435 (discussing the separation of *patrimonia*).

<sup>31</sup> NHCC § 6:313.

<sup>32</sup> NHCC § 6:326(4)-(5).

<sup>33</sup> § 6:325 and 6:326(1)(c) of the Civil Code (Hung.).

<sup>34</sup> 2013. évi V. törvény a Polgári Törvénykönyvről (Act V of 2013 on the Civil Code) (Hung.) (§ 6:320).

case with beneficiary of an A-A Trust, is entitled to equitable relief in the event of a wrongful transfer of the subject property to someone who is not a BFP.<sup>35</sup> The NHCC is silent as to whether the procedural remedies of tracing and following into the product would be available to an FAM beneficiary. It would be if the FAM were an A-A Trust. We shall see whether the Hungarian courts develop a common law of tracing and following into the product in the FAM context.

### 3. *No Early FAM Termination for the Beneficiary*

The A-A Trust beneficiary's inability under the material purpose doctrine, when applicable, to acquire the trust property free of trust before the time established by the terms of the trust for the trust's termination lacks a counterpart in the FAM context.<sup>36</sup> As a practical matter, however, the fulfillment of a FAM's material purpose will usually coincide with the time of termination that had been specified in the FAM contract.

#### ii. *Summary of the Beneficiary's Interest in the Trust Property*

To summarize, the FAM beneficiary's interest in the underlying FAM property itself is not as linked as is the A-A Trust beneficiary's interest in the trust property. Still, the FAM is an equitable-contractual hybrid that generally looks and feels more equitable than contractual.<sup>37</sup>

#### b. *Creating the FAM*

##### i. *Expanded Statute of Frauds is Applicable to Express FAM*

For an FAM to be enforceable under Hungarian law, its terms must be memorialized in a writing that is signed by the FAM settlor and the FAM

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<sup>35</sup> 2013. évi V. törvény a Polgári Törvénykönyvről (Act V of 2013 on the Civil Code) (Hung.) (§ 6:318(3)).

<sup>36</sup> 2013. évi V. törvény a Polgári Törvénykönyvről (Act V of 2013 on the Civil Code) (Hung.) (§ 6:314(1)). This provides that beneficiaries of an FAM will have no access to its assets other than as expressly authorized by the terms of the FAM contract. The beneficiary of an A-A Trust that lacks a material purpose, on the other hand, may be able to defeat the trust and gain access to the subject property prior to its specified termination date. *See generally* Rounds, Jr & Rounds III, *supra* note 3 at 1133-36.

<sup>37</sup> *See generally* Gabor Szaboet al., *A bizalmi vagyonkezelés*, HVG-ORAC LAP- ÉS KÖNYVKIADÓ KFT (2014)(Hung.).



manager.<sup>38</sup> Self-declared FAMs require notarial deed executed by only the FAM settlor.<sup>39</sup> The writing requirement applies not only when the subject of the FAM is land but also when the subject of the FAM is personal property. In the Anglo-American legal tradition, the statute of frauds requires only that a trust of land be memorialized by writing. Purchase money resulting trusts of land and constructive trusts of land, however, are not subject to the statute of frauds. The FAM regime has nothing equivalent to either the resulting trust<sup>40</sup> or the constructive trust.<sup>41</sup>

*ii. The Equity Maxim “A Trust Shall not Fail for the Want of a Trustee” Needs to be Qualified in the FAM Context*

As the relationship between the FAM manager and the FAM beneficiary is contractual, it cannot be said that an FAM shall not fail *at inception* for want of an FAM manager. If there is no FAM manager *at inception* then no FAM can arise. Once the FAM manager has accepted his/her/its appointment, however, the FAM becomes independent from the manager’s persona and thus may survive the FAM manager’s death or corporate dissolution.<sup>42</sup>

*iii. FAM Declarations and Testamentary FAMs are Possible: Critical Non-Contractarian Features of the FAMs*

Although FAMs are contracts this does not mean that only FAMs created via contract are enforceable. The FAM declaration, the testamentary FAM, and the donative inter-vivos-transfer FAM come to mind. The parties to an FAM that is created other than via contract are generally subject to the

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<sup>38</sup> 2013. évi V. törvény a Polgári Törvénykönyvről (Act V of 2013 on the Civil Code) (Hung.) (§ 6:310(2)).

<sup>39</sup> 2013. évi V. törvény a Polgári Törvénykönyvről (Act V of 2013 on the Civil Code) (Hung.) (§ 6:329(1)).

<sup>40</sup> The resulting trust is a common law/equitable procedural device for dealing with the property of a failed A-A Trust. The court declares the trustee of a failed express trust a resulting trustee and orders the trustee to convey legal title back to the settlor, or to the settlor’s executor. Does Hungarian jurisprudence have a comparable device for dealing with failed FAMs? The answer is definitely ‘no’. Hungarian law follows a different logic. Contract rules apply when it comes to the sorting out of the rights, duties, and obligations of the parties to a failed FAM.

<sup>41</sup> A consequence of the FAM’s expanded statute of frauds is that a FAM may not be created by implication of law. There is also a ban on constructive FAMs. Implied FAMs seem to be possible only in extremely rare cases. A court, for example, might find that a particular standard written contract coincidentally also has the requisite elements of an FAM.

<sup>42</sup> 2013. Act V § 6:326(5) of 2013 on the Civil Code (Hung.).

same rights, duties, and obligations as are the parties to an FAM that is created via contract.<sup>43</sup>

Self-declaration FAMs, as explained supra, arise by means of the settlor's unilateral notarized declaration.<sup>44</sup> It is also possible to create an FAM by will.<sup>45</sup> Although a Hungarian will, just like its Anglo-American counterpart, speaks at death, no testamentary FAM comes into existence until such time as the designated FAM manager agrees to serve. Whether a failure to accept the office of manager may be cured by the judicial appointment of an alternate manager remains to be seen.

Finally, an FAM may arise via an inter vivos donative transfer. The relationship is deemed a contract even though there is no exchange of consideration.<sup>46</sup>

*iv. Uncertainty as to whether an FAM can be irrevocable*

There are two categories of express A-A Trusts: revocable and irrevocable. The settlor of an FAM may reserve a right of revocation. It is, however, unsettled whether the grant of a revocation power to an FAM beneficiary would be enforceable.<sup>47</sup> That having been said, it may be the case that a FAM under which no one possesses a right of revocation is unenforceable.<sup>48</sup>

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<sup>43</sup> 2013. Act V § 6:329(3) of 2013 on the Civil Code (Hung.).

<sup>44</sup> 2013. Act V § 6:329(1) of 2013 on the Civil Code (Hung.).

<sup>45</sup> 2013. Act V § 6:329(2) of 2013 on the Civil Code (Hung.).

<sup>46</sup> 2013. Act V § 6:61 of 2013 on the Civil Code (Hung.).

<sup>47</sup> The FAM beneficiaries are not parties to the FAM agreement. It is currently unclear whether FAM beneficiaries or third parties can be granted by the FAM contract enforceable revocation powers.

<sup>48</sup> An A-A Trust is enforceable even in a case where the settlor has reserved no right to revoke. This may also be the case with an FAM, although not all Hungarian commentators are in accord. Some see the FAM as a type of mandate. Recall that each party to a mandate agreement is vested with the power to terminate the agreement unilaterally. The problem is that an FAM is a *sui generis* contract variant with different termination rules than a mandate.

*c. Unlike a Pure Hungarian Contract, an FAM agreement can survive the Removal, Incapacity, Death and Dissolution of the FAM Manager*

The removal,<sup>49</sup> incapacity,<sup>50</sup> or death/dissolution<sup>51</sup> of the FAM manager will not necessarily terminate the FAM. In this respect an FAM more closely resembles an A-A Trust than a contract.

*d. The FAM Settlor's (Beneficiary's) Residual Right to Remove and/or Appoint Managers*

Even in the case of an irrevocable FAM, the right to remove and replace managers is reserved to the settlor.<sup>52</sup> The settlor is free to exercise this right without restriction, but if a FAM remains without a manager for more than three months, it terminates.<sup>53</sup> The FAM beneficiary is granted standing to petition the court to remove the manager, but only after the settlor's death/dissolution and only if the FAM manager commits a serious breach of the FAM agreement.<sup>54</sup>

*e. To Summarize: The FAM Has Some Non-Contractarian Attributes*

To summarize, the FAM is a special type of contract that has some features that are traditionally non-contractual, such as asset-segregation. The two critical trust-like features are:

- a FAM beneficiary has an interest in the very property that is the subject of the FAM agreement; and
- a FAM manager is *per se* a fiduciary.<sup>55</sup>

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<sup>49</sup> A FAM manager can only be removed if a successor FAM manager is appointed simultaneously. Removal alone, therefore, will not result in the termination of the FAM. *See* 2013. Act V § 6:325(1) of 2013 on the Civil Code (Hung.).

<sup>50</sup> The incapacity of the FAM manager will not necessarily bring about the FAM's termination as the court is empowered to appoint a guardian to stand in the shoes of manager and carry out his FAM responsibilities. *See generally* 2013. Act V § 2:34 of 2013 on the Civil Code (Hung.).

<sup>51</sup> Death or dissolution results in the termination of a FAM only if no new FAM trustee is appointed during a three-months statutory moratorium. *See* 2013. Act V § 6:326(1)(c) of 2013 on the Civil Code (Hung.).

<sup>52</sup> 2013. Act V § 6:325(1) of 2013 on the Civil Code (Hung.).

<sup>53</sup> 2013. Act V § 6:326(1)(c) of 2013 on the Civil Code (Hung.).

<sup>54</sup> 2013. Act V § 6:325(2) of 2013 on the Civil Code (Hung.).

<sup>55</sup> Hungarian law is similar to the South-African law in this regard. *See* Waal, *supra* note 22 at 441-47.

## V. RIGHTS OF THE CREDITORS OF THE PARTIES TO A FAM

With some minor exceptions, it is a core principle of the civil law (recall our discussion *supra* of the indivisibility of ownership principle) that he who holds the title to property must also own the beneficial interest in that property. The A-A Trust with its legal-equitable bifurcations would seem incompatible with this core principal. Certainly, it is the rare A-A Trust where it is self-evident from the public record who possesses the economic interest in the subject property. This is because the record title to the property is in the trustee.

To the lawyer trained in the civil law tradition this ownership bifurcation seems illogical and untidy. He is also likely to consider the absence of transparency as bad public policy in that it puts the creditors of the A-A Trust beneficiary at an unacceptable disadvantage.<sup>56</sup> Hungary addressed these concerns in the design and implementation of the FAM regime. We will now examine how.

a. *The FAM Beneficiary's Creditors Stand in the Shoes of the Beneficiary*

The law is clear: The creditors of an FAM beneficiary stand in the shoes of the FAM beneficiary.<sup>57</sup> In other words, only the beneficiary's quasi-equitable interest is reachable. As to the subject property itself, that is only reachable once the property is distributable pursuant to the terms of the FAM.

b. *The FAM Manager's Creditors Have No Access to the Subject Property*

FAM property being a separate *patrimonium*, it is off-limits to the FAM manager's personal creditors, spouse, partner, and children.<sup>58</sup> Moreover, the FAM manager is duty-bound to keep his/her/its personal assets and the FAM assets physically segregated, and to separately account for them.<sup>59</sup> Both the beneficiary and the settlor have standing to seek judicial relief should FAM property wrongfully come into the hands of third parties, such as the FAM manager's creditors, spouse, partner, or children.<sup>60</sup>

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<sup>56</sup> Bolgár, *supra* note 5, at 210.

<sup>57</sup> 2013. Act V § 6:314(2) of 2013 on the Civil Code (Hung.).

<sup>58</sup> 2013. Act V § 6:313(1) of 2013 on the Civil Code (Hung.).

<sup>59</sup> 2013. Act V § 6:312(1) of 2013 on the Civil Code (Hung.).

<sup>60</sup> 2013 Act V § 6:313(2) of 2013 on the Civil Code (Hung.).

*c. The FAM Settlor's Creditors*

Unless the settlor has reserved an interest in the FAM property or the FAM was established fraudulently, the settlor's creditors may not reach the property. A retained interest, however, would be reachable, for the most part under the same rules and conditions that are applicable to the beneficiary's creditors.<sup>61</sup> At least this is what the Parliament had in mind, although the language of the statute is not a model of clarity in this regard.<sup>62</sup>

VI. THE DUTIES, POWERS, LIABILITIES, AND RIGHTS OF THE FAM MANAGER

We now discuss the critical duties, powers, liabilities, and rights of the FAM manager.

*a. Source of the Duties, Powers, Liabilities and Rights: Title to FAM Property Rests Always with the FAM Manager*

The heart of the FAM is the FAM manager's sole and undivided legal title to the subject property.<sup>63</sup> On the public record, the FAM manager is the owner of the subject property.<sup>64</sup> If title is not in the manager, then the legal relationship of the parties with respect to the subject property is something other than a FAM. The corollary of this rule is that legal life estates and legal remainders may not be created via a FAM.<sup>65</sup>

Title, on the other hand, bestows on the FAM manager critical duties and powers. Duties keep the FAM manager honest and are an incentive to administer the FAM in the interests of the FAM beneficiary. Powers are the

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<sup>61</sup> The symmetry between the rights of the creditors of the FAM settlor and those of the FAM beneficiary is not exact. The settlor's creditors in a revocable FAM have the right to terminate the FAM and reach the subject property that would otherwise go back to the settlor. Act LIII on the Judicial Enforcement Procedure (§ 132/A(3)) (Hung.) "Judicial Enforcement Act"). The creditors of the beneficiaries of neither revocable nor irrevocable FAMs have the same privilege. They have to wait until the FAM terminates.

<sup>62</sup> The fuzziness stems from § 132/A(3) of the Judicial Enforcement Act, which provides that the settlor's creditors may reach such FAM property that either the settlor or "the holder of the right to disburse from the FAM" receives at termination. This latter phrase seems to empower the settlor's creditors to reach property in which the settlor no longer has any interest whatsoever. Such an interpretation would be, however, contrary to fundamental civil law principles and could have not been the true intention of the legislator.

<sup>63</sup> 2013 Act V § 6:310(1) of 2013 on the Civil Code (Hung.).

<sup>64</sup> *E.g.* 1997. évi CXLI § 17(1)(c), (m) törvény az ingatlan-nyilvántartásról (Act CXLI of 1997 on Real Estate Registration) (Hung.).

<sup>65</sup> Via a FAM, [A] may, by contract, transfer property to [B] inter vivos, subject to an obligation on the part of [B] to transfer the property to [C] at [B]'s death. This creates a mere *in personam* obligation in [B], who still remains the sole titleholder. [C] may sue [B] in contract should he fail to transfer the [C] in accordance with the terms of the FAM.

tools that enable the FAM manager to discharge those duties. First we take up the duties of an FAM.

*b. The FAM Manager's s Duties*

The FAM manager's core duties, unlike the core duties of a trustee, are imposed by statute. They include the duty of undivided loyalty, the duty to be generally prudent, the duty to protect and defend the FAM property, the duty of confidentiality, and the duty to account. The FAM manager is also saddled with myriad specific duties that are incident to these general duties.

*i. Duty of Loyalty<sup>66</sup>*

An A-A Trustee generally must act *solely* in the interest of the trust beneficiaries. A FAM manager, however, need only act *primarily* in the FAM beneficiary's interest. This is not a license for the FAM fiduciary to self-deal. What it appears to mean is that when the interests of the FAM beneficiary are in conflict with the interests of a third party, the interests of the third party are subordinated. How this all plays out in practice remains to be seen.

*ii. Duty to be Generally Prudent<sup>67</sup>*

The professional FAM fiduciary must exercise due diligence in all dealings with the FAM property. He/she/it must possess the skills and competence of the prudent professional manager when it comes to the administration of the FAM assets.<sup>68</sup> In other words, the manager's lack of a critical skill or his/her ordinary intelligence is not a viable defense to an allegation that the manager has imprudently administered the FAM assets. As the FAM statute contains no further guidance, it remains to be seen whether the same standard governs amateur FAM fiduciaries as well.

*iii. Duty to Protect FAM Property Against All Foreseeable Threats in a Commercially Reasonable Manner<sup>69</sup>*

Unlike in an A-A Trust, a FAM manager has an express duty to protect the FAM assets in a commercially reasonable manner. This would

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<sup>66</sup> 2013 Act V § 6:317(1) of 2013 on the Civil Code (Hung.).

<sup>67</sup> Act V § 6:317(1) of 2013 on the Civil Code (Hung.).

<sup>68</sup> *Id.* It is also sufficient if the professional FAM manager provides for the necessary expertise by resorting to the services of an external service provider.44 § of Act XV of 2014 (Hung.) (on FAM managers and their activities ("FAM Manager Act")).

<sup>69</sup> § 6:317(2) of 2013. évi V. törvény Polgári Törvénykönyv (Act V of 2013 on the Civil Code) (Hung.).

appear to be more analogous to the Anglo-American business judgment rule than any default rule of prudent investing that might govern the trustee of an A-A Trust.<sup>70</sup> It falls to the Hungarian courts to sort all this out over time.

*iv. Duty of Confidentiality*<sup>71</sup>

A strict duty of confidentiality is imposed on the FAM manager. The duty survives even the termination of the FAM. That having been said, there are statutory exceptions to the duty of confidentiality that relate to tax enforcement, EU regulatory compliance, and the like.<sup>72</sup>

*v. Duty to Account to the Settlor, the Beneficiary, and the State*<sup>73</sup>

The FAM manager must properly account to the FAM settlor and beneficiary at regular intervals, as well as upon reasonable request. The manager also must file with the state certain reports pertaining to the FAM, such as an annual tax return. The FAM manager who breaches his/her/its accounting and/or reporting duties is subject to judicial sanction.

*vi. Other Express Duties*

Professional FAM managers are subject to additional duties incident to the overarching duty to properly administer the FAM property. They include the following:

- Duty of cautious investment,
- Duty of prudently monitoring existing investments,
- Duty of distributing risk (diversifying the portfolio) and
- Duty to prudently hire agents and advisors as necessary.<sup>74</sup>

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<sup>70</sup> William T. Allen et. al., Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 Bus. Law. 1287, 1296, 1298 (2001).

<sup>71</sup> § 6:319 of 2013. évi V. törvény Polgári Törvénykönyv (Act V of 2013 on the Civil Code) (Hung.).

<sup>72</sup> The various authorities and other organs against which the FAM manager is relieved from the duty of confidentiality include e.g. the Tax Authority, police, courts, The European Commission Anti-Fraud Office (website: [http://ec.europa.eu/anti\\_fraud/index\\_en.htm](http://ec.europa.eu/anti_fraud/index_en.htm)), etc. (§ 42 of FAM Manager Act).

<sup>73</sup> §§ 6:320 and 6:327 of 2013. évi V. törvény Polgári Törvénykönyv, (Act V of 2013 on the Civil Code) (Hung.).

<sup>74</sup> Although the FAM Manager Act refers both to the duty of utilizing FAM property and its elements, it leaves to the courts to elaborate the content of the principle (§ 45 of the FAM Manager Act).

*c. The FAM Manager's Liability*

The FAM manager who breaches a duty may be held liable for any harm that is occasioned by the breach.

*i. Directions and Nature of the Liability*

The FAM manager is liable contractually to both the FAM settlor and the FAM beneficiary.<sup>75</sup>

The A-A Trust, on the other hand, is *sui generis*. It is not a creature of contract. As such, often the rights of the A-A Trust beneficiary will trump those of the A-A trust settlor, particularly in the case of an irrevocable A-A Trust.

*ii. Extent of Liability – Different Rules for Fee-Based and Gratuitous FAM Administrations*

Recall that under the civil law, there need not be an exchange of consideration for a contract to be enforceable. That having been said, one risks greater liability breaching a contract that has been supported by consideration than one that has not been. The FAM contract is no exception. Moreover, the compensated FAM manager generally assumes greater liability than his uncompensated counterpart.<sup>76</sup>

*d. External Liability – Personal Liability if the FAM Manager Fails to Disclose to Third Parties True Value of the FAM Estate*

The FAM manager is personally liable in contract to third parties rendering goods and services to the FAM estate *only if* the manager fails to disclose to the third party the true solvency of the FAM estate when the contract is entered into. Otherwise, the third party's primary and only recourse is to the FAM estate, and only the FAM estate, in the event the contract is breached. In other words, the FAM manager is not personally on the hook should the third party be unable to obtain full satisfaction via levy on the FAM assets.<sup>77</sup>

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<sup>75</sup> § 6:321(1) of 2013. évi V. törvény Polgári Törvénykönyv, (Act V of 2013 on the Civil Code) (Hung.).

<sup>76</sup> § 6:142 of 2013. évi V. törvény Polgári Törvénykönyv, (Act V of 2013 on the Civil Code) (Hung.).

<sup>77</sup> § 6:323 of 2013. évi V. törvény Polgári Törvénykönyv, (Act V of 2013 on the Civil Code) (Hung.).



## VII. FURTHER DIFFERENCES BETWEEN THE FAM AND THE A-A TRUST

*a. Powers of Appointment Doctrine under Hungarian Law  
Murky*

A non-fiduciary power of appointment granted to someone by the terms of an A-A Trust is a personal power of disposition. The donee of such a power may exercise it in favor of a permissible appointee outright and free of trust, or in further trust if the terms of the power or default law so permit. Thus, it is functionally a power to short-circuit, alter, or extend the terms of the trust.<sup>78</sup>

The FAM settlor may also reserve, or the FAM beneficiary be granted, a power to amend the terms of the FAM contract.<sup>79</sup> This power functionally bears some resemblance to a non-fiduciary power of appointment established via the terms of an A-A Trust. It may well be that one not a party to an FAM agreement also may be granted such an amendment power.<sup>80</sup> In general, however, a power of appointment may not be directly granted via a FAM contract.

*b. FAM Registration and Fiduciary Licensure*

Professional FAM managers are required to be licensed by the Hungarian National Bank (HNB), which has been designated as the licensing and supervisory authority over FAMs.<sup>81</sup> Only corporations and limited liability companies are eligible to become professional FAM fiduciaries. They have to comply with statutory infrastructural and organizational criteria and hold a dedicated and segregated security reserve of HUF 70,000,000 (ca. \$311,000).<sup>82</sup>

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<sup>78</sup> Rounds, *supra* note 3, 828-29.

<sup>79</sup> A power reserved to the settlor, such as to amend the material purposes of the FAM or to extend or limit the FAM manager's powers, may be acceptable under Hungarian law (NHCC § 6:191(4)). Neither the settlor nor the beneficiary, however, may direct the FAM manager. He must act independently of them (NHCC § 6:316). An amendment, therefore, purporting to direct the FAM manager to carry out a specific task, such as to invest in a particular company, would be unenforceable.

<sup>80</sup> The independence requirement explained in the previous footnote relates only to the FAM manager's dealings with the FAM settlor and the FAM beneficiary. In theory, there is nothing to prevent FAM settlors from granting powers of appointment to third parties. It remains to be seen, however, whether the Hungarian courts will enforce such grants.

<sup>81</sup> § 3 of the FAM Manager Act. Once the corporate trustee is licensed, the FAM manager is subject to a HNB oversight. The HNB, however, has no authority to take action against the manager for breaching the terms of the FAM contract.

<sup>82</sup> Gov. Decree No. 87/2014.

Amateur FAM managers are in a better position. They need not be licensed. Only the particular FAM has to be registered.<sup>83</sup>

*c. No Such Thing as Charitable FAMs*

Hungarian law is influenced by the German legal tradition when it comes to charitable undertakings. Foundations are the traditional legal vehicles for dedicating property to charitable purposes. There is no statutory prohibition against establishing an FAM for a charitable purpose. There, however, may be tax reasons why the FAM would not be the way to go.

*d. An FAM may not have Unborn or Unascertained Beneficiaries*

The Hungarian legal tradition, unlike the Anglo-American legal tradition which spawned the trust relationship, has been reluctant to recognize property rights in persons who have yet to be conceived/born.<sup>84</sup> Thus, the terms of an FAM for the benefit of a designated unborn beneficiary are unenforceable. The Anglo-American guardian ad litem judicially charged with advocating for the property rights of the yet-to-be-conceived, the unborn, and the unascertained under an A-A Trust has no counterpart in the Hungarian legal tradition.

All this having been said, once a designated FAM beneficiary is born alive, enforceable property rights may accrue. But this is a far cry from the typical A-A Trust that has unborn and unascertained remaindermen whose equitable property rights are enforceable *ab initio*.

#### VIII. THE FAM AS AN INSTRUMENT OF HUNGARIAN SUCCESSION LAW

Anglo-American succession law and Hungarian succession law are the products of very different legal traditions. We now give the American reader a quick tour of the civil law of forced heirship.

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<sup>83</sup> § 19 of the FAM Manager Act. The HNB in fact keeps two separate registries. One is a public register of licensed professional FAM managers. It contains no information about the FAMs they administer. The other registry is the registry of the FAMs whose managers are non-professionals. Its non-public database contains FAM-specific information (e.g. data on the settlor, the beneficiaries etc.).

<sup>84</sup> See NHCC § 2:2(1). Under NHCC, only persons born alive are entitled to judicially enforceable property rights protection. Such protection, however, has a retroactive effect reaching back to the date of conception.

*a. The Influence of Forced Heirship Rules on Hungarian FAMs*

Forced heirship rules are to ensure that a decedent's spouse, children, and parents are not left destitute. Forced heirship rules are a limitation on one's freedom of property disposition.

*i. Forced Heirship Rules Governing Disposition by Will (Testamentary Dispositions)*

If the testator leaves a will, his descendants, spouse and parents may claim mandatory dispositions from the estate.<sup>85</sup> The descendants and parents are essentially entitled to one third of what they otherwise would have inherited by intestacy.<sup>86</sup> The surviving spouse receives a *usufruct* right in the estate for his/her support and maintenance.<sup>87</sup>

*1. Influence on Testamentary FAMs*

Testamentary FAMs are subject to the forced heirship rules as well. The testator's descendants, parents and spouse may seek satisfaction of their claims from the testamentary FAM assets.<sup>88</sup>

*2. Influence on Inter Vivos FAMs*

Forced heirship rules capture *inter vivos* donative transfers made by the testator within ten years before his or her death.<sup>89</sup> Thus, it is likely that Hungarian courts will subject *inter vivos* FAMs established for donative purposes to the forced heirship rules, particularly *inter vivos* FAMs established within ten years before the /testator's/FAM settlor's death.

*a. Forced Heirship Rules in Absence of a Will*

If the deceased left no will, then the forced heirship rules allow family members to unwind donative transfers made to anybody within ten years before death.<sup>90</sup>

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<sup>85</sup> NHCC § 7:75.

<sup>86</sup> NHCC § 7:82(1).

<sup>87</sup> NHCC § 7:82(2).

<sup>88</sup> NHCC § 7:75).

<sup>89</sup> NHCC §§ 7:80(1) and 7:81(1)(a).

<sup>90</sup> NHCC §§ 7:80(1) and 7:84(1)(b) (explaining that a donative transfer can be unwound only if the estate proves to be insufficient to cover all forced heirship dispositions).

If multiple descendants inherit the estate, then for computation purposes inter vivos gifts are deemed advancements to the extent the testator had intended them as such.<sup>91</sup> The *inter vivos* FAM is not exempt from these forced heirship rules.

*b. Forced Heirship Rules are  
Inapplicable to Foreign  
Settlers*

Hungarian Forced heirship rules have no application to non-Hungarian FAM settlors. If a U.S. citizen who is not also a Hungarian national sets up a FAM, Hungarian conflict of laws rules<sup>92</sup> defer to applicable U.S. federal and state succession law.<sup>93</sup>

IX. CONCLUSION

The FAM is a common law/civil law hybrid. Although it was inspired by the A-A Trust, it is not a true trust. Its asset-management applications are more limited, as well. It is apparent that the FAM is not suitable to accommodate all the various situations in which the A-A Trust can come in handy, but in exchange it provides a legal vehicle that fits comfortably into the framework of Hungary's civil law system. This was exactly what the Hungarian Parliament had in mind. The FAM was designed to serve primarily estate planning and asset management purposes via a highly adaptive and flexible form of contract. How well will the FAM ultimately be received by the Hungarian bench and bar? Time will tell.

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<sup>91</sup> NHCC § 7:56(1).

<sup>92</sup> Since Hungary is not a federation, it has had no need to develop an internal conflicts of law jurisprudence. See *Hungary – Government*, GlobalSecurity.org, <http://www.globalsecurity.org/military/world/europe/hu-government.htm>. However, transnational conflicts are another matter.

<sup>93</sup> §§ 11 and 36 of 13/1979. Korm. r. (Law-Decree No. 13 of 1979 on Private International Law) (Hung.).

**CONTENTIOUS MODES OF UNDERSTANDING CHINESE  
COMMERCIAL LAW**

Tianshu ZHOU and Mathias SIEMS\*

ABSTRACT

*Is Chinese commercial law simply a copy of German and other Western commercial laws, a “mystery” that Westerners cannot understand, or an “irrelevance” given the role of culture and politics in China? This article critically discusses these three modes of understanding. It is found that, while they seem to have some initial plausibility, one also has to be aware of their shortcomings. Thus, in the understanding of Chinese commercial law, it is most appropriate to take into account all three modes, as well as their limitations. This article also suggests approaching this topic as a “bilateral process” since the understanding of Chinese law also depends on the way Chinese law-makers understand Western legal systems.*

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\* Tianshu Zhou, China University of Political Science and Law (CUPL), Beijing, China, and Mathias Siems, Durham University, UK. This article was written during a research visit of Mathias Siems at CUPL: he thanks the CUPL for its hospitality and the Leverhulme Trust (Philip Leverhulme Prize 2010) for funding. Tianshu Zhou thanks the Program for Young Innovative Research Team and Young Lecturer’s Supporting Program in CUPL for funding.

## INTRODUCTION

A non-Chinese scholar who tries to understand Chinese commercial law may initially feel that this is a relatively easy endeavor since the *text* of many Chinese laws include concepts that are similar to the laws of other countries. But then, he or she may hesitate since the specific Chinese *context* of the law, for example her politics and culture, may be seen as very different from, say, the countries of Europe, America and Africa. Thus, it is said to be the case that “businesses and their lawyers tend to feel some discomfort about Chinese law and the legal system they will encounter in their business dealings with their Chinese counterparts.”<sup>1</sup>

This article aims to reflect on the way Chinese commercial law may be understood, in particular how common modes of understanding can be regarded as contentious. This discussion is not only of interest for Chinese commercial law since it serves as a general example of how lawyers can (or should) approach the law of a foreign country. In particular, the topic of this article is related to the more general question of whether legal knowledge primarily requires an understanding of the positive law or whether one should adopt a socio-legal perspective. To be sure, this distinction should also not be overemphasized as both forms of understanding are related to each other: the interpretation of the positive law can require consideration of economic, social and political factors, and any socio-legal perspective has to consider the positive law as it relates to those factors.<sup>2</sup>

In order to discuss this topic, this article provides examples from the Chinese Contract Act and the Chinese Company Law.<sup>3</sup> Commercial law also includes other subjects, such as securities law, bankruptcy law and insurance law. But these latter subjects only cover specified areas of commercial life. By contrast, contracts and corporations are the fundamental carriers of modern business whose power reach every corner

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<sup>1</sup> Nicole Kornet, *Contracting in China: Comparative Observations on Freedom of Contract, Contract Formation, Battle of Forms and Standard Form Contracts*, 14.1 ELECTRONIC J. COMP. L. (2010), available at <http://www.ejcl.org/141/art141-1.pdf>.

<sup>2</sup> See, e.g., *METHODOLOGIES OF LEGAL RESEARCH: WHICH KIND OF METHOD FOR WHAT KIND OF DISCIPLINE?* (Mark Van Hoecke ed., 2011).

<sup>3</sup> Contract Law of the People's Republic of China of 15 March 1999 [Contract Act], available at [http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/12/content\\_21908031.htm](http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/12/content_21908031.htm); The Company Law of the People's Republic of China [Company Law] [promulgated by the President of the People's Republic of China, Oct. 27, 2005, effective Jan. 1, 2006], available at [http://www.fdi.gov.cn/1800000121\\_39\\_4814\\_0\\_7.html](http://www.fdi.gov.cn/1800000121_39_4814_0_7.html). Parts of the following are based on our previous research on these laws: TIANSHU ZHOU, CHINA'S LEGAL REFORM OF CORPORATE GOVERNANCE: FROM THEORETICAL RESEARCH TO PRACTICAL SOLUTIONS (University of Edinburgh, 2012); Mathias Siems, *Die epistemologischen Grundlagen des chinesischen Vertragsrechts im Rechtsvergleich*, 5 *Hanse L. Rev.* 3 (2009).

of the commercial world. For example, without the support of basic rules of company law (*e.g.*, corporate voting system, directors' duties), neither securities nor bankruptcy law can work in practice. A similar subordinated relationship can be found, say, between contract law and insurance law. Additionally, contract and company law are interesting subjects for practicing lawyers as foreign companies who want to do business in China may ask them to provide sophisticated legal advice on these subjects.

This article suggests several possible perspectives of understanding China's commercial law. It addresses forms of understanding at the levels of the positive law, its underlying ideas and how the law is applied. This is then used as a basis in order to develop our own position. The structure of this article is as follows. Section I discusses whether Chinese commercial law can be classified as being part of a particular legal family. Section II examines the contrasting view that Chinese commercial law is very different from the laws of other countries and therefore a "mystery." Section III then critically discusses the view that Chinese commercial law is an "irrelevance", either because of cultural or political reasons. Section IV concludes that all three modes have their shortcomings. In addition, it suggests approaching this topic as a "bilateral process" since the understanding of Chinese law also depends on the way Chinese law-makers understand Western legal systems.

#### I. CHINESE COMMERCIAL LAW AS PART OF A LEGAL FAMILY?

It is possible to establish similarities between the Chinese commercial law and the commercial laws of other countries. This is predominantly based on an analysis of the black-letter law. For example as the first sub-section will discuss, some legal transplants from German commercial law can be identified in Chinese commercial law. Yet even with this narrow legal focus, the result is not unambiguous because, as explained in the second sub-section, it is also possible to regard Chinese commercial law as a mixture of various legal traditions.

##### A. *Similarities to the German Legal Family*

The German literature often emphasizes the closeness between German and Chinese law.<sup>4</sup> The influential research by economists on "law and finance" also classifies China as belonging to the German legal origin.<sup>5</sup>

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<sup>4</sup> See, *e.g.*, Rolf Knieper, *Einige Aspekte der Zivil- und Wirtschaftsrechtsform*, 2002 NEWSLETTER DER DEUTSCH-CHINESISCHEN JURISTENVEREINIGUNG 1, 6 (2002).

<sup>5</sup> For a summary, see Mathias Siems, *Legal Origins: Reconciling Law & Finance and Comparative Law*, 62 MCGILL L.J. 55 (2007).

Furthermore, even a Chinese legal scholar has put it as follows: “it is a fact that our legal system is, in principle, a copy of the German one.”<sup>6</sup>

With respect to contract law, it is possible to refer to the history of the Chinese Contract Act. The first two books of the German Civil Code (BGB) have played a decisive role in the drafting of this Act. The Chinese law-makers also considered the Civil Codes of Taiwan and Japan,<sup>7</sup> which are also largely based on German law. Moreover, the Contract Act consolidates some of the previous acts: these laws were mainly influenced by the Soviet and Hungarian civil law – and these latter laws also had some similarities to German law.<sup>8</sup>

Specifically, there are a number of parallels in the wording of provisions between the Chinese and the German contract law. For example, the provisions of the Chinese Contract Act on good faith, including performance in good faith and the concept of pre-contractual liability,<sup>9</sup> offer and acceptance,<sup>10</sup> and the principle of reciprocal contracts, including the duty of specific performance,<sup>11</sup> all appear to be close copies of the corresponding provisions of the German BGB.<sup>12</sup>

Several rules of the German Stock Corporation Act (AktG) have also been transplanted into the Chinese company law system. Both Germany and China have a two tier model of corporate governance, viz. a system with not only a management board but also a supervisory board, which is required to have some members who are employee representatives.<sup>13</sup> Additionally, neither the AktG nor the Chinese Company Act allows the board of

<sup>6</sup> Jian MI, *Zu einigen Problemen bei der gegenwärtigen Reform des chinesischen Zivilrechts*, 2003 NEWSLETTER DER DEUTSCH-CHINESISCHEN JURISTENVEREINIGUNG 1, 5 (2003) (own translation). For a similar view, see Deng Feng, *Qingmo Bianfa de Falv Jingjixue Jieshi: Weishenmo Zhongguo Xuexi le Dalu Fa*, [Economic Analysis of the Legal Reform of Late-Qing Dynasty: Why did China Adopt Civil Law System], 21 ZHONGWAI FAXUE [Peking University Law Journal] 165 (2009).

<sup>7</sup> See BING LING, CONTRACT LAW IN CHINA ¶ 2.021 (2002).

<sup>8</sup> See Huixing Liang, *Die Rezeption ausländischen Zivilrechts in China*, 2003 NEWSLETTER DER DEUTSCH-CHINESISCHEN JURISTENVEREINIGUNG 68, 70, 72 (2003).

<sup>9</sup> Contract Act art. 6, 42, 60(2).

<sup>10</sup> See *id.* at art. 13-31 (in particular section 23 on the timely dispatch of acceptance and art. 30 on acceptance containing material change).

<sup>11</sup> See *id.* at art. 66-69; art. 107 (specific performance); MO ZHANG, CHINESE CONTRACT LAW 305 (2006).

<sup>12</sup> See, e.g., Bürgerliches Gesetzbuch [BGB] Code Civil [C. CIV.] §§ 148, 149, 150(2), 242, 241(2), 280(1), 311(2) and 320-26 (F.R.G.) (discussing good faith and pre-contractual liability, offer and acceptance, and reciprocal contracts).

<sup>13</sup> See Company Law art. 52; Gesellschaftsrecht [German Law on Stock Corporations] [AktG] § 95; Chun Liao, *The Governance Structures of Chinese Firms: Innovation, Competitiveness, and Growth in a Dual Economy* 87-88 (2009) (for employee co-determination).



directors to approve its members' self-dealing activities.<sup>14</sup> Instead, authorization by another body is required: the supervisory board in Germany and the general meeting in China.<sup>15</sup>

But the classification as being part of the German legal family is not beyond doubt. Some of the aforementioned similarities may only be superficial ones. For example, with respect to "good faith" the crucial point to consider is how courts actually apply this principle.<sup>16</sup> With respect to company law, it may be argued that the relationship between management and a supervisory board is fundamentally different. In Germany, the management board is appointed by the supervisory board, whereas in China, both boards are appointed by shareholders.<sup>17</sup> Thus in Germany, but not in China, there is a vertical relationship between the supervisory and management boards.

It can also be argued that Chinese commercial law has not only been influenced by the foreign model from Germany, but that it is a "mixed legal system" that combines elements of civil and common law, as the next subsection will discuss.

### B. Classification as a "mixed legal system"

The Chinese Contract Act is the product of comparative work. For example, it is possible to refer to the influence of the American Chamber of Commerce, which has led to the incorporation of elements of the common law into the Contract Act.<sup>18</sup> In addition, the Contract Act incorporates elements of the Vienna Sales Convention (CISG) and the UNIDROIT Principles of International Commercial Contracts, both of which also include legal thinking from common law countries.

This influence can also be evidenced with specific examples. In China, the parties of a contract have to abide by the principle of fairness which shows some parallels to the principles of "equity" and "unconscionability" in common law countries.<sup>19</sup> An offer is not binding until acceptance, similar to the common law but different from the German law.<sup>20</sup>

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<sup>14</sup> *But see* Companies Act 2006 § 177 (U.K.) (stating that in the UK, uninterested directors' approval can legally verify a director's conflict interest activity).

<sup>15</sup> *See* AktG § 88; Companies Act 2006 § 148(4)-(5).

<sup>16</sup> *See, e.g.,* Simona Novaretti, *General Clauses and Practice: The Use of the Principle of Good Faith in the Decisions of Chinese Courts*, 5 EUR. REV. PRIV. L. 953 (2010).

<sup>17</sup> *See* AktG § 30(4) AktG; Company Law art. 38(2).

<sup>18</sup> *See* ZHANG, *supra* note 11 at 12 (increased Common Law influence).

<sup>19</sup> Contract Act art. 5; ZHANG *supra* note 11, at 74-75 (identifying further subcategories).

<sup>20</sup> Contract Act art. 14. *See* BGB § 145; United Nations Commission on International Trade Law [CISG] art. 16(1).

There are also similarities in the liability for breach of contract. As it is under common law, the duty to pay damages does not depend on fault, at least according to the dominant view.<sup>21</sup> With respect to the calculation of damages, the Contract Act refers to the foreseeability of damages, similar to the English decision in *Hadley v. Baxendale*.<sup>22</sup> Also similar to common law, it is not possible to exclude liability for personal injury in a contractual clause, and it has been suggested that the exceptions to specific performance are a compromise between civil and common law ideas.<sup>23</sup>

Chinese company law has also adopted some legal doctrines of Anglo-American law. A number of reforms of the 2000s can be seen as transplants from the US, namely the requirement that listed companies have independent directors,<sup>24</sup> the availability of shareholder-appraisal rights and derivative actions,<sup>25</sup> and the introduction of cumulative voting, which enhances minority shareholders' voting power in public companies.<sup>26</sup> Moreover, following the US model, a 2014 revision of the Company Law abolished the minimal capital requirement that existed in the 1993 and 2005 versions of the law.<sup>27</sup> It is also possible to refer to some instances where Chinese courts have considered Anglo-American concepts in company and securities law.<sup>28</sup>

Thus, in both instances there are some mixtures of specific rules from different foreign models. Often, then, it may not be straight-forward to determine which foreign model has been adopted. For example, a wide range of directors' duties exists in both Anglo-Saxon and continental European company law.<sup>29</sup> It is also not helpful if some academics refer to

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<sup>21</sup> See Contract Act art. 7; ZHANG *supra* note 11 at 291-93; LING, *supra* note 7, at ¶¶ 8.030-43.

<sup>22</sup> Contract Act art. 113; *Hadley v. Baxendale* 9 Exch. 341, 156 Eng. Rep. 145 (1854).

<sup>23</sup> John H. Matheson, *Convergence, Culture and Contract Law in China*, 15 MINN. J. INT'L L. 329, 368 (2006) (discussing section 110 of the Contract Act).

<sup>24</sup> China Sec. Regulatory Comm'n, *Company Law and Corporate Governance Guidelines* ch. 3 § 5 (2002).

<sup>25</sup> Companies Law of the People's Republic of China, art. 111.

<sup>26</sup> *Id.* at art. 106.

<sup>27</sup> Gaby Smeenk, *Recent Company Law Changes in China Improve Business Climate* (Apr. 16, 2014), <http://www.mondaq.com/x/307150/Corporate+Commercial+Law/Recent+Company+Law+Changes+In+China+Improve+Business+Climate>.

<sup>28</sup> See Guangdong Xu, Tianshu Zhou, Bin Zeng, & Jin Shi, *Director's Duties in China*, 14 EUR. BUS. ORG. L. REV. 57 (2013); Robin Hui Huang, *Private Enforcement of Securities Law in China: A Ten-Year Retrospective and Empirical Assessment*, 61 AM. J. COMP. L. 1 (2013). See generally Benjamin Liebman & Timothy Wu, *China's Network Justice*, 8 CHI. J. INT'L LAW 257 (2007).

<sup>29</sup> See MATHIAS SIEMS, *CONVERGENCE IN SHAREHOLDER LAW* 191-93 (2008).

the concepts of “offer” and “acceptance” as showing the impact of the common law,<sup>30</sup> as those also exist in civil law countries.

More fundamentally, it needs to be considered that the distinction between civil and common law countries is not primarily about differences in specific rules but about the style of legal systems.<sup>31</sup> For example, it may be crucial whether case law or statute law play a more pronounced role. Then, it could be argued that the Chinese contract law should belong to the civil law since, as in other civil law countries, contract and company law are codified with case law only playing a secondary role. In this respect, it can also be noted that the main examples of mixed legal systems are Scotland, South Africa, Quebec, Louisiana, Puerto Rico, Sri Lanka and Israel,<sup>32</sup> and that these legal systems do not seem to be particularly close to the Chinese one.

However, such reasoning is not beyond doubt. At a general level, this concerns the alleged distinction between statute law in civil law countries and case law in common law ones. For example, in Germany, court decisions play an important role, and some common law countries have codified contract law (*e.g.*, in India) – and, in any case, the company law of all countries (whether common or civil law) is to a significant degree based on codified law.

Moreover, in many aspects, the style of Chinese law is different from both common and civil law countries. In terms of sources of law, the Standing Committee of the National People’s Congress can issue general guidance for statutory interpretation.<sup>33</sup> In addition, guidance on interpretation is often provided by the Supreme People’s Court (SPC); however, this is not necessarily linked to particular cases. While the SPC can declare judgments to be “guiding cases”,<sup>34</sup> in the current context it is more significant that the SPC has issued detailed general guidance on both the Contract Act and the Company Law.<sup>35</sup> Thus, here the SPC functions more like a legislative body – unlike courts in Europe or North America.

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<sup>30</sup> Patricia Pattison & Daniel Herron, *The Mountains are High and the Emperor is Far Away: Sanctity of Contract in China*, 40 AM.BUS.L.J. 459, 466-67 (2003); Matheson, *supra* note 23, at 341-43. See ZHANG, *supra* note 11, at 12, 263.

<sup>31</sup> See generally MATHIAS SIEMS, *COMPARATIVE LAW* 41-48 (2014).

<sup>32</sup> See, *e.g.*, Website of the World Society of Mixed Jurisdiction Jurists, <http://www.mixedjurisdiction.org>.

<sup>33</sup> See LING, *supra* note 7, at ¶¶ 2.009-10.

<sup>34</sup> See, *e.g.*, Jinting Deng, *The Guiding Case System in Mainland China* (2013), available at <http://ssrn.com/abstract=2318958>.

<sup>35</sup> See, *e.g.*, Kristie Thomas, *China’s Legal Response to the Global Financial Crisis: Increasing Certainty in Contractual Disputes to Boost Market Confidence*, 10 J. CORP. L.

As a result, identifying similarities to civil and common law countries only provide a limited understanding of Chinese commercial law. The next section therefore discusses a view more focused on the distinct features of Chinese law.

## II. CHINESE COMMERCIAL LAW AS A “MYSTERY”?

It may be said that Chinese commercial law is something like a mystery that “Westerners” are not able to understand. The following will explain that this line of reasoning can be based on either the specific features of Chinese contract and company law or more general problems of *proper* understanding.

### A. Specific features of Chinese Commercial Law

The Chinese Contract Act acknowledges the freedom of contract.<sup>36</sup> However, the literature also refers to the analogy of a “bird in cage” meaning that there is indeed some freedom but only within narrow boundaries.<sup>37</sup> This model may reflect the remaining influence of communist concepts and the wish not to grant too much discretion to courts.<sup>38</sup>

In detail, these limitations to the freedom of contract show in various elements of the Contract Act: one of its provisions lists eight specific items, which the parties of a contract have to agree on, for example, the quality of the product, the liabilities for breach of contract, and the method of dispute resolution.<sup>39</sup> If uncertainties remain, the Act states that it is primarily objective criteria, such as government issued pricing guidelines that fill the gap (*i.e.* not the hypothetical will of the parties).<sup>40</sup> More generally, it is also

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STUD. 485 (2010); Shaowei Lin & David Cabrelli, *Legal Protection for Minority Shareholders in China*, 8 FRONTIERS OF LAW IN CHINA 266, 277 (2013).

<sup>36</sup> Contract Act art. 4; Christina Eberl-Borges & Yingxia SU, *Freedom of Contract in Modern Chinese Legal Practice*, 46 GEO. WASH. INT'L L. REV. 341, 350-51 (2014); Kornet, *supra* note 1, at 8 (referring to sections 3 and 8, principle of equality and *pacta sunt servanda*).

<sup>37</sup> ZHANG, *supra* note 11, at 60. See also STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 182 (Stanford Univ. Press 1999).

<sup>38</sup> See Hao Jiang, *Enlarged State Power to Declare Nullity: The Hidden State Interest in the Chinese Contract Law*, 7 J. CIV. L. STUD. 147, 148 (2014) (discussing the rule against fraud and duress “when state interest is harmed” in the Contract Act art. 52). See also Jörg Michael Scheil, *Beobachtungen zur Vertragsfreiheit in China*, 1999 NEWSLETTER DER DEUTSCH-CHINESISCHEN JURISTENVEREINIGUNG 2, 8-9 (1999).

<sup>39</sup> Contract Act art. 12.

<sup>40</sup> *Id.* at art. 62.

stipulated that a contract must not disrupt the social and economic order and that it should promote socialist modernization.<sup>41</sup> There is also the potential of significant government intervention: administrative regulations come into play where the state has issued a “mandatory plan”, administrative agencies have the duty to supervise the legality of contracts, and a number of provisions include the phrase that administrative regulations can deviate from the Contract Act, for example, for the form, effectiveness and changeability of a contract.<sup>42</sup> In addition, other laws provide specific restrictions for contracts with foreigners, in particular for joint ventures.<sup>43</sup>

In company law, we also find some divergence from the “modern mainstream.” Some elements of the Company Law are deeply influenced by a Chinese form of “corporatism”, as a middle ground between liberalism and Marxism. This refers to the idea of a strong central government authority with the existence of some private interest groups that enjoy a certain degree of autonomy. With a strong tradition of totalitarianism, China has maintained a hierarchical system, which can be traced back to the influence of Confucianism.<sup>44</sup> As early as the late 19th century when the concept of a company was first introduced into China, the Qing government attempted to control corporate practice by establishing a number of government-controlled companies. In these companies, the government had the power to dispose of the company’s assets and appoint its directors and managers, thus blurring the line between governmental power and private domain.<sup>45</sup>

For example, Colin Hawes finds that, “there are four articles in the first chapter of the Company Law that bear very little relation to anything in the Australian company legislation, or for that matter, possibly any non-Chinese jurisdiction.”<sup>46</sup> Specifically, they are the provisions about the overall purpose of this legislation, the government supervision of companies, and the requirements that companies have a party organization

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<sup>41</sup> *Id.* at art. 1, 7.

<sup>42</sup> *Id.* at art. 10, 38, 44, 77, 127.

<sup>43</sup> See ZHANG, *supra* note 11, at 64. See also C. Stephen Hsu, *Contract Law of the People’s Republic of China*, 16 MINN. J. INT’L L 115, 161 (2007) (discussing conflict of laws).

<sup>44</sup> See *infra* Section III.A for a discussion of Confucianism.

<sup>45</sup> JIANMIN DOU, RESEARCH ON THE HISTORY OF CORPORATE IDEOLOGY IN CHINA 21-22 (1999). See also Chi-Kong Lai, *China’s First Modern Corporation and the State: Officials, Merchants, and Resource Allocation in the China Merchants’ Steam Navigation Company, 1872-1902*, 54 J. ECON. HISTORY 432 (1994) (noting that “(t)he [Qing] government had long been recruiting private entrepreneurial and material resources to launch various kinds of joint ventures, often adopting different approaches to what was called ‘official supervised merchant enterprise’ (*kuan-tushang-pan*)”).

<sup>46</sup> Colin Hawes, *Interpreting the PRC Company Law Through the Lens of Chinese Political and Corporate Culture*, 30 UNIV. NEW SOUTH WALES L.J. 813, 813 (2007).

and that a socialist trade union is active in practice.<sup>47</sup> Moreover, official data indicate that party organizations and trade unions have been set up in some private and even multi-national enterprises in China.<sup>48</sup> Thus, overall, these provisions constitute a firm legislative basis by which the Communist Party can exert its influence on companies, regardless of the differences between state-owned enterprises (SOEs) and private companies.

All of this may sound unfamiliar to a Western observer, but it goes too far to allege that Chinese commercial law is simply something like a mystery because these examples can be rationally explained considering the historical and political context of the law. Moreover, some parallels can be drawn between these concepts of Chinese commercial law and those of Western countries. For example, it is possible to suggest some convergence between the contract law of China and Europe: while in China there is the trend towards an extension of contractual freedom, in Europe the trend is to include social elements into contract law, not least due to the correction of market failures.<sup>49</sup>

A similar counter-argument can be made with respect to “corporatism”. In continental Europe, some countries are said to have pursued neo-corporatist policies after the Second World War.<sup>50</sup> In addition, the financial crisis that started in 2008 may point towards the need to reconsider the freedom that companies have in the “Western” model of company and financial law. This may therefore be seen as a “return of societal corporatism”<sup>51</sup> casting doubt on the uniqueness of the Chinese model.

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<sup>47</sup> Company Law art. 1, 5, 18 and 19.

<sup>48</sup> See *Woguo Guimo Yishang Weigong Qiye Jiben Shixian Zhonggong Dangzuzhi Fugai*, 11 COMMUNISTS 47 (2012); Shi Wenjing, *Zengqiang Waizi Qiye Dangzuzhi Zishen Huoli De Chenggong Jingyan*, 70 XIAMEN TEQU DANGXIAO 19-21 (2003); Liu Guojie, *Yige Waizi Qiye Dangzuzhi de Rongheguan*, ZHONGGUO XIANDAI, Nov. 24, 2009 (describing a case study of the Party organisation in a South-Korean World's Top Five Hundred multi-national enterprise).

<sup>49</sup> See Junwei Fu, *Towards a Social Value Convergence: a Comparative Study of Fundamental Principles of Contract Law in the EU and China*, OXFORD UNIV. COMP. L. FORUM 5 (2009), available at <http://ouclf.iuscomp.org/articles/fu.shtml>.

<sup>50</sup> See, e.g., Philip Manow, *The Uneasy Compromise of Liberalism and Corporatism in Postwar Germany* (Univ. of Cal. Berkeley Center for German and European Studies Working Paper, Paper No. 5.88), available at <http://hdl.handle.net/11858/00-001M-0000-0012-576B-8>.

<sup>51</sup> See Leslie Budd, *Re-regulating the Financial System: The Return of State or Societal Corporatism?*, 7 CONTEMPORARY SOCIAL SCIENCE: JOURNAL OF THE ACADEMY OF SOCIAL SCIENCES 1 (2012); Steven Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 464, 537 (2009).

B. *General problems of understanding*

Yet, there may also be a more fundamental objection: perhaps it is possible to rationalize specific rules of Chinese commercial law. But it may be suggested that this does not mean that “Westerners” *properly* understand Chinese law.

For this line of reasoning, a first reference can be made to Teemu Ruskola’s research on “legal orientalism.”<sup>52</sup> The term “legal orientalism” is meant to refer to the problem that Chinese law is misrepresented if it is approached from a Western point of view. Thus, attempts by the West to understand Chinese law are said to tell us more about the legal culture of the former than about the Chinese one.

Second, it is possible to refer to Pierre Legrand’s controversial research. Legrand criticizes mainstream comparative law as superficial and positivist.<sup>53</sup> Instead, what is needed is a deep immersion into the legal mentalities of a country so as to understand the epistemological and ontological basis of the legal system in question. The result of such an approach is that each legal system is unique.<sup>54</sup> Frequently, Legrand refers to the examples of contract law in England and France. If we just focused on the positive law, such as the distinction between offer and acceptance, we may be misled in believing that there is an apparent similarity. However in his view, the English “contract” and the French “*contrat*” are something fundamentally different since they are based on different conceptual understandings of the contract: an exchange of promises in England and a meeting of minds in France.<sup>55</sup> It seems likely that even more so, Legrand would find profound differences between the contract law of England (or France) and China because Chinese scholars discuss different theories about the nature of contracts without the emergence of a consensus view.<sup>56</sup> Furthermore, significant differences at the practical level cause problems of misunderstanding. For example, although the remedial rules of the Chinese Contract Act share considerable similarities with the relevant Western legal rules, the possibility of an “efficient breach of contract” is not applicable in

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<sup>52</sup> TEEMU RUSKOLA, LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW (2013); Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179 (2002).

<sup>53</sup> See, e.g., PIERRE LEGRAND, LE DROIT COMPARE (2nd ed. 2006); Pierre Legrand, *How to Compare Now?*, 16 LEGAL STUD. 232 (1996). See also SIEMS, *supra* note 31, at 109-14.

<sup>54</sup> See Pierre Legrand, *On the Singularity of Law*, 47 HARV. INT’L L.J. 47, 51 (2006).

<sup>55</sup> PIERRE LEGRAND, FRAGMENTS ON LAW-AS-CULTURE 3 (1999).

<sup>56</sup> ZHANG, *supra* note 11, at 33-34.

China due to the differences of socio-cultural settings and the underdeveloped court system.<sup>57</sup>

Some Chinese company law doctrines may also support Legrand's line of reasoning, in particular as far as socio-cultural differences may inhibit the understanding of "transplanted" legal rules.<sup>58</sup> For example, consider the institution of the independent director. Donald Clarke argues that it is an institution to protect rather than to restrict majority shareholder's power in the Chinese context. The reason behind it is that the state ownership in Chinese public companies is over-concentrated, distorting the function of independent director.<sup>59</sup> In addition, the close social relationship between independent directors and managers or controlling shareholders disarms their incentive to be independent.<sup>60</sup>

The implementation of fiduciary duties is another example. Chinese judges tend to interpret the "duty of loyalty" narrower than the judges in the UK and the US. The reason behind this difference is related to the behavior pattern of Chinese judges as the current regime provides little incentive for judges to interpret the law actively when it is drafted in an ambiguous manner.<sup>61</sup> Similarly, Nicholas Howson and Donald Clarke's research on derivate actions finds that Chinese judges have a strong incentive to avoid mass litigation. Courts are particularly reluctant to get involved in lawsuits involving multiple plaintiffs or the interests of multiple parties and various

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<sup>57</sup> Ni Zhu, *A Case Study of Legal Transplant: Possibility of Efficient Breach in China*, 36 GEO. J. INT'L L. 1145 (2005).

<sup>58</sup> See Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. EUROP. & COMP. L. 111 (1997).

<sup>59</sup> Donald C. Clarke, *Corporate Governance in China: An Overview*, 14 CHINA ECON. REV. 494, 502 (2003), available at [http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1047&context=faculty\\_publication](http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1047&context=faculty_publication) s (The Dean of the Changjiang School of Business, who serves as an independent director, was recently quoted as saying, "I have never thought that the independent director is the protector of medium and small shareholders; never think that. My job is first and foremost to protect the interests of the large shareholder, because the large shareholder is the state.").

<sup>60</sup> See Juan Ma & Tarun Khanna, *Independent Directors' Dissent on Boards: Evidence from Listed Companies in China* 17 (Harv. Bus. Sch. Strategy Unit, Working Paper No. 13-089, 2013), available at <http://ssrn.com/abstract=2252200> (detailing recent empirical research about independent directors' dissent in China finds that, on one hand, independent directors need to build a good public reputation for being an active monitor, and on the other hand, they need to establish a good "private" reputation for being friendly with the controlling shareholders and top management).

<sup>61</sup> Xu et al., *supra* note 28, at 769. See also Jiahui AI, *Zhongguo Faguan Zuidahua Shenmo*, 3 FALV HE SHEHUIKEXUE 110 (2007).



rules and practices reflecting the state's own distaste for such suits reinforce such reluctance.<sup>62</sup>

However, barriers of understanding are not insurmountable. It is not impossible to learn new things. Thus, legal systems should not be seen as "closed frameworks" that foreigners can never enter. A possible reply may be that we can only acquire a partial knowledge about a foreign legal system, but then domestic lawyers face the same problem. Every lawyer, be it a practitioner or an academic, only has incomplete knowledge of the legal rules and the way these are applied in his or her own legal system. Thus, complete understanding is an illusion and knowing something about domestic law and foreign law merely differs in degree not in kind.<sup>63</sup>

None of this denies the risk of misunderstandings. In particular, it is crucial to be familiar with the specific Chinese context of the law. The need for a contextual perspective will therefore be elaborated in the following section.

### III. CHINESE COMMERCIAL LAW AS AN "IRRELEVANCE"?

Considering the cultural, socio-economic and political context of the law, it has sometimes been argued that Chinese law is (or was) seen as an "irrelevance."<sup>64</sup> Two types of reasoning may support such a view. First, it is often indicated that traditionally, contract and company law only played an insignificant role in China. Second, it is possible to refer to the communist legacy of Chinese law and possible problems of law enforcement.

#### A. *Traditional Triviality of Commercial Law*

Until the beginning of the 20th century, Chinese law was predominantly focused on administrative and criminal law. Trade and exchange of goods were common; yet, this did not lead to the development

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<sup>62</sup> Donald C. Clarke & Nicholas C. Howson, *Pathway to Minority Shareholder Protection: Derivative Actions in the People's Republic of China*, in *THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH* 243 (Dan Puchniak, Harald Baum and Michael Ewing-Chow eds., 2012).

<sup>63</sup> SIEMS, *supra* note 31, at 112-13.

<sup>64</sup> Stanley Lubman, *The Study of Chinese Law in the United States: Reflections on the Past and Concerns about the Future*, 2 *WASH. U. GLOBAL. STUD. L. REV.* 1, 8 (2003) (discussing the impact of cultural revolution); Raymond Siu Yeung Chan, Daniel Ho and Angus Young, *Rethinking the Relevance or Irrelevance of Directors' Duties in China: The Intersection between Culture and Laws*, 1 *ASIAN J. LAW & SOC'Y* 183 (2014) (outlining an empirical analysis of directors' duties). *See also* Teemu Ruskola, *Law Without Law, Or is 'Chinese Law' an Oxymoron?*, 11 *WM. & MARY BILL OF RIGHTS J.* 655 (2003).

of a consolidated Chinese commercial law until the early 20th century.<sup>65</sup> By way of explanation, researchers often emphasize the role of culture, in particular the impact of Confucianism and Taoism.

According to Confucian thinking, it is important to accept one's role in society and by doing so, harmony, social peace and stability can be maintained; law is therefore not seen as essential.<sup>66</sup> Furthermore, Confucian moral standards may, to large extent, discourage the development of commerce. For example, Confucius once said, "The Superior Man cares about virtue; the inferior man cares about material things. The Superior Man seeks discipline; the inferior man seeks favors"; and on another occasion, Confucius told a student that "the Superior Man is aware of Rightness; the inferior man is aware of benefit."<sup>67</sup> Ancient Chinese officials, who were trained in Confucian philosophy, were reluctant to be involved in commercial disputes, as pursuing profit was morally suspect under Confucianism, not to mention the dispute triggered by seeking personal benefit.<sup>68</sup> The legal gap at that time was filled by private force: while local notables also used regulations of guilds and families as well as on longstanding custom in case of commercial disputes, decisions would normally be based on a considerable degree of personal comprehension of local practices on the part of the decision maker.<sup>69</sup>

According to Taoism, one should find fulfillment in oneself. Thus, for example, complying with contractual agreements happens because of an internal motivation, not due to external pressure. Again, as this may already guarantee harmony and stability,<sup>70</sup> law is often seen in a negative light. For example, in Laotse's *Tao te king* it is said: "If you don't have integrity, there's always kindness. If you don't have kindness, there's always justice. If you don't have justice, all you have left is righteousness. Righteousness is a pale imitation of true faith and loyalty, and always leads to trouble."<sup>71</sup>

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<sup>65</sup> See LING, *supra* note 7, at ¶ 1.013; ZHANG, *supra* note 11, at 27; Pattison & Herron, *supra* note 30, at 509.

<sup>66</sup> See generally ZHANG, *supra* note 11, at x; Pattison & Herron, *supra* note 30, at 478-79; Matheson, *supra* note 23, at 371.

<sup>67</sup> CONFUCIUS, ANALECTS, <http://ctext.org/analects>.

<sup>68</sup> David Faure, *Zhongguo Ziben Zhuyi De Mengya* [The Emerging Capitalism in Ancient China], 1 *Zhongguo Jingjishi Yanjiu* [The Journal of China's Economic History] 62 (2002).

<sup>69</sup> William C. Kirby, *China Unincorporated: Company Law and Business Enterprise in Twentieth-Century China*, 54 *J. Asian Study* 43, 44-5 (1995). See also SUSAN MANN, *LOCAL MERCHANT AND THE CHINESE BUREAUCRACY 1750-1950* (1987).

<sup>70</sup> See Pattison & Herron, *supra* note 30, at 479-80.

<sup>71</sup> DuhTao, Chapter 38 as translated by Ron Hogan, available at <http://www.duhtao.com/translations.html>.

To be sure, Confucianism and Taoism are not directly incorporated into the positive commercial law. While some provisions of commercial law may reflect Socialist thoughts,<sup>72</sup> it is hard to find any provision which is drafted in accordance with traditional Confucian or Taoist thinking. This can be attributed to the legal elites' attitude towards the commercial law tradition. As one scholar notes, local customary law and practice are usually dismissed in China's legal reform as being "backwards" or "old and bad habits" impeding economic and legal development rather than enhancing them.<sup>73</sup>

With respect to the role of Confucianism and Taoism in society, in 1974, the Communist Party released a document, which required all Chinese to participate in a campaign of attacking Confucian philosophy (*pi lin pi kong*). In the Party's eyes, Confucius represented Feudalism and its traditions.<sup>74</sup> Yet in recent years, there is said to be a revival of Confucianism in China.<sup>75</sup> In addition to and overlapping with Confucianism and Taoism, the literature often mentions the importance of clientelism ("guanxi"), namely that family and social ties create trust and loyalty without the need for formal contracts.<sup>76</sup>

Clientelism refers to a close-knit society, which is highly reliant on personal relationships and networks of familial, personal and social connection.<sup>77</sup> The network, which facilitates exchange of personal and knowledge-based resources for mutual protection and aid, can be traced back to the traditional nepotism of Chinese emperors, as well as the corruption and particularism of Chinese dynastic bureaucracy.<sup>78</sup> It is also said to play a key role in China's political, social and legal life today. For example, Randall Peerenboom divides clientelism into two groups:

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<sup>72</sup> See *supra* Section II and *infra* Section III.B for a discussion of Confucianism.

<sup>73</sup> Jianfu Chen, *The Transformation of Chinese Law: From Formal to Substantial*, 37 Hong Kong L.J. 689, 737 (2007). See also *infra* Section IV (for relationship between legal and economic development).

<sup>74</sup> See, e.g., Merle Goldman, *China's Anti-Confucian Campaign, 1973-1974*, THE CHINA QUARTERLY, 63, 435, 438 (1975).

<sup>75</sup> Sébastien Billioud & Joël Thoraval, *The Contemporary Revival of Confucianism*, CHINA PERSPECTIVES, Issue 75, 2008 p. 88-106 (2008); Tania Branigan, *Beijing Marks Confucius's Happy Return, Aged 2,561*, THE GUARDIAN (Sept. 28 2010), <http://www.theguardian.com/world/2010/sep/28/confucius-china-cultural-revolution>.

<sup>76</sup> See, e.g., Matheson, *supra* note 23, at 373-4; Pattison & Herron, *supra* note 30, at 484-85; Yi LU & Zhigang TAO, *Contract Enforcement and Family Control of Business: Evidence from China*, 37 J. COMP. ECONOMICS 597 (2009) (finding that weaker contract enforcement is associated with higher degree of family control of business).

<sup>77</sup> See Emauela Todeva, *Business Network in China: Legacies and Practice*, Business Network and Strategic Alliances in China (2007), available at [http://mpr.ub.uni-muenchen.de/52849/1/MPRA\\_paper\\_52849.pdf](http://mpr.ub.uni-muenchen.de/52849/1/MPRA_paper_52849.pdf).

<sup>78</sup> *Id.*

horizontal and vertical. “Horizontal clientelism” refers to the relationships between equal parties. By contrast, “vertical clientelism” refers to the patron-client relationship between supervisors and subordinates.<sup>79</sup> Both horizontal and vertical clientelism involve a system of exchanging interests, which can be regarded as a replacement of formal legislation.

The importance of clientelism can also be illustrated by way of examples from contract and company law. The literature on Chinese contract law often explains that its formal rules are frequently not accepted.<sup>80</sup> For example, despite the binding nature of contracts,<sup>81</sup> it is not seen as a stigma to renegotiate the conditions of a contract. Thus, signing a contract may not be seen as the conclusion of the negotiations but as the beginning of a business relationship.<sup>82</sup> The literature also frequently explains that forms of mediation are more important than judicial enforcement since Chinese culture prefers a situation where one can win without the necessity of a fight.<sup>83</sup>

With respect to company law, assume the following two cases:<sup>84</sup> first, an executive director decides to buy overpriced supplies from a personal acquaintance who in turn helps the director’s son into a prestigious school; and second, a government official gives a preferential policy to a company in exchange for the appointment of his son as a senior executive with handsome remuneration. In the first scenario, the director realizes his personal interests at the expense of the shareholders. In the second scenario, the governmental official gains personal benefits from his governmental authority. In both cases, the persons in power, whether economically or politically, have the ability of economic self-enrichment without incentives to comply with any rules of company law.

Does all of this show that commercial law is irrelevant in China? To start with, the opposition between law and Confucianism should not be overrated. Sometimes it may just be a convenient stereotype, for example, “the West” uses Confucianism as a way to portray Chinese society as

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<sup>79</sup> See RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 470 (2002).

<sup>80</sup> See Knieper, *supra* note 4, at 5. See also Scott D. Seligman, CHINESE BUSINESS ETIQUETTE (1999) (discussing the deep roots of guanxi as one of the biggest hurdles to establish the rule of law in China).

<sup>81</sup> Contract Act, art. 8.

<sup>82</sup> See Pattison & Herron, *supra* note 30, at 460, 491.

<sup>83</sup> See *id.* at 482, 500-01 (referring to Sun Tzu, THE ART OF WAR, the ancient war text from 500 BC).

<sup>84</sup> See Udo C. Braendle, Tanja Gasser & Juergen Noll, *Corporate Governance in China – Is Economic Growth Potential Hindered by Guanxi?*, 110 BUS. & SOC’Y REV. 389, 401 (2005).

backwards and irrational.<sup>85</sup> Specifically, it can be argued that continuing ethical values can also play a role within the legal framework. For example, the Chinese literature suggests that the principle of good faith of the Contract Act can be a way to incorporate Confucian thinking into the positive law.<sup>86</sup> Other scholars recommend that some key Confucian thinking should be integrated into the Chinese corporate governance regime in order to achieve a functional convergence.<sup>87</sup>

There are also some problems with the statement that in China the positive commercial law just does not matter because of a preference for negotiated solutions to conflicts. Avoidance of judicial enforcement is not unique to China. In the 1960s, Stewart Macaulay found that in the US, contract law is often of secondary importance in practice since companies prefer to solve conflicts without reliance on formal contract law, lawyers and courts.<sup>88</sup> Recent scholarship has also drawn a parallel between the movement towards alternative dispute resolution in the West and forms of mediation in China.<sup>89</sup>

In addition, studies have shown that under Chinese law contracts, corporate disputes and their enforcement have become more important. According to three studies conducted in the years 2001 and 2005, the vast majority of firms value well-drafted contracts.<sup>90</sup> Today, judicial enforcement also plays a more pronounced role than is often assumed. According to a study by Donald Clarke and his colleagues, the number of commercial and civil disputes has multiplied between 1983 and 2001, and there has also been a trend toward courts deciding more cases by way of judgment and fewer by judicial mediation.<sup>91</sup> Recent data tell a similar story.

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<sup>85</sup> See *supra* II.B (the debates about “legal orientalism” and about Max Weber’s description of China). See also X.Y. Qian, *Traditional Chinese law v. Weberian Legal Rationality*, 10 MAX WEBER STUDIES 29 (2010).

<sup>86</sup> See Novaretti, *supra* note 16, at 980. See also ZHANG, *supra* note 11, at 76; Liming Wang & Chuanxi Xu, *Fundamental Principles of China’s Contract Law*, 13 COLUM. J. ASIAN L. 1, 16-17 (1999). See also *supra* I.A (discussing good faith).

<sup>87</sup> Charles K.N. Lam & S.H. Goo, *Confucianism: a Fundamental Cure to the Corporate Governance Problems in China*, 35 COMPANY LAWYER 52 (2014); Angus Young, Grace Li & Alex Lau, *Corporate Governance in China: the Role of the State and Ideology in Shaping Reforms*, 28 COMPANY LAWYER 204, 222 (2007).

<sup>88</sup> Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 1 (1963). See also David Charny, *Non-legal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 375 (1990); CONTRACTS, COOPERATION AND COMPETITION (Simon Deakin & Jonathan Michie, eds., 1997).

<sup>89</sup> Philip C.C. Huang, *Whither Chinese Law?*, 33 MODERN CHINA 163 (2007).

<sup>90</sup> For references, see Donald Clarke, Peter Murrell & Susan Whiting, *The Role of Law in China’s Economic Development*, in CHINA’S GREAT ECONOMIC TRANSFORMATION 375, 408 (Thomas Rawski & Loren Brandt eds., 2008).

<sup>91</sup> *Id.* at 412-13.

According to China Law Yearbook 2012, Chinese courts accepted 3,333,595 contract law cases in 2011; only 36 percent of cases were closed by mediation.<sup>92</sup>

Chinese culture may also change at the individual level. According to past indicators, there were profound differences between China and the West. Based on an estimate from 2001, China had lower values than Western countries in the Hofstede-categories of “individualism” and “uncertainty avoidance” (*i.e.*, risk appetite) but higher values in those related to “power distance” (*i.e.*, respect of authority) and “long term orientation.”<sup>93</sup> Yet according to the Hofstede data, Hong Kong and Taiwan are closer to the Western world,<sup>94</sup> thus potentially indicating the future direction of cultural attitudes in (mainland) China. Accordingly, a recent article by Shaomin Li suggests that “cultural heritage is not the main obstacle to the transition, for the main obstacle is the powerful political forces that have been deeply entrenched in and benefited from the relation-based system.”<sup>95</sup> This leads us to the second reason why commercial law and judicial enforcement may still be insignificant.

### B. *The Communist Legacy*

It might be argued that under Communism (or Socialism), civil courts are bound to be largely irrelevant due to the lack of individual rights that would require legal enforcement. As far as contracts exist, these only have the aim of fostering the fulfillment of government plans. Thus in a Communist planned economy, contract law aims to control individual behavior and the economy but not to enable individuals (or even private companies) to do what they want to do.<sup>96</sup> Similarly, under such ideology, company legislation is drafted primarily for the purpose of facilitating economic planning. For example, according to a law from the 1950s:

“for the purpose of overcoming economic anarchy,  
adjusting the relationship between production and  
marketing, and developing toward a planned

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<sup>92</sup> CHINA LAW YEARBOOK 1066 (2012).

<sup>93</sup> GEERT HOFSTEDÉ, CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS AND ORGANISATIONS ACROSS NATIONS (2001). *See also* Geert Hofstede, *China*, THE HOFSTEDÉ CENTER, <http://www.geert-hofstede.com/china.html>.

<sup>94</sup> Jeffrey E. Thomas, *Rule of Law with Chinese Characteristics: An Empirical Cultural Perspective on China and Hong Kong* (2014), available at <http://ssrn.com/abstract=2523031>.

<sup>95</sup> Shaomin Li, *China's (Painful) Transition from Relation-Based to Rule-Based Governance: When and How, Not If and Why*, 21 CORPORATE GOVERNANCE: AN INT'L REV. 567 (2013).

<sup>96</sup> *See generally* Zhang, *supra* note 11, at 47-50.

economy, if necessary, the government may make production and marketing plans in relation to certain important products, which should be complied with by both state-owned and private enterprises.”<sup>97</sup>

Of course in the last two decades China has, to a significant degree, moved away from this model. Today, China is seen as a socialist *market economy*, and commercial law is therefore not only (or even primarily) aimed at plan fulfillment and control.<sup>98</sup> Instead, it is regarded as an important instrument, which facilitates and supports economic development. This movement is reflected by Deng Xiaoping’s famous “two hand theory”: on the one hand, the economy must be developed, and on the other hand, the legal system must be strengthened in order to maintain an environment for such development.<sup>99</sup>

Since 1999, the Chinese constitution also aims to combine elements of socialism and the rule of law.<sup>100</sup> Core to the rule of law are strong and independent courts. Whether these exist in China is often doubted. As there is no doctrine of separation of powers, courts are just seen as one of many bureaucracies,<sup>101</sup> and judges are seen as being dependent on political decision-makers and the people’s congresses.<sup>102</sup> There is also the widespread problem of corruption – and, in this respect, it may be seen as unfortunate that the frequency of general provisions in the Contract Act could enable the use of improper considerations.<sup>103</sup> Moreover, it is sometimes noted that enforcement of judgments is difficult, particularly against state-owned enterprises,<sup>104</sup> and that neither formal nor informal enforcement is effective in the Chinese stock market.<sup>105</sup>

Some of the international benchmark data may also support such a skeptical view. Based on surveys, the World Bank Governance Indicators

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<sup>97</sup> YUWA WEI, *COMPARATIVE CORPORATE GOVERNANCE: A CHINESE PERSPECTIVE* 92 (2003).

<sup>98</sup> For exceptions, see *supra* Section II.

<sup>99</sup> DENG XIAOPING, *THE SELECTED WORKS OF DENG XIAOPING* 107 (1989).

<sup>100</sup> See Article 5, *Constitution of the People’s Republic of China*, <http://english.people.com.cn/constitution/constitution.html>.

<sup>101</sup> See PEERENBOOM, *supra* note 79, at 484.

<sup>102</sup> See Matheson, *supra* note 23, at 380 (“Never underestimate the power of the Communist Party.”).

<sup>103</sup> See Matheson, *supra* note 23, at 378; Peerenboom, *supra* note 79, at 455.

<sup>104</sup> See Pattison & Herron, *supra* note 30, at 505-06; Michael Trebilcock & Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 VA. L. REV. 1517, 1560-61 (2006).

<sup>105</sup> DING CHEN, *CORPORATE GOVERNANCE, ENFORCEMENT AND FINANCIAL DEVELOPMENT: THE CHINESE EXPERIENCE* (2013).

regularly examine how far a country's population has "confidence in and abide by the rules of society, in particular the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence."<sup>106</sup> In this respect, the weak performance by China has not changed considerably in the last fifteen years.<sup>107</sup> A similarly low and unchanged result can be observed for China's performance in the Global Corruption Index, published annually by Transparency International.<sup>108</sup>

However, some indicators, also collected by the World Bank, present a more optimistic picture. The Business Environment Survey 2000 included seven questions about courts, contracts and property rights, and in China, 80 percent of the respondents answered that contract and property rights were usually protected.<sup>109</sup> In the Enterprise Survey 2012, respondents did not regard courts and corruption as major constraints, and in this survey, China also performs better than the average country in East Asia.<sup>110</sup> Furthermore, China performs very well in the category "enforcing contract" of the World Bank's Doing Business Report 2014: it is ranked 19 in the world with above average performance for the duration and costs of trials (as scaled by the annual per capita income of each country).<sup>111</sup>

There are good reasons to criticize these broad indicators,<sup>112</sup> but in the current context, they are in line with other research that has identified improvements of the rule of law in China,<sup>113</sup> accompanied by a professionalization of legal education and an increase in the number of lawyers.<sup>114</sup> For example, recent research has rejected "wholesale denunciations of a lack of judicial independence".<sup>115</sup> Rather, one has to distinguish between cases: while in political cases or in those that involve

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<sup>106</sup> See *Rule of Law*, THE WORLD BANK, <http://info.worldbank.org/governance/wgi/pdf/rl.pdf>.

<sup>107</sup> *Country Data Report for China, 1996-2013*, THE WORLD BANK, <http://info.worldbank.org/governance/wgi/pdf/c42.pdf>.

<sup>108</sup> Available at <http://www.transparency.org/research/cpi/>

<sup>109</sup> *World Business Environment Survey 2000*, THE WORLD BANK, <http://go.worldbank.org/RV060VBJU0>.

<sup>110</sup> See *World Bank Group Enterprise Surveys*, THE WORLD BANK, <http://www.enterprisesurveys.org/Data/ExploreEconomies/2012/china>.

<sup>111</sup> Available at <http://www.doingbusiness.org/reports/global-reports/doing-business-2014>.

<sup>112</sup> SIEMS, *supra* note 31, at 167-86 and Mathias Siems, *Measuring the Immeasurable: How to Turn Law into Numbers*, in DOES LAW MATTER? ON LAW AND ECONOMIC GROWTH 115 (Michael Faure & Jan Smits eds., 2011).

<sup>113</sup> John W. Head, *Feeling the Stones When Crossing the River: The Rule of Law in China*, 7 SANTA CLARA J. INT'L L. 25 (2010); PEERENBOOM, *supra* note 79.

<sup>114</sup> Clarke *et al.*, *supra* note 90.

<sup>115</sup> Randall Peerenboom, *Introduction*, JUDICIAL INDEPENDENCE IN CHINA 4 (Randall Peerenboom ed., 2010).



important socio-economic issues, individual judges may be put under pressure, this is different for the mass of more routine ones, in particular on commercial matters.<sup>116</sup>

A study by Nicholas Howson also found that Shanghai courts are not hesitant to rule against political actors, such as government departments and state-owned enterprises in matters of company law.<sup>117</sup> However, Howson also identifies some constraints of judicial independence given the “bureaucratic embeddedness” of the courts in “China’s modified authoritarian system.”<sup>118</sup> This is in line with statements by other researchers who distinguish between the different elements of judicial independence, for example, pointing towards the strengthened role of merit for recruitment and promotions but also formal and informal hierarchies that may restrict individual judges.<sup>119</sup>

As a result, it is clear that the role of law in China is not identical to its role in “Western” countries. However, there is also the trend that commercial law does play a growing role in practice. Thus, despite its limitations, it should not be regarded as irrelevant. This time-dependency of the law will also play a role in our concluding assessment.

#### IV. CONCLUSION: TOWARDS A BILATERAL PERSPECTIVE

All three modes of understanding Chinese commercial law seem to have some initial plausibility, but one also has to be aware of their shortcomings. Chinese commercial law has been influenced by German and other legal systems.<sup>120</sup> However, classifying it as part of the German legal family (or as a mixed legal system) would ignore the distinct features of Chinese commercial law. In particular, it is necessary to consider the historical, socio-economic and political context of the law. This is possible (though not easy); thus, Chinese commercial law should not simply be seen as a mystery. It should also not be categorized as irrelevant: cultural limitations, as well as problems of law enforcement, play a role for the

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<sup>116</sup> See, e.g., Fu Yulin & Randall Peerenboom, *A new analytical framework for understanding and promoting judicial independence*, in JUDICIAL INDEPENDENCE IN CHINA 95 (Randall Peerenboom ed., 2010); Carlo Guarneri, *Judicial independence in authoritarian regimes: lessons from continental Europe*, in JUDICIAL INDEPENDENCE IN CHINA 234, 239 (Randall Peerenboom ed., 2010) (calling this a “bifurcated structure”).

<sup>117</sup> Nicholas C. Howson, *Corporate Law in the Shanghai People’s Courts, 1992-2008: Judicial Autonomy in a Contemporary Authoritarian State*, 5 EAST ASIA L. REV. 303 (2010).

<sup>118</sup> *Id.* at 303.

<sup>119</sup> Randall Peerenboom, *Common myths and unfounded assumptions: challenges and prospects for judicial independence in China*, JUDICIAL INDEPENDENCE IN CHINA 69, 74-78 (Randall Peerenboom ed., 2010).

<sup>120</sup> See *supra* Section I.2.

understanding of Chinese commercial law, but they do not make it inconsequential.

At present, it is therefore most appropriate to take into account all three “contentious modes”, as well as their limitations, in the understanding of Chinese commercial law. But it is also clear that Chinese law is very much a moving target. In particular, some may argue that more reliance on law is necessary for economic development. In the Chinese context, this is of course a controversial statement.<sup>121</sup> Here, on the one hand, there is the view that the Chinese experience shows how personal relationships can substitute for law. This is not only the case because parties who do business with their familiar partners will suffer less from the costs of asymmetric information but also because strong networks of social connection facilitate the flow of information between parties.<sup>122</sup> On the other hand, there is the argument that these interlaced personal networks facilitate “rent-protection” activities, for example, through the appointment of close friends to company positions or the bribery of judges or other government officials.<sup>123</sup>

The Chinese experience does not seem to confirm the claim that a strong legal system is necessary for economic development.<sup>124</sup> Yet in any case, it seems likely that economic and legal systems typically co-evolve.<sup>125</sup> It has also been suggested that the sustainability of economic growth in China now depends on improvements to the rule of law: it can reduce its

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<sup>121</sup> For recent discussions *see, e.g.*, GUANDONG XU, DOES LAW MATTER FOR ECONOMIC GROWTH? A RE-EXAMINATION OF THE 'LEGAL ORIGIN' HYPOTHESIS 141 (2014) (noting that China is an economic anomaly because it has weak rule of law and strong economic growth); Julian Du et al., *Economic institutions and firm behavior and performance in China: did institutions matter and how did they come into being?*, in RETHINKING LAW AND DEVELOPMENT: THE CHINESE EXPERIENCE 35 (Guanghua Yu ed., 2014); DAVID KENNEDY, *Law and Development Economics: Toward a New Alliance*, in LAW AND ECONOMICS WITH CHINESE CHARACTERISTICS: INSTITUTIONS FOR PROMOTING DEVELOPMENT IN THE TWENTY-FIRST CENTURY 19, 20 (David Kennedy & Joseph E Stiglitz eds., 2013) (noting that legal frameworks profoundly affect economic growth); LINDA YUEH, CHINA'S GROWTH: THE MAKING OF AN ECONOMIC SUPERPOWER 40-41 (2013) (noting that “legal and economic reforms did not progress in a particular sequence but developed alongside the other”).

<sup>122</sup> *See* Ronald J. Gilson, *Controlling Family Shareholder in Developing Countries: Anchoring Relational Exchange*, 60 STAN. L. REV. 633, 639 (2007). *See also* REUSS-MARKUS KRAUBE, GUANXI AS A MODEL OF SOCIAL INTEGRATION 19, 20, 74 (2010), available at [https://ssl.humanities-online.de/download/Krausse\\_Guanxi\\_ccl.pdf](https://ssl.humanities-online.de/download/Krausse_Guanxi_ccl.pdf).

<sup>123</sup> For the distinction between horizontal and vertical clientelism *see supra* text accompanying notes 77-85.

<sup>124</sup> Indeed, many indicate that in China the causal relationship may be the reverse. *See, e.g.*, Trebilcock & Leng, *supra* note 104, at 1554-65.

<sup>125</sup> *See* Clarke et al., *supra* note 90, at 378-80. *See generally*, Mathias Siems & Simon Deakin, *Comparative Law and Finance: Past, Present and Future Research*, 166 J. INST. & THEORETICAL ECON. 120, 133-35 (2010).

overreliance on export-led growth,<sup>126</sup> and if such improvements were not to happen, entrenched interest groups such as corrupt officials may “block the reform, obstruct development, and even threaten the political stability of the nation.”<sup>127</sup> As private companies grow and engage in more complex transactions, it also seems likely that formal contracts and judicial enforcement will gain in importance.<sup>128</sup> Thus, Chinese commercial law may indeed move closer to the models of Western countries.

As a result, it can also be expected that legal transplants will remain important for the development of commercial law in China. This is confirmed by research on the evolution of law that law is a cognitive institution,<sup>129</sup> that it is a “product of a systemic order of thought” and that “only law produces law.”<sup>130</sup> It is then also possible to approach the question of whether and how Western lawyers understand Chinese commercial law from a “bilateral perspective” since its answer largely depends on the extent to which Chinese legislators, judges and lawyers understand the transplanted Western law. Furthermore, comprehensive understanding of Western legal theories substantially influences lawyers’ way of behaviors, including their manner of legal reasoning, their day-to-day operations of commercial law subjects and even the language of their legal communication.<sup>131</sup> Some researchers have already investigated the phenomenon that Chinese judges and practical lawyers are making endeavors to understand and implement the transplanted laws in the light of Western legal theories and practice.<sup>132</sup> As the Chinese commercial lawyers’ understanding of Western legal theories becomes increasingly sophisticated and comprehensive, and as Western legal thought becomes more integrated into their way of thinking and behaving, the growth of Chinese commercial law will follow a more refined and concrete internal logic, and a more ingenious adoption of Western law will emerge.

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<sup>126</sup> Marina Kurkchiyan, *Russia and China: A Comparative Perspective on the Post-Communist Transition* 1,6 (FLJS, Working Paper 2010), [https://www.academia.edu/1328569/Russia\\_and\\_China\\_a\\_Comparative\\_Perspective\\_on\\_the\\_Post-Communist\\_Transition](https://www.academia.edu/1328569/Russia_and_China_a_Comparative_Perspective_on_the_Post-Communist_Transition).

<sup>127</sup> Chenggang Xu, *The Fundamental Institutions of China’s Reforms and Development*, 49 J. ECON. LITERATURE 1076, 1140 (2011).

<sup>128</sup> PEERENBOOM, *supra* note 79, at 467-68, 480-81, 496; Trebilcock & Leng, *supra* note 104, at 1543.

<sup>129</sup> Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97, 111-12 (2002).

<sup>130</sup> Simon Deakin & Fabio Carvalho, *System and Evolution in Corporate Governance* 9 (ECGI, Working Paper, 2009), available at <http://ssrn.com/abstract=1581746>.

<sup>131</sup> See Chao Xi, *Case Note: Private Enforcement of Securities Law in China: Daqing Lianyi co v Zhong Weida and Others Hei Longjiang High Court*, 1 J. COMP. L. 492, 494 (2006).

<sup>132</sup> *Id.*; Liebman & Wu, *supra* note 28, at 293.

Although law is a system of self-production (i.e., it is “autopoetic”), it still has an inter-relationship with the external environment.<sup>133</sup> China’s current mode of economic development is ultimately unsustainable and its negative aspects also become increasingly apparent to the general public. More specifically, both domestic and foreign investors may become impatient with China’s model of economic growth, which is based on corruption, government connections and unfair competition. This growing public unease and apprehension may force both the central government and local governments to redefine their roles in engaging and supervising commercial activities. Otherwise, the government and the Party’s legitimate position will be seriously threatened. Consequently, although corporatism and clientelism may still play a role in China’s commercial world, a fairer playing field will be provided by implementing a more substantial system of the rule of law. These external movements can also impact the internal dynamic of self-reproduction of the law: improving the quality of Chinese commercial law based on a fair understanding of Western counterparts. As far as this is the case, this will therefore reduce the problems of misunderstanding discussed in this article.

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<sup>133</sup> See Deakin & Carvalho, *supra* note 130.

**BEYOND PRE-RECONSTRUCTION SLAVERY:  
AMERICA’S MODERN DAY TRADE PRACTICES AND CONFRONTING  
FORCED LABOR**

Alyssa B. Coffey\*

INTRODUCTION

“Solidarity, acceptance, and signs of fraternity and understanding exist side by side with rejection, discrimination, trafficking and exploitation, suffering and death. Particularly disturbing are those situations where migration is not only involuntary, but actually set in motion by various forms of human trafficking and enslavement. Nowadays, “slave labour” is common coin!” – Pope Francis<sup>1</sup>

The 13<sup>th</sup> Amendment abolished America’s pre-reconstruction slavery practices in 1865.<sup>2</sup> However, most Americans today could not look around their homes and confidently say that everything they had purchased had been built without slave labor. With commercial activity increasingly stretching beyond the country’s shores, Americans face the moral questions of commercially supporting new and continuing forms of a labor practice they condemned, and fought a civil war to end, nearly 160 years ago. Today, an estimated 21 million people across the world are thought to be victims of forced labor.<sup>3</sup>

Although many Americans are familiar with the African-enslavement that the United States abolished with ratification of the 13<sup>th</sup> Amendment,<sup>4</sup> far fewer are aware of what legal instruments might be used by the United States to act with regard to international and domestic modern-day slavery practices. Not only has the United States outlawed pre-reconstruction

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\* George Mason University School of Law, J.D. Candidate 2015, Notes Editor, Journal of International Commercial Law, 2013-2014, Western Michigan University, B.A., Degree in Secondary Education for Political Science and English, December 2008.

<sup>1</sup> Message of His Holiness Pope Francis for the World Day of Migrants and Refugees, Migrants and Refugees: Toward a Better World, *available at* [http://www.vatican.va/holy\\_father/francesco/messages/migration/documents/papa-francesco\\_20130805\\_world-migrants-day\\_en.html](http://www.vatican.va/holy_father/francesco/messages/migration/documents/papa-francesco_20130805_world-migrants-day_en.html).

<sup>2</sup> U.S.C.A. Const. Amend. XIII, § 1.

<sup>3</sup> Press Release, Int’l Labour Org., 21 Million People Are Now Victims of Forced Labor, the ILO Says (June 1, 2012), *available at* [http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_181961/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_181961/lang--en/index.htm).

<sup>4</sup> *Id.*

slavery, it has also, in case after case, found the purpose and scope of the 13<sup>th</sup> Amendment to extend to, and thus outlaw, other forms of forced labor analogous to slavery.

Likewise, the United States has implemented restrictions on forced labor into its international trade agreements with many other countries. Although the World Trade Organization (WTO) does not consider labor practices in trade agreement formation or assessment of practices<sup>5</sup>, the United States has inserted labor chapters in the unilateral and bilateral trade agreements it establishes with countries outside of the WTO.<sup>6</sup> Within these trade agreements, the United States offers trade preferences in exchange for, among other provisions, adhering to certain international labor standards.<sup>7</sup> These labor standards are drawn from the International Labor Organization's (ILO's) 1998 Declaration on Fundamental Principles and Rights at Work, which include: (1) Freedom of association and the effective recognition of the right to collective bargaining; (2) Elimination of all forms of forced or compulsory labor; (3) Effective Abolition of Child Labor, and (4) Elimination of discrimination in respect of employment and occupation.<sup>8</sup>

Every year, several governmental departments assess whether a trade partner country is still in compliance with the international labor standards set forth in our free trade agreements.<sup>9</sup> If a country is not found to be in compliance, the United States has several options at its disposal to encourage the trade partner country to redouble its efforts to comply with international labor standards, including revocation and modification of trade preferences.<sup>10</sup>

Although the United States has revoked trade preferences in the past, many free-trade partner countries continue to allow forced labor in various forms, and thus, benefit from labor practices that the United States has condemned both domestically and internationally. The United States has taken steps to show its support for the eradication of slavery-like practices through the labor chapters of its trade agreements. This comment argues that, as the United States has condemned slavery-like labor practices in its

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<sup>5</sup> *Labour Standards: Consensus, Coherence and Controversy*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey5\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm) (last visited Apr. 18, 2015).

<sup>6</sup> *Labor*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://www.ustr.gov/issue-areas/labor> (last visited Apr. 18, 2015).

<sup>7</sup> *Id.*

<sup>8</sup> *ILO Declaration on Fundamental Principles and Rights at Work*, INT'L LABOR ORG., <http://www.ilo.org/declaration/lang--en/index.htm> (last visited Jun. 1, 2015).

<sup>9</sup> *Labor Advisory Committee*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/labor/labor-advisory-committee> (last visited Apr. 18, 2015).

<sup>10</sup> *Id.*

own commercial system, it should take further steps in its trade agreement enforcement decisions to ensure trade partner countries deter these practices and that the United States does not continue to import the products of forced labor once they are identified.

Part I of this Comment provides a background on the formation of the International Labor Organization, ratification of Convention 105 on the Abolition of Forced Labor, the adoption of the 1998 Declaration on Fundamental Principles and Rights at Work in addition to the inclusion of that declaration's principles in our unilateral and bilateral trade agreements. Part II of this Comment discusses the 13<sup>th</sup> Amendment to the United States Constitution and demonstrates that United States' courts have considered the scope and purpose of the Amendment to reach beyond pre-reconstruction slavery and disallow many forms of modern-day slavery currently used in trade partner countries. Part III forwards potential solutions and actions that could reduce U.S. support of forced labor through an executive order while enforcing compliance by revoking trade preferences through our existing international trade agreement.

#### I. BACKGROUND: INTERNATIONAL LABOR ORGANIZATION

In order to understand what legal remedies the United States might have to address regarding international labor practices, it is important to be familiar with the country's participation in the International Labor Organization and the United States' own free trade agreements. This part first provides general information regarding the ILO, Ratification of Convention 105 on Forced Labor, and the 1998 changes to the fundamental ILO Conventions. Then, it explains how the United States may enforce the provisions of the labor chapters in its trade agreements through the process of revoking trade preference benefits to trade partner countries.

##### A. *Initial ILO Formation and General Information*

Established in 1919<sup>11</sup> and included as a United Nations specialized agency in 1946,<sup>12</sup> the ILO focuses on labor issues, particularly international labor standards and decent work for all.<sup>13</sup> The vast majority of UN member

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<sup>11</sup> *Origins and History*, INT'L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> (last visited Apr. 18, 2015).

<sup>12</sup> *About the ILO*, INT'L LABOUR ORG., <http://ilo.org/global/about-the-ilo/lang--en/index.htm> (last visited Apr. 18, 2015).

<sup>13</sup> *Mission and Objectives*, INT'L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> (last visited Apr. 18, 2015).

states (185 of 193) are also ILO members.<sup>14</sup> As one of its primary functions, the organization registers complaints against entities that are violating international rules.<sup>15</sup> Crucially, however, the ILO Constitution includes no sanction authority or enforcement mechanism,<sup>16</sup> so its recommendations are not always heeded.<sup>17</sup> This creates problems for holding violators accountable. Still, the United States complies with many of the ILO's international labor standards and retains leverage to enforce labor practice compliance with trade partners by conferring or revoking trade preference benefits through its trade programs. As will be discussed, this has been done in a few different instances relating to labor in particular.

*B. Ratification of Convention 105 on Forced Labor*

The ILO has taken many steps to confront forced labor. For example, on September 25<sup>th</sup>, 1991, the United States ratified Fundamental Labor Convention 105, the Abolition of Forced Labor Convention.<sup>18</sup> Articles 1 and 2 of the convention specify general labor practices ILO members agree to adhere to in their attempts to combat forced labor. Article 1 states that:

Each Member of the International Labor Organization which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labor-

- (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;

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<sup>14</sup> *Alphabetical List of ILO Member Countries*, INT'L LABOUR ORG., <http://www.ilo.org/public/English/standards/relm/country.htm> (last visited Apr. 18, 2015).

<sup>15</sup> *Complaints*, INT'L LABOUR ORG., <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/complaints/lang--en/index.htm> (last visited Apr. 18, 2015).

<sup>16</sup> See Anne Trebilcock, *Putting the Record Straight About International Labor Standard Setting*, 31 COMP. LAB. L. & POL'Y J. 553, 563 (2010).

<sup>17</sup> Miriam Mafessanti, *Corporate Misbehavior & International Law: Are There Alternatives to "Complicity"?*, 6 S.C.J. INT'L L. & BUS. 167, 191 (2010) ("The ILO can only bind the member states that ratify the various ILO conventions, but even then it is not equipped with an enforcement mechanism against recalcitrant states...").

<sup>18</sup> *Ratifications of ILO Conventions: Ratifications for United States*, INT'L LABOUR ORG., [http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102871](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871) (last visited Apr. 18, 2015).



- (b) as a method of mobilizing and using labor for purposes of economic development;
- (c) as a means of labor discipline;
- (d) as a punishment for having participated in strikes; and
- (e) as a means of racial, social, national or religious discrimination.<sup>19</sup>

Additionally, Article 2 states:

Each Member of the International Labor Organization which ratifies this Convention undertakes to take effective measures to secure the immediate and complete abolition of forced or compulsory labor as specified in Article 1 of this Convention.<sup>20</sup>

Subsection (b) of Article 1 clearly outlines that any member nation may not “make use” of any form of forced labor for purposes of economic development.<sup>21</sup> Article 2 commits member nations to “take effective measures” to secure abolition of forced or compulsory labor.<sup>22</sup> Because the United States ratified Convention 105 it has bound itself to make these efforts and commitments,<sup>23</sup> although as previously stated, the ILO possesses limited power to act against non-compliance. These international labor commitments connect to the major changes to the Fundamental ILO Conventions that the United States agreed to in 1998.

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<sup>19</sup> *Convention C105, Abolition of Forced Labour Convention, 1957* (No. 105), INT’L LABOUR ORG., [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C105](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C105) (last visited Apr. 28, 2015).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

*C. 1998 Conference Changes to Fundamental ILO Conventions*

## 1. Adoption of 1998 Declaration:

The ILO has also changed its labor standards over time. In 1998, the 86th International Labor Conference took important steps to push for increased labor standards when it adopted the Declaration on Fundamental Principles and Rights at Work.<sup>24</sup> This added significant changes to the Organization. To these ends, this declaration contains four fundamental policies guiding ILO membership to this day: (1) The right of workers to associate freely and bargain collectively; (2) The end of forced and compulsory labor; (3) The end of child labor; and (4) The end of unfair discrimination among workers.<sup>25</sup> With consideration to these four areas, the ILO contends that membership equates to an obligation to work toward fully respecting these principles.<sup>26</sup> Thus, the ILO Conventions stating these fundamental principles have been ratified by most member countries<sup>27</sup> and, as such, they remain important standards for the United States in constructing international trade agreements. This fact can be seen in several of the United States' recent trade agreements.

## 2. Examples of United States' Incorporation of the 1998 Declaration into Trade Agreement Labor Chapters

For many years now, the United States has included labor chapters conducive with the 1998 Declaration in Labor Chapters of various free trade agreements and trade preference programs. Many of these trade agreements have had major impacts on recent trade with other countries. To mention a few very important examples, the United States adopted this language into agreements such as the African Growth and Opportunity Act (AGOA), the Dominican-Republic-Central American Free Trade Agreement (CAFTA-DR), and the General System of Preferences.<sup>28</sup> These agreements add large contributions to international trade with the United States. Regarding trade partner countries and total trade value, AGOA is critical to United States

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<sup>24</sup> *About the Declaration*, INT'L LABOUR ORG., <http://www.ilo.org/declaration/thedeclaration/lang--en/index.htm> (last visited Apr. 18, 2015).

<sup>25</sup> *Id.*

<sup>26</sup> *The Text of the Declaration and Its Follow-Up*, INT'L LABOUR ORG., <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm> (last visited Apr. 18, 2015).

<sup>27</sup> *NORMLEX: Information System on International Labour Standards*, International Labor Organization, <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0> (last visited Apr. 18, 2015).

<sup>28</sup> *Id.*

trade as 37 sub-Saharan African countries met AGOA eligibility in 2011<sup>29</sup> with imports that year totaling \$70.6 billion.<sup>30</sup> Another very important and recent trade agreement, CAFTA-DR, applies to the Dominican Republic as well as five Central American countries.<sup>31</sup> In 2013 alone, CAFTA-DR imports constituted \$30 billion dollars.<sup>32</sup> Finally, the U.S. Generalized System of Preferences (GSP), under which U.S. businesses imported \$19.9 billion worth of products in 2012, promotes economic growth in developing countries by providing duty-free entry for up to 5,000 products imported from one of the 122 designated countries and territories.<sup>33</sup> The GSP recently expired, but has gained support to be renewed.<sup>34</sup>

As these trade agreements and programs demonstrate, the amount of trade contemplated under such programs is clearly vast. These programs give an incomplete, yet meaningful, insight into how much international trade contemplates labor standards through various United States' trade agreements. Other trade agreements incorporate these standards as well. However, specifically on the issue of labor, the United States also has the means to incentivize (and enforce) some level of compliance with its trade agreements. Still, the extent to which this is done with adequate frequency is widely debated.

*D. United States' Enforcement Practices and Trade Benefit  
Revocation Through USTR and Executive Agency  
Recommendations to the President*

It is important to understand where enforcement power lies in the ability to revoke trade preferences. This is because, in many instances, the United States has the ability to revoke trade preferences for non-compliance through the aforementioned labor chapters.<sup>35</sup> Yet, this revocation is often

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<sup>29</sup> Media Note, Office of the Spokesman, U.S.-Sub-Saharan Africa Trade and Economic Cooperation Forum 2011, *available at* <http://www.state.gov/r/pa/prs/ps/2011/06/164709.htm>.

<sup>30</sup> *U.S. Reinstates Mali's Eligibility for AGOA*, SOURCING JOURNAL (Jan. 3, 2014), <https://www.sourcingjournalonline.com/u-s-reinstates-malis-eligibility-agoa/>.

<sup>31</sup> *CAFTA-DR (Dominican Republic-Central America FTA)*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta> (last visited Apr. 18, 2015).

<sup>32</sup> *Id.*

<sup>33</sup> *Generalized System of Preferences*, UNITED STATES TRADE REPRESENTATIVE, [https://ustr.gov/sites/default/files/GSP%20Guidebook\\_Final\\_06262013.pdf](https://ustr.gov/sites/default/files/GSP%20Guidebook_Final_06262013.pdf) (last visited Apr. 18, 2015).

<sup>34</sup> *Generalized System of Preferences*, UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp>.

<sup>35</sup> Media Note, Office of the Spokesperson, Statement by the U.S. Government on Labor Rights and Factory Safety in Bangladesh, *available at* <http://www.state.gov/r/pa/prs/ps/2013/07/212209.htm> (last visited Apr. 18, 2015).

politically difficult. Thus, such revocation considers many factors and input from several perspectives before any action is taken.

With a staff of approximately 200 people,<sup>36</sup> the USTR is a small federal agency responsible for developing and coordinating U.S. international trade, commodity, and direct investment policy, as well as overseeing inter-country negotiations.<sup>37</sup> Relating to its role in trade benefit revocation, the process involves the USTR as well as many other agencies (with major input coming from the State Department, the Department of Labor, and the Department of Commerce in addition to others), the Office of the United States Trade Representative (USTR), and the President of the United States (who ultimately makes the decision).<sup>38</sup> Between these agencies, several different perspectives and interests are considered. Then, these agencies, led by the USTR, work together to recommend international trade approaches in which the United States engages or (in the case of trade benefit revocation) disengages. The USTR also frequently consults with government agencies on trade policy matters through meetings with the Trade Policy Review Group and the Trade Policy Staff Committee.<sup>39</sup>

*E. The USTR's Office of Labor Affairs and Recent Decisions to Revoke Trade Benefits*

There are, of course, many issues involved with international trade. As such the USTR focuses on many distinct trade issues, and the agency addresses labor issues through a specialized Office within the agency. Specifically, the USTR's Office of Labor Affairs negotiates and implements labor provisions of bilateral, regional, and multilateral trade agreements<sup>40</sup> and does so by assessing adherence to the worker rights provisions of various trade preference programs.<sup>41</sup> In addition to these assessments, it also develops positions on labor issues and pushes for international consensus in regional and multilateral fora such as the ILO, among others.<sup>42</sup> Finally, the Office also engages agencies to develop capacity building initiatives that

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<sup>36</sup> *The Best Places to Work in the Federal Government: Office of the United States Trade Representative*, PARTNERSHIP FOR PUBLIC SERVICE, <http://bestplacestowork.org/BPTW/rankings/detail/TN00> (last visited Apr. 18, 2015).

<sup>37</sup> *Mission of the USTR*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/about-us/about-ustr>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Labor*, *supra* note 6.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

support trade partner labor standard compliance.<sup>43</sup> These roles make it an integral part of the United States' push for improved labor standards.

As mentioned, the USTR uses an inter-agency structure to coordinate trade policy and present issues for presidential decision.<sup>44</sup> However, due to the aforementioned political difficulty in doing so, the decision to revoke benefits is not pursued very often. It has, however, been done in particularly egregious cases. For example, the USTR recently recommended to President Obama that the United States revoke Bangladesh's GSP trade preferences, following the November 2012 Tazreen Fashions factory fire, the April 2013 Rana Plaza building collapse, and the general inability of Bangladeshi workers to exercise their labor rights.<sup>45</sup> In June of 2013, President Obama publicly announced his decision to follow that recommendation,<sup>46</sup> thereby providing an important example of the USTR agency functioning to assist in trade benefit revocation for labor rights violations. It also demonstrated that such revocation can be accomplished, despite political difficulties. While the aforementioned revocation in Bangladesh relates more to acceptable conditions of work, the USTR also pushed for revocation of GSP trade preferences with Burma in 1989 over various worker rights concerns including some directly related to forced labor.<sup>47</sup>

## II. BACKGROUND: 13<sup>TH</sup> AMENDMENT

While most Americans equate the word "slavery" with the forced labor seen in the enslavement of Africans in the pre-reconstruction United States, American courts have actually extended the 13<sup>th</sup> Amendment to prohibit several other labor practices akin to that particular type of slavery. Therefore, Americans should not be quick to dismiss the 13<sup>th</sup> Amendment as only relating to one particular condemnation of one type of slave labor. Although the 13<sup>th</sup> Amendment obviously cannot be exported, it is imperative to understand that the modern-day slavery practices that the United States has condemned are currently continuing in countries that the

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<sup>43</sup> *Id.*

<sup>44</sup> *Mission of the USTR, supra* note 37.

<sup>45</sup> See Statement by the U.S. Government on Labor Rights and Factory Safety in Bangladesh, United States Trade Representative (July 25, 2013), available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2013/july/ustr-froman-amb-qader-worker-rights>.

<sup>46</sup> *Id.*

<sup>47</sup> Press Release, Office of the United States Trade Representative, Marantis Highlights Support for Economic Reforms in Burma Through Trade and Investment (July 25, 2013), available at <http://www.ustr.gov/about-us/press-office/press-releases/2013/april/amb-marantis-economic-reforms-burma-trade>.

country provides monetary assistance to by way of trade preference programs. Furthermore, it provides assistance to these types of labor by allowing forced labor products to be imported, bought, and sold in this country. This part discusses the purposes and effects of the 13<sup>th</sup> Amendment, attempts to eradicate post-reconstruction slavery in the United States, and exempted forced labor under the 13<sup>th</sup> Amendment. It then discusses analogous forced labor violations in U.S. trade partner countries.

*A. Purposes and Effects of the 13<sup>th</sup> Amendment*

The 13<sup>th</sup> Amendment to the United States Constitution states, “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”<sup>48</sup> The United States Supreme Court has determined that this amendment, “is not a mere prohibition of state laws establishing or upholding slavery, but rather absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States”<sup>49</sup> and that the amendment, “by its own unaided force and effect, abolished slavery and established universal freedom.”<sup>50</sup> Although the United States took this incredible step to outlaw pre-reconstruction slavery, it is important to understand that American courts have applied the Amendment to encompass other labor practices akin to slavery since the 13<sup>th</sup> Amendment’s enactment.

*B. Attempts to Eradicate Post-13<sup>th</sup> Amendment Slavery in the United States*

Often less known to many Americans is the fact that several forms of forced labor have been outlawed in the United States under the 13<sup>th</sup> Amendment since its ratification. For example, the Supreme court has consistently stated that the aim of this amendment as implemented by the Antipeonage Act, 8 U.S.C.A. former § 56 [now 42 U.S.C.A. § 1994], and 18 U.S.C.A. former § 444 [now 18 U.S.C.A. § 1581], was not merely to end slavery, but to maintain a system of completely free and voluntary labor throughout the United States.<sup>51</sup> The Court has stated that the purpose of those who outlawed involuntary servitude in predecessors of this amendment, in this amendment itself, and in statutes enacted to enforce it, was to abolish all practices whereby subjection having some incidents of

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<sup>48</sup> U.S.C.A. Const. Amend. XIII, § 1.

<sup>49</sup> Griffin v. Breckenridge, 403 U.S. 88, 105 (1971).

<sup>50</sup> Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).

<sup>51</sup> See Pollock v. Williams, 322 U.S. 4, 17 (1944); U. S. v. Booker, 655 F.2d 562 (1981).

slavery was legally enforced.<sup>52</sup> Enforcement could be accomplished either directly, by states using their power to return slaves to master, or indirectly by subjecting persons who left an employer's service to criminal penalties, but the term goes farther.<sup>53</sup>

The sentiment that the 13<sup>th</sup> Amendment does not begin and end with pre-reconstruction slavery conditions has been re-iterated by many lower courts as well.<sup>54</sup> Likewise, these lower courts have made efforts to establish that the purpose of the 13<sup>th</sup> Amendment was not merely abolishing physical cruelties of slavery, but also to eradicate those badges and incidents of slavery and to abolish analogous practices.<sup>55</sup> These sentiments are well summarized in the majority opinion of the 1872 Supreme Court *Slaughterhouse Cases*:

While it cannot be said that no one but the negro can share in the protection of this amendment, yet in any fair construction of any section or phrase it is necessary to look to the purpose which was the pervading spirit of these amendments, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.<sup>56</sup>

Both the Supreme and lower courts have stated that “Involuntary servitude,” proscribed by the Thirteenth Amendment, is defined as action by master causing servant to have, or to believe he has, no way to avoid continued service or confinement.<sup>57</sup> Courts have caveated this with the statement that, when the employee has a choice, even though it is a painful one, there is no involuntary servitude.<sup>58</sup> A showing of compulsion is

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<sup>52</sup> *Id.*

<sup>53</sup> U.S. v. Shackney, 333 F.2d 475, 485-86 (1964).

<sup>54</sup> Jordan v. Lewis Grocer Co., 467 F.Supp. 113, 116 (1979) (“The purpose of the amendment was to abolish all practices involving enforced subjection akin to slavery or compulsion by the states or private individuals.”). Bobilin v. Board of Educ., 403 F.Supp. 1095, 1101 (1975) (“Plaintiffs assert, and this Court agrees, that...the elimination of African slavery, while the prime motivating cause of the Thirteenth Amendment, nevertheless does not demark the outer limits of that Amendment's application.”).

<sup>55</sup> Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441(1968).

<sup>56</sup> *Slaughter-House Cases*, 83 U.S. 36, 74 (1997).

<sup>57</sup> Watson v. Graves, 909 F.2d at 1553 (quoting United States v. Shackney, 333 F.2d 475, 86 (2d Cir. 1964) (“Involuntary servitude,” proscribed by Thirteenth Amendment, is defined as action by master causing servant to have, or to believe he has, no way to avoid continued service or confinement.)).

<sup>58</sup> *Watson*, 909 F.2d at 1553 (citing *Shackney*, 333 F.2d at 487).

therefore a prerequisite to proof of involuntary servitude.<sup>59</sup> This definition tracks similarly to that used in international labor contexts which includes, “all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily, and includes indentured labor.”<sup>60</sup> Additionally, under international standards, “forced labor” refers to work provided or obtained by force, fraud, or coercion, including: (1) By threats of serious harm to, or physical restraint against any person, (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or (3) by means of the abuse or threatened abuse of law or the legal process.<sup>61</sup> Below are three areas courts have discussed as forced labor practices analogous to slavery:

### 1. Peonage

Peonage, or debt bondage where an employer compels a worker to pay off a debt with work, has existed in several forms in the United States post-reconstruction era. Most notably for the United States, southern governments used peonage to return freed slaves to the bondage of slavery with the implementation of the Black Codes and with sharecropping. Based on various cases, courts have held that the words “involuntary servitude” as used in the 13th Amendment have a larger meaning than slavery and were meant to ban peonage, the essence of which is compulsory service in payment of a debt.<sup>62</sup>

### 2. Human-Trafficking

It would not be possible to discuss modern-day slavery without mentioning human trafficking. In June of 2013, Secretary of State, John Kerry, re-iterated the recognition of human trafficking as modern-day slavery when he stated:

When we help countries to prosecute traffickers, we are strengthening the rule of law. When we bring victims out of exploitation, we are helping to create

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<sup>59</sup> *Watson*, citing *Flood v. Kuhn*, 316 F.Supp. 271, 281 (D.C.N.Y.1970), *aff'd*, 443 F.2d 264 (2d Cir.1971), *aff'd on other grds.*, 407 U.S. 258 (1972).

<sup>60</sup> *List of Goods Produced By Child or Forced Labor: Frequently Asked Questions*, U.S. DEP'T OF LABOR BUREAU OF INT'L AFFAIRS: OFFICE OF CHILD LABOR, FORCED LABOR, AND HUMAN TRAFFICKING, *available at* [http://www.dol.gov/ilab/reports/pdf/TVPRA\\_FAQs2014.pdf](http://www.dol.gov/ilab/reports/pdf/TVPRA_FAQs2014.pdf).

<sup>61</sup> *Id.*

<sup>62</sup> *In re Markman*, 5 B.R. 196, 198 (1980); 11 U.S.C.A. §§ 1322(c), 1325(a)(1, 4).



more stable and productive communities. When we stop this crime from happening in the first place, we are preventing the abuse of those who are victimized as well as the ripple effect that caused damage throughout communities into our broader environment and which corrupt our global supply chains. We all have an interest in stopping this crime. That's why President Obama is so focused on this issue. And that's why, as Secretary of State, I will continue to make the fight against modern-day slavery a priority for this Department and for the country.<sup>63</sup>

Secretary Kerry's statement is consistent with what courts have found regarding human-trafficking in the United States.<sup>64</sup>

### 3. Migrant Worker Abuse

As is the case with peonage and human-trafficking, migrant worker abuse in conditions amounting to slavery is also a problem in many areas of the world. Again, American courts have attempted to stymie such migrant worker abuse under the 13<sup>th</sup> Amendment where employers forbid workers from leaving camp unless they satisfied any "debts" allegedly owed to the operator of the camp.<sup>65</sup> This applied to a case where employers repeatedly threatened workers with serious injury or death if they attempted to leave, and in fact, severely beat some workers and assaulted them with firearms.<sup>66</sup> Around the world, peonage, human-trafficking, and migrant worker abuse often are seen together, and such practices have been condemned within our court system.<sup>67</sup> Although these types of post-reconstruction slave labor outlined above have been legally held to be unconstitutional under the 13<sup>th</sup> Amendment, some exemptions of forced labor have been held to be permitted.

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<sup>63</sup> *Trafficking in Persons Report 2013*, U.S. DEP'T OF STATE, <http://www.state.gov/j/tip/rls/tiprpt/2013/>.

<sup>64</sup> *United States v. Dann*, 652 F.3d 1160, 1170 (9th Cir. 2011); *United States v. Kaufman*, 546 F.3d 1242, 1263 (10th Cir. 2008).

<sup>65</sup> *Id.*

<sup>66</sup> *United States v. Booker*, 655 F.2d 562, 566 (1981).

<sup>67</sup> *United States v. Mussry*, 726 F.2d 1448, *cert. denied*, 469 U.S. 855 (holding the Indictment and bill of particulars which alleged that defendants unlawfully held poor, non-English speaking Indonesian servants against their will by enticing them to travel to the United States, paying them little money for their services, and withholding their passports and return airline tickets, while requiring them to work off, as servants, the debts resulting from the costs of their transportation alleged conduct that, if proved, was sufficient to demonstrate improper or wrongful acts by defendants in violation of this amendment and its enforcing statutes).

C. *Forced Labor Exempted Under the 13<sup>th</sup> Amendment*

There is one major exception to the 13<sup>th</sup> Amendment's prohibition against forced labor and that is the provision for the use of prison labor.<sup>68</sup> The Supreme Court has reiterated the text stating that not all situations in which labor is compelled by physical coercion or force of law violate Thirteenth Amendment.<sup>69</sup> The court has stated that, by its terms, the Amendment excludes involuntary servitude imposed as legal punishment for a crime.<sup>70</sup> Similarly, some courts have held that compensation for prison labor is not required.<sup>71</sup> Additionally, the Court has recognized that the prohibition against involuntary servitude does not prevent the State or Federal Governments from compelling their citizens, by threat of criminal sanction, to perform certain civic duties.<sup>72</sup> These duties are relatively limited according to the case law. Although prison labor exemptions exist and are not condemned by the Constitution, the next section demonstrates that the practices of peonage, human-trafficking and extreme migrant worker abuse are frequently used by several of our trade partner countries.

D. *Examples of Forced Labor Abuses in U.S Trade Partner Countries*

Below includes a discussion of several trade partner countries with the United States that have also ratified Convention 105.<sup>73</sup> The one exception is Malaysia which denounced Convention 105 in 1990.<sup>74</sup> However, it retains a

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<sup>68</sup> U.S.C.A. Const. Amend. XIII, § 1.

<sup>69</sup> U.S. v. Kozminski, 487 U.S. 931 (1988), on remand 852 F.2d 1288.

<sup>70</sup> *Id.*

<sup>71</sup> Murray v. Mississippi Dept. of Corrections, 911 F.2d 1167 (1990), *cert. denied*, 498 U.S. 1050 (holding that compelling inmate to work without pay did not violate his Thirteenth Amendment rights; compensating prisoners for work was not constitutional requirement but, rather, was by grace of state.); Holt v. Sarver, 309 F.Supp. 362(1990), affirmed and remanded 442 F.2d 304, on remand 363 F. Supp. 194 (holding that forced uncompensated labor of state convicts did not violate the 13<sup>th</sup> Amendment).

<sup>72</sup> See Hurtado v. United States, 410 U.S. 578, 589, n. 11 (1973) (jury service); Selective Draft Law Cases, 245 U.S. 366, 390 (1918) (military service). In Robertson v. Baldwin, 165 U.S. 275 (1897), the Court observed that the Thirteenth Amendment was not intended to apply to "exceptional" cases well established in the common law at the time of the Thirteenth Amendment, such as "the right of parents and guardians to the custody of their minor children or wards," or laws preventing sailors who contracted to work on vessels from deserting their ships. *Id.* at 288; 331.

<sup>73</sup> *Ratification of C105: Abolition of Forced Labor Convention*, INT'L LABOUR ORG., [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312250:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312250:NO) (last visited Apr. 18, 2015).

<sup>74</sup> *Malaysia*, INT'L LABOUR ORG., <http://www.ilo.org/asia/countries/malaysia/lang--en/index.htm> (last visited Apr. 18, 2015).

very similar convention on forced labor (Convention 29) that the United States has also ratified.<sup>75</sup>

### 1. Malaysia

In addition to working together on the Trans-Pacific Partnership, the United States and Malaysia meet frequently to discuss bilateral trade and investment issues and to coordinate approaches on APEC, ASEAN, and the WTO.<sup>76</sup>

#### a. Extent of Malaysia's Forced Labor Problem

Although Malaysia is currently in trade talks with the United States regarding the Trans-Pacific Partnership,<sup>77</sup> the country faces several labor practice problems including peonage (debt bondage), human-trafficking and migrant worker abuse. The State Department's 2012 Human Rights Report found that numerous sources reported occurrences of forced labor, and conditions existed that created vulnerabilities to forced labor in plantation agriculture, the fishing industry, and some factories producing electronic components, and garment production.<sup>78</sup> Labor union representatives described common patterns involving recruiting agents that imposed high fees, sometimes rendering foreign workers vulnerable to debt bondage.<sup>79</sup> Likewise, Non-Governmental Organizations (NGO's) pointed to examples of indebted workers whose employers held their passports and who were forced to accept harsh working conditions, lower wages than promised, unexpected wage deductions, and poor housing, all under threat of imprisonment or deportation.<sup>80</sup>

One of the greatest problems cited by the ILO is the plight facing migrant workers who become trapped in Malaysia once they arrive.<sup>81</sup> The ILO noted the statement in the International Trade Union Confederation's

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<sup>75</sup> *Id.*

<sup>76</sup> *Malaysia*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/countries-regions/southeast-asia-pacific/Malaysia> (last visited Apr. 18, 2015).

<sup>77</sup> *Id.*

<sup>78</sup> *Country Reports on Human Rights Practices for 2012, Malaysia, Section 7: Worker Rights (b) Prohibition of Forced or Compulsory Labor*, U.S. DEP'T OF STATE, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper> (last visited Apr. 18, 2015).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Observation (CEACR)- adopted 2012, published 102nd ILC session (2013)*, INT'L LABOUR ORGANIZATION, [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3057624:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3057624:NO) (last visited Apr. 18, 2015).

(ITUC's),<sup>82</sup> statement that some workers who willingly enter Malaysia in search of economic opportunities subsequently encounter forced labor at the hands of employers or informal labor recruiters.<sup>83</sup> This includes workers from Indonesia, Nepal, India, Thailand, China, the Philippines, Cambodia, Bangladesh, Pakistan and Vietnam.<sup>84</sup> The ITUC indicated that these migrant workers are employed on plantations and construction sites, in textiles factories, and as domestic workers, and experience restrictions on movement, deceit and fraud in wages, passport confiscation and debt bondage.<sup>85</sup> Moreover, the ITUC alleged that the Memorandum of Understanding (MoU) between Malaysia and Indonesia covering the employment of Indonesian domestic workers explicitly allows for the confiscation of workers' passports.<sup>86</sup> The ITUC also alleged that the Malaysian government has failed to report any criminal prosecutions of employers who subject workers to conditions of forced labor or labor recruiters who use deceptive practices and debt bondage to compel migrant workers into involuntary servitude.<sup>87</sup> Such a reporting failure raised concerns that the government was not enforcing the law.

The ILO noted the Malaysian government's indication that it conducted training for labor inspectors in collaboration with the ILO Tripartite Action to Protect Migrant Workers from Labor Exploitation Project (the ILO TRIANGLE Project) in 2012.<sup>88</sup> It also noted information from the International Organization on Migration where the Government of Indonesia enacted a moratorium on placing domestic workers in Malaysia due to continuing labor violations.<sup>89</sup> However, this moratorium was lifted once the two governments signed a new MoU in May 2011.<sup>90</sup> This MoU stipulated that Indonesian domestic workers have the right to retain their passports while in Malaysia, shall be entitled to one rest day per week, and shall have their wages commensurate with the market.<sup>91</sup> The ILO further noted that as of 2009, there were approximately 2.1 million migrant workers

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<sup>82</sup> *Protection of Domestic Workers: the ITUC Supports Proposed ILO Convention-International Trade Union Confederation*, INT'L TRADE UNION CONFEDERATION, <http://www.ituc-csi.org/protection-of-domestic-workers-the> (last visited Apr. 18, 2015) (the ITUC is an international labor union confederation representing over 168 million workers in 155 countries and territories).

<sup>83</sup> *Observation (CEACR)*, *supra* note 81.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Observation (CEACR)*, *supra* note 81.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

and approximately 700,000 irregular migrant workers in Malaysia although other estimates were much higher.<sup>92</sup> These workers may be subject to unpaid wages, passport retention, heavy workloads, and confinement or isolation.<sup>93</sup>

The reports from the ILO are supported by the findings of the State Department's 2012 Human Rights Report as well.<sup>94</sup> Although the Malaysian Constitution prohibits forced or compulsory labor and five agencies, including the Department of Labor, have enforcement powers under the law, their standard operating procedures have not always resulted in government officials actively trying to identify instances of forced labor.<sup>95</sup> Additionally, while the law criminalizes possession of someone else's passport "without legal authority," NGOs repeatedly reported that agents or employers sometimes drafted contracts including provisions for employees to sign over the right to hold their passports to the employer or agent.<sup>96</sup> Other reports included instances where employers confiscated employee passports without contractual authority.<sup>97</sup> Effectively, this practice made some foreign workers captives of the hiring company.<sup>98</sup> Thus, although Malaysia has seen some improvements in recent years, it is a country where forced labor is a clear problem.

b. Continued Importation of Goods Associated with Forced Labor

Although the United States' Department of Labor included palm oil from Malaysia on its List of Goods Produced by Child or Forced Labor<sup>99</sup> and the State Department's Human Rights Report indicated forced labor occurred in some factories producing electronic components,<sup>100</sup> these two products made the list of the top five imported products from Malaysia to the United States in 2012. Electrical Machinery comprised \$13.3 billion in traded goods and Fats and Oils (palm oil) totaled \$1.4 billion.<sup>101</sup> Likewise,

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Country Reports on Human Rights Practices for 2012, Malaysia, Section 7: Worker Rights (b) Prohibition of Forced or Compulsory Labor, supra* note 78 at 65.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *List of Goods Produced by Child or Forced Labor*, U.S. DEP'T OF LABOR, BUREAU OF INT'L AFFAIRS at 3-7, <http://www.dol.gov/ilab/reports/child-labor/list-of-goods/> (last visited Apr. 18, 2015).

<sup>100</sup> *Country Reports on Human Rights Practices for 2012, Malaysia, Section 7: Worker Rights (b) Prohibition of Forced or Compulsory Labor, supra* note 78.

<sup>101</sup> *Malaysia*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *supra* note 76.

the United States' State Department indicated that some sources reported forced labor in plantation agriculture, but in 2012, U.S. imports of agricultural products from Malaysia totaled \$1.9 billion, making Malaysia our 17th largest supplier of agriculture imports.<sup>102</sup> Leading categories include: tropical oils (\$1.3 billion), cocoa paste and cocoa butter (\$148 million), and rubber products (\$132 million).<sup>103</sup>

## 2. Guatemala

In 2010, U.S. goods imports from Guatemala totaled \$4.7 billion in 2011, a 47.6% increase (\$1.5 billion) from 2010, and up 81% from 2000.<sup>104</sup>

### a. Reports of Guatemala's Forced Labor Problem

Some attempts at progress on labor rights in Guatemala have recently been made. In 2013,<sup>105</sup> after several reports of continuing worker rights abuses and labor violations, the United States and Guatemala agreed on an immediate enforcement plan to resolve concerns raised in a labor case brought by the United States under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR).<sup>106</sup> The 18-point plan includes concrete actions with specific time frames that Guatemala will implement to improve labor law enforcement.<sup>107</sup> This is the first labor case that the United States has brought to dispute settlement under a trade agreement.<sup>108</sup> Under the Enforcement Plan, which was the result of extensive engagement and resolve by both governments, Guatemala committed to strengthening labor inspections, expediting and streamlining the process of sanctioning employers and ordering remediation of labor violations, increasing labor law compliance by exporting companies, improving the monitoring and enforcement of labor court orders, publishing labor law enforcement information, and establishing

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Guatemala*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/countries-regions/americas/Guatemala> (last visited Apr. 18, 2015).

<sup>105</sup> *Fact Sheet: Guatemala agrees to Labor Enforcement Plan*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2013/april/guatemala-labor-enforcement> (last visited Apr. 18, 2015).

<sup>106</sup> *Guatemala Submission Under CAFTA-DR*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/April/United-States-Keeps-In-Place-Labor-Case-Against-Guatemala>.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

mechanisms to ensure that workers are paid what they are owed when factories close.<sup>109</sup>

However, according to the State Department's 2012 Human Rights Report, reports continued that men and women were subjected to forced labor in agriculture work, including in coffee-growing.<sup>110</sup> This report was supported by similar findings in the 2013 Trafficking in Persons report.<sup>111</sup> In addition to remarking on forced conditions in agriculture, the TIP report stated that indigenous Guatemalans remained particularly vulnerable to this type of exploitative labor practice.<sup>112</sup> Organized crime units generally profited from forced labor by operating human trafficking rings.<sup>113</sup> Moreover, the United States continues to allege Guatemala is failing to adequately enforce its labor standards.<sup>114</sup>

#### b. Continued Importation of Goods Associated with Forced Labor

Although U.S. governmental reports indicated forced labor in coffee-growing and other agricultural workplaces, the United States continued to import from these areas.<sup>115</sup> These imports included edible fruit and nuts (bananas and cantaloupes) (\$802 million) as well as Spices, Coffee, and Tea (\$593 million).<sup>116</sup>

### 3. Ethiopia

In 2012, Ethiopia was African Growth and Opportunity Act (AGOA) eligible.<sup>117</sup> U.S. goods imported from Ethiopia totaled \$144 million in 2011.<sup>118</sup>

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<sup>109</sup> *Id.*

<sup>110</sup> *Country Reports on Human Rights Practices for 2012, Guatemala, Section 7: Worker Rights (b) Prohibition of Forced or Compulsory Labor*, U.S. DEP'T OF STATE, available at <http://www.state.gov/documents/organization/204664.pdf>.

<sup>111</sup> *Trafficking in Persons Report, Guatemala, State Department of the United States*, U.S. DEP'T OF STATE, <http://www.state.gov/j/tip/rls/tiprpt/countries/2013/215472.htm> (last visited Apr. 19, 2015).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr> (last visited May 27, 2015).

<sup>115</sup> *Guatemala*, *supra* note 104.

<sup>116</sup> *Id.*

<sup>117</sup> *Ethiopia*, UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/countries-regions/africa/east-africa/Ethiopia> (last visited Apr. 19, 2015).

<sup>118</sup> *Id.*

a. Reports of Ethiopia's Forced Labor Problem

In its 2012 Human Rights Report, the State Department reported that the government did not effectively enforce the forced labor prohibition, and that forced labor occurred in practice.<sup>119</sup> Both adults and children were forced to engage in traditional weaving, or agricultural work.<sup>120</sup> The report also stated that situations of debt bondage occurred in traditional weaving, pottery, cattle herding, and other agricultural activities.<sup>121</sup> The 2013 Trafficking in Persons Report detailed several instances of forced labor in traditional weaving, being shop assistants, and errand-running.<sup>122</sup>

b. Continued importation of Goods Associated with Forced Labor

Again, although the Department of Labor's List Goods Produced by Child Labor or Forced Labor listed hand-woven textiles from Ethiopia<sup>123</sup> the product category still made the list of the five largest categories of imported products (totaling \$3 million). Regardless of the United States' State Department reports of forced labor in agriculture, U.S. imports of agricultural products from Ethiopia totaled \$120 million in 2011.<sup>124</sup>

4. Bangladesh

USTR notes that, under the GSP, U.S. goods imported from Bangladesh totaled \$4.9 billion in 2012, a 0.8% increase (\$39 million) from 2011, and up 130% from 2002.<sup>125</sup>

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<sup>119</sup> *Country Reports on Human Rights Practices for 2012, Ethiopia, Section 7: Worker Rights (b) Prohibition of Forced or Compulsory Labor*, UNITED STATES DEPARTMENT OF STATE, available at [https://ustr.gov/sites/default/files/Ethiopia\\_0.pdf](https://ustr.gov/sites/default/files/Ethiopia_0.pdf).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Trafficking in Persons Report, Ethiopia*, U.S. STATE DEP'T, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper> (last visited Apr. 19, 2015).

<sup>123</sup> *List of Goods Produced by Child or Forced Labor*, *supra* note 99 at 1, 18, 33.

<sup>124</sup> *Id.*

<sup>125</sup> Hisham Bin Mustafa, Apparel exports to US defy safety concerns, PRIYO NEWS (Sept. 16, 2013, 4:20 AM), <http://news.priyo.com/2013/09/16/apparel-exports-us-defy-safety-concerns-85700.html>, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/countries-regions/south-central-asia/Bangladesh> (last visited Apr. 19, 2015).



## a. Reports of Bangladesh's Forced Labor Problem

On April 24<sup>th</sup>, 2013, a disastrously unsafe textile factory collapsed in Bangladesh, killing 1,124 workers.<sup>126</sup> Another 2,438 people were rescued alive.<sup>127</sup> Several cracks had appeared in the walls of the factory when employers ordered their employees to return to work.<sup>128</sup> However, its workers were warned their pay would be docked if they refused to go back inside after inspectors ordered the owners to evacuate the building.<sup>129</sup>

After world-outrage at the news, the United States Trade Representative recommended to President Barack Obama that the trade preferences afforded to Bangladesh under the GSP be revoked with a continuing action plan.<sup>130</sup> The plan addressed several working condition violations to be addressed regarding (1) Labor, Fire and Building Standards, (2) The Ready Made Garments Sector, (3) The Export Processing Zones (zones where many labor law requirements are lifted in order to spur economic growth for a period of time), and the Shrimp Processing Sector.<sup>131</sup> The United States Government encouraged the Government of Bangladesh (GOB) to take significant actions to provide a basis for reinstating Bangladesh's Generalized System of Preferences (GSP) benefits.<sup>132</sup> This encouragement also included implementing commitments under the "National Tripartite Plan of Action on Fire Safety and Structural Integrity."<sup>133</sup> Additionally, a variety of relevant parties signed the Accord on Fire and Building Safety in Bangladesh, a five-year legally binding agreement between international labor organizations, non-governmental

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<sup>126</sup> Saeed Ahmed & Leone Lakhani, Bangladesh Building Collapse: An End to Recovery Efforts, a Promise of a New Start, CNN (June 14, 2013, 5:17 PM), <http://www.cnn.com/2013/05/14/world/asia/bangladesh-building-collapse-aftermath/index.html>.

<sup>127</sup> *Id.*

<sup>128</sup> Dean Nelson, Bangladesh Building Collapse Kills at Least 82 in Dhaka, THE TELEGRAPH (Apr. 24, 2013, 11:25 AM), <http://www.telegraph.co.uk/news/worldnews/asia/bangladesh/10014778/Bangladesh-building-collapse-kills-at-least-82-in-Dhaka.html>.

<sup>129</sup> Syed Zain Al-Mahmood & Shelly Banjo, Deadly Collapse in Bangladesh, WALL ST. JOURNAL (Apr. 24, 2013, 8:19 PM), <http://www.wsj.com/articles/SB10001424127887324874204578441912031665482>.

<sup>130</sup> Media Note, Office of the Spokesperson, Statement by the U.S. Government on Labor Rights and Factory Safety in Bangladesh, *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2013/july/usg-statement-labor-rights-factory-safety>.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

organizations, and retailers engaged in the textile industry to maintain minimum safety standards in the Bangladesh textile industry.<sup>134</sup>

This already challenging climate for worker rights adds to the difficulties of forced labor conditions. The State Department's 2012 Human Rights Report stated that, although the law prohibits all forms of forced or bonded labor, the provided penalty of imprisonment for up to one year or a fine was not sufficiently stringent to deter violations.<sup>135</sup> The report also stated that the law was not properly enforced and inspection mechanisms to enforce laws against forced labor did not function effectively.<sup>136</sup> Additionally, the report states that some men recruited to work overseas with fraudulent employment offers were later exploited through forced labor or debt bondage.<sup>137</sup> Moreover, the report states that the law does not include a specific prohibition on fraudulent recruitment, but it cites the concept of fraud as a possible element of human trafficking.<sup>138</sup> Finally, it states that, while forced labor was not as common in urban areas, there were more instances of bonded labor in rural areas.<sup>139</sup> The Trafficking In Persons report also states that Bangladeshi adults and children were subjected to forced and bonded labor among other violations.<sup>140</sup> In some instances, children were sold into labor bondage by their parents.<sup>141</sup> Regarding debt bondage, some employers bound Bangladeshi and Indian migrant workers to forced labor in Bangladesh's brick kilns.<sup>142</sup> Reports also stated that some Bangladeshi families were subjected to debt bondage in the shrimp farming industry in southeastern areas of Bangladesh.<sup>143</sup> Others were forced to work in the tea industry in the northeastern part of the country.<sup>144</sup> The report states that lack of adequate law enforcement efforts and institutional weaknesses continued to contribute to the trafficking of migrant workers

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<sup>134</sup> Accord on Fire and Building Safety in Bangladesh (May 13, 2013), available at [http://www.industriall-union.org/sites/default/files/uploads/documents/2013-05-13\\_-\\_accord\\_on\\_fire\\_and\\_building\\_safety\\_in\\_bangladesh\\_0.pdf](http://www.industriall-union.org/sites/default/files/uploads/documents/2013-05-13_-_accord_on_fire_and_building_safety_in_bangladesh_0.pdf).

<sup>135</sup> *Country Reports on Human Rights Practices for 2012, Bangladesh, Section 7: Worker Rights (b) Prohibition of Forced or Compulsory Labor* at 36, U.S. DEP'T OF STATE, <http://www.state.gov/documents/organization/204607.pdf>.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 36-37.

<sup>141</sup> *Trafficking In Persons Report, Bangladesh, Country Narratives* at 87, U.S. DEP'T OF STATE, available at: <http://www.state.gov/documents/organization/210738.pdf>.

<sup>142</sup> *Id.* at 87-88.

<sup>143</sup> *Id.* at 87.

<sup>144</sup> *Id.*

abroad.<sup>145</sup> Additionally, inadequate trafficking victim protection remained a serious problem.<sup>146</sup>

b. Continued Importation of Goods Associated with Forced Labor

Despite these reports of forced labor, the United States remained the second-largest importer of shrimp from Bangladesh.<sup>147</sup> The shrimp industry is a major industry for Bangladesh and migrant worker abuse is clearly a problem in the sector.

III. POTENTIAL SOLUTIONS AND NECESSARY ACTION

The previous two parts of this comment established that the United States continues to import goods from areas and industries that its own governmental agencies have linked to forced labor. The final part of this comment discusses steps that should be taken to end U.S. support of the modern-day slave labor it has domestically condemned by using various trade tools while enforcing (not undermining) the language already in the labor chapters of our trade agreements.

A. Executive Order Approach

On June 12, 1999, President Clinton signed Executive Order 13126 on the "Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor."<sup>148</sup> As its name implies, the Executive Order is intended to ensure that U.S. federal agencies do not procure goods made by forced or indentured child labor.<sup>149</sup> The Order requires the Department of Labor, in consultation with the Departments of State and Homeland Security, to publish and maintain a list of products, by country of origin, which the three Departments have a reasonable basis to believe, might have been mined, produced or manufactured by forced or indentured child labor.<sup>150</sup> 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

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<sup>145</sup> *Id.* at 88.

<sup>146</sup> *Id.*

<sup>147</sup> *U.S. Duties Lead to Market Opening for Bangladesh Shrimp Exporters*, THE FISH SITE (Aug. 27, 2013), <http://www.thefishsite.com/fishnews/21107/us-duties-lead-to-market-opening-for-bangladesh-shrimp-exporters>.

<sup>148</sup> Exec. Order No. 13,126, 64 Fed. Reg. 32,383 (June 16, 1999), *available at* [http://www.dol.gov/ilab/reports/pdf/2013EO\\_FAQ.pdf](http://www.dol.gov/ilab/reports/pdf/2013EO_FAQ.pdf).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

listed items.<sup>151</sup> Although the list tracks forced child labor, it does not address forced *adult* labor.<sup>152</sup> While efforts to curb child labor with this order should be lauded, the Obama Administration should also consider taking executive action to track and combat adult forced labor in this manner as well. As the extensive analysis of Congressional and Judicial attitudes toward forced labor with the ratification of the 13<sup>th</sup> Amendment show, Americans do not condone slavery as an acceptable labor practice. Furthermore, American courts have held that peonage, human trafficking, and extreme migrant worker abuses constitute this type of unacceptable labor practice. The President could act to expand this tracking and case law regarding the 13<sup>th</sup> Amendment suggests he could do so without undermining American jurisprudence or congressional intent.

1. Enforcing Article 1 (b) and Article 2 of Convention 105

As noted above, Article 1 (b) of Convention 105 states that ILO members who have ratified the convention pledge to suppress and not make use of any form of forced or compulsory labor as a method of mobilizing and using labor for purposes of economic development.<sup>153</sup> Although there is no indication this commitment carries beyond a country's own domestic attempts to combat forced labor, particular attention should be given to the phrase, "and not to make use of". Can it really be said that the United States is not "making use of" forced labor when its economy benefits from the importation of forced-labor goods? Is the fact that the labor is sourced beyond the country's borders enough to absolve the country of its anti-slavery commitments and principles? The spirit of the 13<sup>th</sup> Amendment and court interpretations would seem to suggest the answer is no.

Additionally, each state that ratifies Convention 105 undertakes the duty to take effective measures to secure the immediate and complete abolition of forced labor.<sup>154</sup> The United States has taken and continues to take great steps to eradicate slave labor within its borders. However, when U.S. companies continue to import goods from industries in other countries where the United States government's own reports indicate the use of forced labor, the spirits of the 13<sup>th</sup> Amendment and Convention 105 are

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Int'l Labour Org., *C105 - Abolition of Forced Labour Convention, 1957*, 40th ILC session No. 105 (25 Jun 1957), available at

[http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C105](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C105).

<sup>154</sup> *Id.*

violated. Its practical effect is to commercially support outsourced slavery. Again, this seems counter-intuitive to anti-slavery efforts.

Regarding its list of forced labor products, the Department of Labor has stated that, the list's primary purposes are, "to raise public awareness about forced labor and child labor and to promote efforts to address them"<sup>155</sup> and that, "the list is not intended to be punitive, but rather as a starting point for individual and collective action."<sup>156</sup> Whether or not punitive action is helpful in any given instance is often a case for debate, however, neither the ILO nor the United States currently has the resources to adequately monitor which foreign employers within an industry are in compliance. As demonstrated by the mixed results of government efforts in trade partner countries, foreign governments alone cannot (or at times will not) adequately monitor and enforce laws against forced labor. The Department of Labor has stated that, although the congressionally mandated TVPRA required a list of goods and countries, it did not mandate compiling a list of company or industry names.<sup>157</sup> The agency further clarified that it would be difficult for DOL to track every company and industry using good(s) produced with child or forced labor.<sup>158</sup> In addition, the department stated that child labor and forced labor frequently occur in small local enterprises, for which company names, if they are available, have little relevance.<sup>159</sup>

Such information has led the DOL to conclude that seeking to track and name individual companies would be highly resource-intensive and of limited practical value.<sup>160</sup> Moreover, holding individual violators accountable would exceed the DOL's congressional mandate.<sup>161</sup> Therefore, it does seem like the best approach would not be to attempt sort out complying employers from those not complying. Rather, it seems that the more fruitful approach would be to either suspend or discourage importation of products in industries that are known to make use of forced labor. The United States has the ability to revoke trade preferences and the President has the ability to implement an executive order on the matter. Both tools can and should be used further to aid the United States in its efforts to combat modern-day slavery.

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<sup>155</sup> *List of Goods Produced By Child or Forced Labor: Frequently Asked Questions*, *supra* note 60 at 6.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 5.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

## 2. Reiteration of Anti-Forced Labor Principles in Context

As can be seen by the various examples of case law addressing the 13<sup>th</sup> Amendment, the Supreme Court did not find the Amendment to be isolated to the pre-reconstruction slavery most Americans are familiar with. Although that particular form of slavery was, of course, the most notable type of slavery that was abolished in the country, other types of slavery have been discussed as well and should continue to be discussed. Americans must ask themselves how then, if we as a country have found slavery as a labor practice to be so incredibly unacceptable, can we not do everything possible to double our efforts to end the various types of modern day slave-labor practices (peonage, migrant worker abuses, human-trafficking) outlined above.

Currently, many free-trade partner countries allow forced labor for various reasons and thus, benefit from labor practices that we have condemned both domestically and internationally. Although it might be too harsh economically to immediately revoke the trade preferences offered in our free trade agreements, a more practical solution of allowing a reasonable amount of time for trade partner countries to come into compliance with their agreements against forced labor is possible. These legal obligations to international labor standards are not being enforced to the extent they should and the political will to reassess and enforce against forced labor should be stronger at all levels. Multiple times throughout this nation's history, American courts and the American actors within the International Labor Organization have found labor practices analogous to those currently used in many trade partner countries to be in violation of both American principle and law regarding the abolition of slavery. However, current enforcement levels are not strong enough, and the United States could and must do much more to combat the injustice that is modern-day slavery.

## CONCLUSION

The people of the United States decided over 160 years ago that slavery was a reprehensible labor practice that could no longer exist on its soil. That incredible change was a painful victory, but one that was morally necessary. Today, Americans are faced with a similar situation where analogous types of abhorrent labor practices are now one-step removed, and thus, out-of-sight and often out-of-mind. Although Americans cannot export the 13<sup>th</sup> Amendment, we must do our part to guarantee we do not merely substitute domestic slavery for outsourced slavery in countries that permit it beyond our shores.

**THE ROAD TO NOWHERE: HOW BLOCKING STATUTES HAVE  
EXACERBATED BOOMERANG LITIGATION AND RENDERED FORUM NON  
CONVENIENS A MISNOMER FOR DBCP TORT LITIGANTS**

Alena Thomas<sup>1</sup>

INTRODUCTION

As stated by former Supreme Court Chief Justice John Marshall in *Marbury v. Madison*, “Every right, when withheld, must have a remedy, and every injury its proper redress.”<sup>2</sup> But what happens when a remedy achieves nothing? The forum non convenience<sup>3</sup> analysis, pioneered in the name of convenience and efficiency,<sup>4</sup> has been so misconstrued as to forsake its own purpose.

The principle of justice described by Justice Marshall has been effectually denied to Dibromochloropropane (“DBCP”) tort litigants seeking redress within American tribunals.<sup>5</sup> As a college student studying abroad in Nicaragua in 2010, I visited a group of banana farm workers who for years have been camped outside of the Nicaraguan National Assembly,<sup>6</sup> incessantly demanding justice from their government for harmful exposure to DBCP. I wandered throughout the “camp”—essentially ramshackle

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<sup>1</sup> J.D. Candidate, George Mason University School of Law, Class of 2015. Senior Research Editor, George Mason Journal of International Commercial Law. Thank you, Matthew Bowles for your love and support throughout the writing of this article.

<sup>2</sup> *Marbury v. Madison*, 5 U.S. 137, 147 (1803).

<sup>3</sup> See Jena A. Sold, *Inappropriate Forum or Inappropriate Law? A Choice-of-Law Solution to the Jurisdictional Standoff Between the United States and Latin America*, 60 EMORY L.J. 1437, 1445-46 (2011) (meaning “unsuitable court,” forum non conveniens allows a court to dismiss a case over which it has jurisdiction to another more convenient court. Forum non conveniens was first recognized in *Gulf Oil Corp. v. Gilbert*, establishing the private and public interest factors to be considered in dismissing a case. The court reaffirmed its decision in *Piper Aircraft Co. v. Reyno*, in which the court applied the forum non conveniens analysis to foreign plaintiffs).

<sup>4</sup> Megan Waples, *The Adequate Alternative Forum Analysis in Forum Non Conveniens: A Case for Reform*, 36 CONN. L. REV. 1475, 1482 (2004).

<sup>5</sup> See, e.g., Christina Weston, *The Enforcement Loophole: Judgment-Recognition Defenses as a Loophole to Corporate Accountability for Conduct Abroad*, 25 EMORY INT’L L. REV. 731, 758 (2011) (in *Osario v. Dole*, the United States trial court granted a forum non conveniens dismissal on the condition that the defendants, including Dow and Dole, waive all jurisdictional defenses. When the *Osario* plaintiffs re-filed the case in Nicaragua, the defendants, apparently second guessing their forum non conveniens dismissal, contested the trial court’s jurisdiction on the grounds that they wished to exercise opt-out rights under Article 7 of Special Law 364 in exchange for waiving any forum non conveniens arguments in United States courts).

<sup>6</sup> Brendan Riley, *No Justice for Nicaraguan Banana Workers*, COUNCIL ON HEMISPHERIC AFFAIRS, (Sept. 3, 2010), <http://www.coha.org/no-justice-for-nicaraguan-banana-workers/>.

shelters consisting of tarp, scrap metal, and plastic—speaking to the individuals and their families whose lives have been torn apart (or never begun) due to DBCP exposure. DBCP is the active ingredient in certain pesticides used to combat nematode worms in produce such as pineapples and bananas.<sup>7</sup> DBCP has been linked to sterility, tumors, and birth defects in humans.<sup>8</sup> I met the men, women, and children whose bodies and minds have deteriorated due to years of unsafe DBCP exposure on American-owned banana plantations. Despite their humble backgrounds, the banana workers are an organized force devoted to justice. However, it appears that these Nicaraguan banana workers have been looking for justice in all the wrong places: beginning with blocking statutes.

Seeking remonstrance from years of harvesting DBCP-treated bananas on American-owned plantations, the banana workers vainly seek a remedy within United States tribunals, only to be dismissed back to their home countries. Forum non conveniens dismissals have become outcome determinative for foreign tort litigants; once dismissed from a United States court, foreign plaintiffs rarely achieve a tangible remedy in their home forum.<sup>9</sup> One survey illustrated that only 2% of personal injury actions dismissed on forum non conveniens grounds ever went to trial in a foreign forum.<sup>10</sup> The banana workers therefore succumb to an endless cycle of “boomerang litigation.”<sup>11</sup>

In an attempt to combat forum non conveniens dismissals and guarantee citizens their day in court, some countries have enacted blocking statutes.<sup>12</sup> Blocking statutes offer multinational tort plaintiffs two forms of redress: an enforceable judgment within a non-U.S. forum or litigation within the United States.<sup>13</sup> Theoretically, blocking statutes “force” United States courts to hear foreign tort litigants’ claims,<sup>14</sup> because blocking statutes generally mandate that once foreign litigants file suit in the United States, the non-U.S. forum relinquishes all jurisdiction,<sup>15</sup> and thereby loses

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<sup>7</sup> Jeff Todd, *Phantom Torts and Forum Non Conveniens Blocking Statutes: Irony and Metonym in Nicaraguan Special Law 364*, 43 U. MIAMI INTER-AM. L. REV. 291, 294 (2012).

<sup>8</sup> Riley, *supra* note 6.

<sup>9</sup> Todd, *supra* note 7, at 304.

<sup>10</sup> *Id.*

<sup>11</sup> Weston, *supra* note 5, at 758.

<sup>12</sup> Todd, *supra* note 7, at 306.

<sup>13</sup> VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 6:15 (2013).

<sup>14</sup> M. Ryan Casey & Barrett Ristroph, *Boomerang Litigation: How Convenient Is Forum Non Conveniens in Transnational Litigation?*, 4 B.Y.U. INT'L L. & MGMT. REV. 21, 27 (2007).

<sup>15</sup> Sold, *supra* note 3, at 1455-56; *see also* Todd, *supra* note 7, at 308 (though Special Law 364 does not explicitly relinquish jurisdiction, the requirements the Law placed on



the ability to hear the case.<sup>16</sup> Foreign courts intentionally relinquish jurisdiction to evade United States courts' forum non conveniens analysis.<sup>17</sup> Though it does not formally relinquish Nicaraguan courts' jurisdiction, Nicaragua's Special Law 364<sup>18</sup> implicitly relinquishes jurisdiction by imputing stringent requirements on defendants re-filing the case in Nicaragua on forum non conveniens grounds.<sup>19</sup> Though well-intentioned, blocking statutes like Nicaragua's Special Law 364<sup>20</sup> have devolved into "the beginning of the end"<sup>21</sup> for DBCP tort litigants.

The forum non conveniens analysis requires a determination that the non-U.S. forum is both available and adequate.<sup>22</sup> The adequacy analysis is easily achieved; defendants merely need to show that the non-U.S. forum affords *some* sort of remedy.<sup>23</sup> However, the adequacy prong has been reduced to a mere formality for defendants to pass procedural muster.

This comment argues that in order to render the adequacy analysis workable and effective, the plaintiffs' and defendants' judicial burdens must be switched and counterbalanced. As the movant, multinational tort plaintiffs must prove the foreign forum's inadequacy by pointing to blocking statutes. The presence of blocking statutes implies a foreign forum's acquiescence and indicates that United States courts should hear the case.<sup>24</sup> Defendants must rebut the plaintiffs' argument by proving the adequacy of the foreign forum. In order to meet this standard of proof, defendants must point to a judicial history unblemished by boomerang litigation. An absence of boomerang litigation would prove that the foreign forum is capable of hearing and deciding fair, enforceable judgments.<sup>25</sup>

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defendants that re-file in Nicaragua are egregious and meant to deter defendants from re-filing).

<sup>16</sup> Sold, *supra* note 3, at 1455.

<sup>17</sup> *Id.* at 1455-56.

<sup>18</sup> Ley No. 364, 4 Apr. 1992, Ley Especial 364 [Special Law 364].

<sup>19</sup> Todd, *supra* note 7, at 308.

<sup>20</sup> Todd, *supra* note 7, at 308 (Special Law 364 was enacted in late 2000 as a means to defeat forum non conveniens dismissals of DBCP cases. The Law encourages defendants to litigate in the United States by imposing blatantly pro-plaintiff provisions upon defendants who incur the risk of litigating in the foreign forum. An example is the provision requiring defendants to post a bond of \$100,000 within 90 days after the lawsuit has been brought).

<sup>21</sup> Casey & Ristroph, *supra* note 14.

<sup>22</sup> Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 314 (2002).

<sup>23</sup> Todd, *supra* note 7, at 299.

<sup>24</sup> Casey & Ristroph, *supra* note 14, at 27.

<sup>25</sup> *Id.* at 32.

Part I explains the evolution of the forum non conveniens analysis with respect to foreign plaintiffs; focusing specifically on the shortcomings of the current adequacy prong and how blocking statutes such as Nicaragua's Special Law 364 increase boomerang litigation. Part II begins by outlining the burden placed on foreign plaintiffs and multinational tort defendants and concludes by addressing the decreased burden on courts in following such a framework. Part III provides future proposals and closing remarks.

#### I. WHAT'S IN A NAME? HOW FORUM NON CONVENIENS HAS FALLEN FLAT

Presently, forum non conveniens is a misnomer. The rule, initially developed in the name of convenience, has become so far removed from its original purpose that it fails to live up to its name.<sup>26</sup> Forum non conveniens has left innumerable foreign plaintiffs without enforceable judgments, has given multinational defendants a loophole for avoiding accountability,<sup>27</sup> and has left United States courts without effective procedural means to prevent cases "boomeranging back" to the United States.<sup>28</sup>

##### A. *Setting the Framework: Gulf Oil Corporation v. Gilbert*

Decided in 1947, *Gulf Oil Corporation v. Gilbert*<sup>29</sup> set the analytical framework for the forum non conveniens analysis.<sup>30</sup> In *Gulf Oil*, the United States Supreme Court enumerated the private and public interest factors to be balanced when choosing between two forums.<sup>31</sup> The later case of *Piper Aircraft Co. v. Reyno*<sup>32</sup> supplemented *Gulf Oil*, by outlining forum non conveniens as applied to foreign plaintiffs.<sup>33</sup>

The first part of the forum non conveniens analysis prior to consideration of the public and private interest factors is the determination of whether an available and adequate alternative forum exists to hear the dispute in controversy.<sup>34</sup> The adequacy analysis, which is the focus of this

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<sup>26</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

<sup>27</sup> Michael T. Manzi, *Dow Chemical Company v. Castro Alfaro: The Demise of Forum Non Conveniens in Texas and One Less Barrier to International Tort Litigation*, 14 FORDHAM INT'L L.J. 819, 865 (1991).

<sup>28</sup> See generally Casey & Ristroph, *supra* note 14.

<sup>29</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

<sup>30</sup> Manzi, *supra* note 27, at 824.

<sup>31</sup> *Id.*

<sup>32</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

<sup>33</sup> Waples, *supra* note 4, at 1481.

<sup>34</sup> Davies, *supra* note 22, at 314.

comment, is deemed significant so long as the defendant shows that the parties are neither deprived of all remedies nor treated unfairly.<sup>35</sup> The *Piper* Court held that a change in substantive law is not to be given conclusive or even substantial weight in the adequacy inquiry.<sup>36</sup> The Court also held that foreign plaintiffs ought to be afforded less deference than citizen plaintiffs,<sup>37</sup> because it is unlikely that a United States tribunal will ever be convenient for a foreign plaintiff.<sup>38</sup> In order to maintain the efficiency in forum non conveniens analysis, the Court held, foreign plaintiffs must be afforded less deference.<sup>39</sup>

### B. *The Inadequacy of Adequate*

The forum non conveniens adequacy assessment is ripe with shortcomings. First, defendants have a relatively low burden to bear in establishing that some remedy exists in the non-U.S. forum.<sup>40</sup> Further, *Piper*'s holding that decreased deference ought to be afforded to foreign plaintiffs' choice of forum,<sup>41</sup> coupled with United States courts' hesitance to apply choice of law considerations,<sup>42</sup> renders the adequacy analysis overwhelmingly enigmatic.

United States courts adhere to the mantra, "It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation."<sup>43</sup> In *Piper Aircraft Co. v. Reyno*, the United States Supreme Court rejected the lower court's choice-of-law analysis, asserting that, "The doctrine of forum non conveniens is designed in part to help courts avoid conducting complex exercises in comparative law."<sup>44</sup> In the current forum non conveniens analysis, defendants have a very low burden in demonstrating that a non-U.S. forum is adequate. Defendants must merely demonstrate that some remedy is available.<sup>45</sup> Only when "the remedy provided by the alternative forum is so

<sup>35</sup> *Id.* at 321.

<sup>36</sup> *Id.* at 320.

<sup>37</sup> Waples, *supra* note 4, at 1482.

<sup>38</sup> Davies, *supra* note 22, at 369.

<sup>39</sup> Waples, *supra* note 4, at 1482.

<sup>40</sup> Davies, *supra* note 22, at 319-20.

<sup>41</sup> Walter W. Heiser, *Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161, 1168 (2005).

<sup>42</sup> Davies, *supra* note 22, at 320.

<sup>43</sup> Rajeev Muttreja, *How to Fix the Inconsistent Application of Forum Non Conveniens to Latin American Jurisdiction—And Why Consistency May Not Be Enough*, 83 N.Y.U. L. REV. 1607, 1615 (2008).

<sup>44</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 251 (1981).

<sup>45</sup> Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1459 (2011).

clearly inadequate or unsatisfactory that it is no remedy at all may the alternative forum itself be inadequate.”<sup>46</sup>

The low adequacy threshold<sup>47</sup> imposed on multinational defendants interferes with foreign plaintiffs’ ability to refute multinational defendants’ forum non conveniens claims. Unlike multinational defendants’ burden of proving that ‘some’ remedy is available, foreign plaintiffs’ adequacy analysis requires a deeper look at the non-U.S. forum’s judicial system.<sup>48</sup> Yet United States courts are averse to “judging” non-U.S. tribunals, maintaining that, “as long as the plaintiffs are not ‘deprived of any remedy or treated unfairly’ by the alternative forum’s legal system, that forum is adequate.”<sup>49</sup> Foreign plaintiffs are thus restricted from refuting multinational defendants’ claims because their counterargument—that the alternative forum is not *truly* adequate—presents a question that United States courts seek to avoid. Ultimately, “a nonresident plaintiff’s choice of forum is accorded little deference because that choice is viewed as being based on choice of law considerations, not convenience.”<sup>50</sup>

### C. *Forum Non Conveniens As Applied to Nicaraguan DBCP Tort Litigation*

In 1979, DBCP, an effective pesticide in countering nematode worms,<sup>51</sup> was deregistered by the Environmental Protection Agency for all agricultural uses except pineapples, due to the chemical’s link to sterility.<sup>52</sup> Thereafter, in 1984, the first wave of DBCP litigation commenced.<sup>53</sup> Alleging that foreign plaintiffs’ home forums are adequate and more convenient, American courts have dismissed the majority of DBCP claims, permitting multinational defendants to avoid accountability for wrongful torts abroad.<sup>54</sup>

In *Delgado v. Shell Oil Co.*,<sup>55</sup> thousands of plaintiffs from twelve different foreign countries sought damages for injuries stemming from

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<sup>46</sup> Sold, *supra* note 3, at 1448.

<sup>47</sup> *Id.* at 1449.

<sup>48</sup> Whytock & Robertson, *supra* note 45, at 1459.

<sup>49</sup> Sold, *supra* note 3, at 1449.

<sup>50</sup> Heiser, *supra* note 41, at 1168.

<sup>51</sup> Todd, *supra* note 7, at 297.

<sup>52</sup> *Id.*

<sup>53</sup> Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT’L L. 456, 489 (2011).

<sup>54</sup> Manzi, *supra* note 27, at 865.

<sup>55</sup> *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1335 (S.D. Tex. 1995) *aff’d*, 231 F.3d 165 (5th Cir. 2000).

DBCP exposure.<sup>56</sup> A federal district court in Texas granted the Defendant's motion to dismiss on forum non conveniens grounds, concluding that the Nicaraguan Plaintiffs would "not be treated unfairly or deprived of all remedies in the courts of Nicaragua."<sup>57</sup> The court reached this holding based upon the Defendant's affidavit from an associate justice of the Nicaraguan Supreme Court.<sup>58</sup> The affidavit stated that Article 2509 of the Civil Code, Article 89 of the Law on Insecticides, and Articles 82 through 110 of the Labor Code permit an individual plaintiff in Nicaragua, like the Plaintiffs in *Delgado* to, "bring an action in the appropriate judicial forum for personal injuries."<sup>59</sup> Because the foreign Plaintiffs in *Delgado* could bring a suit in Nicaragua, the court upheld the Defendant's motion for dismissal on forum non conveniens grounds.<sup>60</sup>

#### 1. The Dismissal to End All Dismissals: Nicaragua's Special Law 364

To elude the adequacy prong of the forum non conveniens analysis, some countries have resorted to blocking statutes.<sup>61</sup> Blocking statutes strip non-U.S. courts of jurisdiction over multinational tort claims initially filed in the United States.<sup>62</sup> These blocking statutes effectively render the non-U.S. forum "inadequate"<sup>63</sup> and mandate that a case be heard in a United States court.

In late 2000, the Nicaraguan legislature enacted its own blocking statute entitled Special Law 364.<sup>64</sup> Special Law 364 applies specifically to plaintiffs allegedly harmed by DBCP exposure.<sup>65</sup> Enacted in retaliation to forum non conveniens dismissals in mass tort litigation,<sup>66</sup> Special Law 364's pro-plaintiff provisions<sup>67</sup> discourage defendants from litigating in Nicaragua.<sup>68</sup> For example, defendants that proceed in a Nicaraguan court must first pay \$100,000 as a procedural prerequisite for taking part in the lawsuit and must simultaneously post a \$14.6 million bond to ensure

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 1362.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Nanda & Pansius, *supra* note 13.

<sup>62</sup> Casey & Ristroph, *supra* note 14 at 29.

<sup>63</sup> *Id.* at 27.

<sup>64</sup> Drimmer & Lamoree, *supra* note 53, at 490.

<sup>65</sup> Casey & Ristroph, *supra* note 14, at 27.

<sup>66</sup> Todd, *supra* note 7, at 306.

<sup>67</sup> Drimmer & Lamoree, *supra* note 53, at 490.

<sup>68</sup> *Id.* at 490-91 (Special Law 364 "compel[s] defendants to choose between litigating in a forum where the law is stacked against them, or agreeing to litigate in the United States.").

payment for the judgment.<sup>69</sup> The blocking statute also features an irrefutable presumption of causation for plaintiffs, no statute of limitation requirement, and a shortened discovery requirement.<sup>70</sup> However, defendants can avoid all of these provisions by “merely” submitting to jurisdiction in the United States.<sup>71</sup>

Special Law 364 presents a vexing choice for defendants. The blocking statute forces U.S. defendants to choose between litigating in an openly pro-plaintiff, foreign tribunal or litigating within the United States and being subject to greater tort liability.<sup>72</sup> Despite its apparent shortcomings, the Nicaraguan Supreme Court upheld the constitutionality of Special Law 364, calling it “positive discrimination by ameliorating the disadvantages to poor plaintiffs.”<sup>73</sup>

Rather than attaining justice for its citizens, Nicaragua’s Special Law 364 has instead thrown the credibility of Nicaraguan plaintiffs into question.<sup>74</sup> Judge Chaney of the Los Angeles Superior Court held, “[n]o sanction other than dismissal of the Plaintiff’s claims with prejudice would cure the harm here because the misconduct has been so widespread and pervasive such that this court now questions the veracity of DBCP plaintiffs coming from Nicaragua.”<sup>75</sup> Judge Huck of the Southern District of Florida also questioned Nicaraguan Plaintiffs’ credibility in *Osorio v. Dole Food Co.*<sup>76</sup> In that case, the court refused to enforce the \$97 million judgment obtained under Special Law 364,<sup>77</sup> declaring Nicaragua’s Special Law 364 the “antithesis of basic fairness.”<sup>78</sup>

As demonstrated by the foregoing cases, blocking statutes have achieved the opposite of their original purpose.<sup>79</sup> Rather than garnering fair and enforceable litigation in the United States, blocking statutes have “ensured that Nicaraguan Plaintiffs w[ill] be denied any meaningful resolution of their claims.”<sup>80</sup> As demonstrated by Judges Chaney and Huck,

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<sup>69</sup> *Id.* at 491.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 490-91.

<sup>73</sup> Todd, *supra* note 7, at 309-10.

<sup>74</sup> See, e.g., Drimmer & Lamoree, *supra* note 53, at 497-99.

<sup>75</sup> *Id.* at 495.

<sup>76</sup> *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009) *aff'd sub nom.*, 635 F.3d 1277 (11th Cir. 2011).

<sup>77</sup> Drimmer & Lamoree, *supra* note 53, at 496.

<sup>78</sup> *Id.* at 497.

<sup>79</sup> *Id.*

<sup>80</sup> Todd, *supra* note 7, at 294; *But see* Casey & Ristroph, *supra* note 14, at 20 (highlighting *Canales Martinez v. Dow Chemical Co* where court refused to grant the

United States courts have a preconceived notion of Nicaraguan DBCP tort litigants bringing claims under Special Law 364. Rather than hearing the claim within the United States, judges have instead found greater reason to dismiss such cases.<sup>81</sup>

## 2. Dismal Dismissal: Boomerang Litigation

Blocking statutes such as Nicaragua's Special Law 364 create a perpetual tug-of-war between foreign plaintiffs and multinational defendants. Because blocking statutes relinquish non-U.S. courts' jurisdiction over claims originally brought in the United States,<sup>82</sup> foreign plaintiffs are left with un-litigated claims or unenforceable judgments.<sup>83</sup> In the Costa Rican case *Abarca v. Shell Oil Co.*, a Plaintiff filed suit in Costa Rica following a United States court's dismissal on forum non conveniens grounds.<sup>84</sup> The Costa Rican court refused to assume jurisdiction and dismissed the claims, explaining "that [forum non conveniens is] neither recognized nor applicable in our legal system, and therefore cannot be used as the legal ground for determining the jurisdiction of this court."<sup>85</sup>

Blocking statutes thus compound a vicious cycle of boomerang litigation. Boomerang litigation refers to a case that is dismissed by a United States forum and sent to a non-U.S. tribunal, only to eventually be appealed back to the United States for an enforcement judgment.<sup>86</sup> Boomerang litigation is further exacerbated by court-imposed conditions on the parties as a basis for dismissal.<sup>87</sup> For example, United States courts that dismiss on forum non conveniens grounds typically allow a rehearing of a dismissed case so long as the dismissed plaintiff demonstrates that she has "pursued the litigation in the new forum in good faith and to the fullest extent possible before returning with a claim of a failed condition."<sup>88</sup>

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Defendant's motion to dismiss on forum non conveniens grounds, agreeing with the Plaintiff's that, "Costa Rica is not available as an alternative forum, because the law in that country divests Costa Rican Courts of jurisdiction over a plaintiff's claims when the plaintiff has first filed his claim in another forum with competent jurisdiction").

<sup>81</sup> Drimmer & Lamoree, *supra* note 53, at 495-96.

<sup>82</sup> Sold, *supra* note 3, at 1455-56.

<sup>83</sup> *Id.* at 1461.

<sup>84</sup> Muttreja, *supra* note 43, at 1621.

<sup>85</sup> *Id.*

<sup>86</sup> Whytock & Robertson, *supra* note 45, at 1451.

<sup>87</sup> Muttreja, *supra* note 43, at 1630-31.

<sup>88</sup> *Id.* at 1631.

In a home forum where blocking statutes exist, however, 'boomeranging' back to the United States is more likely than not.<sup>89</sup> In the United States there are currently 537 lawsuits against Dole Standard Fruit Company "at various stages of litigation that allege injury from exposure to DBCP or seek enforcement of judgments already rendered by Nicaraguan courts."<sup>90</sup> In the rare case when a foreign plaintiff re-files in the non-U.S. forum and receives a judgment, the foreign plaintiff must convince a United States court to enforce that judgment.<sup>91</sup> Inevitably, such plaintiffs encounter enforcement hurdles. Multinational defendants often cite due process violations when advocating against the enforceability of foreign judgments.<sup>92</sup> For example, in August 2005, Judge Socorro Toruño of the Second Civil District Court of Chinandega (Nicaragua) ordered Dole and Dow Chemical Co. (among others) to pay \$97 million to 150 injured banana workers.<sup>93</sup> A Dole spokesperson, however, cited the unconstitutionality of Special Law 364 to support the company's refusal to pay the judgment.<sup>94</sup> Most United States courts tend to side with multinational defendants in these enforcement judgment instances, citing due process inconsistencies, corruption, and fraud.<sup>95</sup> By "tak[ing] advantage of policies supporting the rejection of foreign judgments and...avoid[ing] adverse judgments altogether,"<sup>96</sup> boomerang litigation allows defendant corporations to avoid responsibility for their actions abroad.

## II. HOW TO RESTORE FORUM NON CONVENIENS TO ITS FORMER CONVENIENCE

The 'adequacy' prong of the forum non conveniens analysis must be restructured. In a forum non conveniens motion, multinational tort defendants bear the burden of proof.<sup>97</sup> This categorical emphasis denies foreign plaintiffs an equitable opportunity to refute defendants' claims. A

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<sup>89</sup> See, e.g., Casey & Ristroph, *supra* note 14, at 38.

<sup>90</sup> *Id.*

<sup>91</sup> Whytcok & Robertson, *supra* note 45, at 1477.

<sup>92</sup> See e.g., *id.* ("Unhappy with the result of the decision rendered by the Nicaraguan Courts, Shell returns to the United States Courts arguing—out of the other side of their mouth—that the Nicaraguan legislative and judicial systems are corrupt, unfair, and failed to provide Shell due process.").

<sup>93</sup> Casey & Ristroph, *supra* note 14, at 37.

<sup>94</sup> *Id.* at 37-38.

<sup>95</sup> Todd, *supra* note 7, at 318; see also Drimmer & Lamoree, *supra* note 53, at 497 (Judge Huck of the Southern District of Florida declared Nicaragua's Special Law 364 the "antithesis of basic fairness").

<sup>96</sup> Casey & Ristroph, *supra* note 14, at 41. See also Manzi, *supra* note 27, at 864-65 (boomerang litigation also proliferates accountability avoidance because multinational corporations are incentivized not to monetarily atone for their actions abroad).

<sup>97</sup> See Davies, *supra* note 22, at 318.



joint diffusion of responsibility borne by the defendants and plaintiffs would better ensure justice. First, DBCP plaintiffs, in demonstrating the inadequacy of the non-U.S. forum, must point specifically to a blocking statute that negates the non-U.S. forum as a viable alternative. Defendants on the other hand, in proving the adequacy of the non-U.S. forum, must downplay the presence of boomerang litigation between the United States and non-U.S. forum. Because boomerang litigation is often tied to unenforceable judgments,<sup>98</sup> defendants must prove that such an outcome will not plague the case.

*A. Over-Compensating for 30 Years of Under Compensation:  
Restoring Deference to Foreign Plaintiffs*

Supporters of the United States' unwillingness to delve into non-U.S. tribunals credit paternalism: "Hearing foreign cases in the United States under United States law advances United States social policy and disrupts the policy of foreign nations."<sup>99</sup> Such an argument oversimplifies and dubiously undermines *Piper's* holding that, "In rare circumstances...where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied."<sup>100</sup>

Due to United States courts' minimalist view<sup>101</sup> of the adequacy determination, mass tort litigation has devolved into "liti-can't-ion" wherein foreign plaintiffs encounter an irreversible, unenforceable fate<sup>102</sup> at the hands of multinational defendants. This fate is further compounded by *Piper's* determination that foreign plaintiffs be afforded 'less deference.'<sup>103</sup> To restore foreign plaintiffs their proper deference, foreign plaintiffs must be the movant. As the movant, foreign plaintiffs have the burden of demonstrating inadequacy of the non-U.S. forum.

A non-U.S. forum cannot be adequate if particularly stringent blocking statutes exist.<sup>104</sup> By enacting blocking statutes, non-U.S. tribunals are conceding their judicial shortcomings<sup>105</sup> and implicitly inviting United

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<sup>98</sup> Casey & Ristroph, *supra* note 14, at 27 (discussing how boomerang litigation is often tied to blocking statutes because blocking statutes are enacted to combat forum non conveniens analysis).

<sup>99</sup> Todd, *supra* note 7, at 301.

<sup>100</sup> Waples, *supra* note 4, at 1483.

<sup>101</sup> *Id.* at 1476.

<sup>102</sup> *Id.*

<sup>103</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 266 (1981).

<sup>104</sup> Casey & Ristroph, *supra* note 14, at 27.

<sup>105</sup> *Id.*

States courts to resolve multinational tort cases.<sup>106</sup> The Nicaraguan Supreme Court has implicitly conceded its own courts' lack of resources and body of law to accommodate mass tort claims.<sup>107</sup> The Nicaraguan Supreme Court cited Special Law 364's pro-plaintiff provisions as means of deterring defendants from pursuing litigation in Nicaragua so that claims can be litigated in United States courts.<sup>108</sup> Though the Nicaraguan Supreme Court has not explicitly relinquished jurisdiction for cases originally filed in the United States, its self-proclaimed pro-plaintiff provisions symbolize relinquishment.<sup>109</sup> Requiring plaintiffs to assert the inadequacy of non-U.S. tribunals by looking specifically at whether the foreign legislature has enacted a blocking statute will give American courts leeway to conduct "rule of law" analysis.<sup>110</sup> Further, such an analysis will revitalize the adequacy prong of the forum non conveniens assessment.

United States courts frequently attach conditions on the parties after granting a forum non conveniens dismissal.<sup>111</sup> Such conditions include the court's promise to rehear the case if the forum turns out to be inadequate.<sup>112</sup> Burdened with proving the inadequacy of a non-U.S. tribunal, foreign plaintiffs will provide United States courts important information about the foreign forum. Unlike the present forum non conveniens analysis, United States courts will have access to both the plaintiffs' and defendants' arguments, allowing the court to make a calculated, one-time decision. American courts will therefore only hear a case once, rather than conducting a rehearing after a dismissal based on specific conditions.<sup>113</sup>

#### 1. What's In a Name? The Hidden Meaning of Blocking Statutes

In *Chandler v. Multidata Sys. Int'l Corp., Inc.*<sup>114</sup> Panamanian plaintiffs brought suit against a United States company for injuries sustained due to excess radiation.<sup>115</sup> Contesting a forum non conveniens dismissal on

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<sup>106</sup> *Id.*

<sup>107</sup> Todd, *supra* note 7, at 309-10.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 308-09 (discussing how Special Law 364 was enacted in late 2000 as a means to defeat forum non conveniens dismissals of DBCP cases. The Law encourages defendants to litigate in the United States by imposing blatantly pro-plaintiff provisions upon defendants who incur the risk of litigating in the foreign forum. An example is the provision requiring defendants to post a bond of \$100,000 within 90 days after the lawsuit has been brought).

<sup>110</sup> Muttreja, *supra* note 43, at 1614.

<sup>111</sup> *Id.* at 1612.

<sup>112</sup> *Id.* at 1609.

<sup>113</sup> *Id.* at 1614.

<sup>114</sup> *Chandler v. Multidata Sys. Int'l Corp., Inc.*, 163 S.W.3d 537 (Mo. Ct. App. 2005).

<sup>115</sup> *Id.* at 541.

inadequacy grounds, the Plaintiffs' expert testimony contended that once a Plaintiff chooses one forum, they cannot choose another.<sup>116</sup> Despite his strong contentions, the expert failed to offer any evidentiary support for his argument.<sup>117</sup> Specifically, the expert could not cite to the Judicial Code or any other credible source.<sup>118</sup> Without tangible evidence to base its ruling on, the Missouri Court of Appeals rejected the expert's argument that Panama's jurisdictional rules made it an inadequate forum and granted a forum non conveniens dismissal.<sup>119</sup>

Unlike *Chandler*, in which the Plaintiffs' assertions failed to convince the court that Panama was an inadequate forum, blocking statutes are a concrete indication of a foreign forum's inadequacy. The inherent purpose of blocking statutes is to retaliate against forum non conveniens dismissals, pushing a case into the United States' hands.<sup>120</sup>

Absent plausible refutation by the defendant, blocking statutes drastically strengthen a plaintiff's argument that the foreign forum is inadequate. As it pertains to Nicaraguan DBCP tort litigation, United States courts ought to consider the ruling in *Canales Martinez v. Dow Chemical Co.*<sup>121</sup> The federal court in Louisiana refused to grant the Defendant's motion to dismiss on forum non conveniens grounds, holding, "Costa Rica is not available as an alternative forum, because the law in that country divests Costa Rican courts of jurisdiction over a plaintiff's claims when the plaintiff has first filed his claim in another forum with competent jurisdiction."<sup>122</sup> United States tribunals deciding DBCP tort cases ought to adhere to the *Canales* ruling that early detection of blocking statutes combats unenforceable judgments.

Despite the *Canales* court's acknowledgment of Costa Rica's shortcomings as an adequate forum,<sup>123</sup> other United States courts have reacted less predictably.<sup>124</sup> For example, in *Morales v. Ford Motor Co.*,<sup>125</sup> a federal court in Texas held that Defendants' unilateral submission to Venezuelan jurisdiction was sufficient to dismiss the case to Venezuela,

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<sup>116</sup> *Id.* at 544.

<sup>117</sup> *Id.* at 545.

<sup>118</sup> *Id.* at 544.

<sup>119</sup> Muttreja, *supra* note 43, at 1637.

<sup>120</sup> VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 6:15 (2014).

<sup>121</sup> *Canales Martinez v. Dow Chem. Co.*, 219 F. Supp. 2d 719 (E.D. La. 2002).

<sup>122</sup> *Casey & Ristroph*, *supra* note 14, at 30.

<sup>123</sup> *Id.*

<sup>124</sup> *Sold*, *supra* note 3, at 1458.

<sup>125</sup> *Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672 (S.D. Tex. 2004).

despite expert testimony that the Venezuelan Plaintiffs' decision to file first in the United States effectually stripped Venezuela of its jurisdiction.<sup>126</sup>

The analysis proposed here can effectively provide uniformity and efficiency to the forum non conveniens analysis. As the movant, foreign plaintiffs are afforded deference by making an initial showing that the non-U.S. forum is inadequate. This procedure will not require the court to delve into the law of a foreign tribunal and will likewise afford the adequacy analysis a proper review. The low threshold for defendants to merely show 'some' remedy<sup>127</sup> deprives forum non conveniens of its potential and rigs the system against plaintiffs who possess a much higher burden of proof to refute defendants' claims. Setting the adequacy threshold substantially higher and upon plaintiffs rather than defendants will harmonize the forum non conveniens analysis. Most importantly, the analysis will simultaneously benefit defendants and plaintiffs: "[w]hile it is undesirable to pass judgment on the laws of foreign countries it is also undesirable to leave U.S. defendants vulnerable to discriminatory or disparate treatment by foreign courts."<sup>128</sup>

*B. The Dark Abyss of Once Dismissed: Defendant's Burden to Disprove Potential Boomerang Litigation*

Boomerang litigation directly relates to blocking statutes.<sup>129</sup> Blocking statutes exacerbate boomerang litigation as United States courts, albeit aware that the foreign forum has relinquished jurisdiction, grant defendants' forum non conveniens motions. Because non-U.S. courts lack jurisdiction to hear a claim originally filed in the United States, foreign plaintiffs' claims go un-litigated and unresolved. The present standard imposed on multinational tort defendants to show the 'adequacy' of the foreign forum effectively "undermines the well settled rule that the movant bears the burden of persuasion on all elements of the forum non conveniens test."<sup>130</sup> In order to afford foreign plaintiffs proper deference, plaintiffs must bear the initial burden of demonstrating the inadequacy of the foreign forum. To do so, foreign plaintiffs must point specifically to blocking statutes. Defendants must respond by showing that despite the presence of blocking statutes, boomerang litigation will not become a prevalent problem in the pending litigation.

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<sup>126</sup> Sold, *supra* note 3, at 1461.

<sup>127</sup> Davies, *supra* note 22, at 319-20.

<sup>128</sup> Weston, *supra* note 5, at 767.

<sup>129</sup> Casey & Ristroph, *supra* note 14, at 32.

<sup>130</sup> Muttreja, *supra* note 43, at 1632.

### 1. Home Is Where Defendants Say It Is: What Creates Boomerang Litigation?

The increase in boomerang litigation is partly contributed to tension between multinational defendants' words and actions.<sup>131</sup> First, in United States courts, multinational defendants advocate for forum non convenience, asserting that 'some' remedy is available in the non-U.S. forum.<sup>132</sup> Then, after their forum non conveniens motion is granted and the case heard in the foreign forum, defendants are unwilling to pay the judgment rendered.<sup>133</sup> The defendants thus return to the United States invoking court-imposed conditions.<sup>134</sup> Back in the United States, foreign plaintiffs beg for enforcement of the foreign forum's judgments, while defendants assert that the non-U.S. forum (that they advocated for) is tainted by due process violations.<sup>135</sup> This endless back and forth undermines the efficient purpose of forum non conveniens as United States courts assess the adequacy of a non-U.S. tribunal twice in the same transnational dispute.<sup>136</sup>

Consider *Delgado v. Shell Oil Co.*,<sup>137</sup> where a United States Court upheld the Defendant's motion for forum non conveniens dismissal, holding that Nicaragua qualified as an adequate foreign forum.<sup>138</sup> The Nicaraguan Plaintiff then re-filed suit in Nicaragua, obtaining a \$489.4 million judgment against Shell Oil. Co.<sup>139</sup> Shell responded by filing a complaint against the Nicaraguan claimants in the United States District Court for the Central District of California, alleging that the Nicaraguan judgment was unenforceable because it was "rendered under a system that does not provide impartial tribunals."<sup>140</sup> To win a forum non conveniens motion by demonstrating the adequacy of a foreign forum, multinational tort

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<sup>131</sup> See e.g., Whytock & Robertson, *supra* note 45, at 1477 ("Unhappy with the result of the decision rendered by the Nicaraguan Courts, Shell returns to the United States Courts arguing—out of the other side of their mouth—that the Nicaraguan legislative and judicial systems are corrupt, unfair, and failed to provide Shell due process.").

<sup>132</sup> Casey & Ristroph, *supra* note 14, at 32.

<sup>133</sup> Whytock & Robertson, *supra* note 45, at 1477.

<sup>134</sup> Muttreja, *supra* note 43, at 1612.

<sup>135</sup> See e.g., Whytock & Robertson, *supra* note 45, at 1477 ("Unhappy with the result of the decision rendered by the Nicaraguan Courts, Shell returns to the United States Courts arguing—out of the other side of their mouth—that the Nicaraguan legislative and judicial systems are corrupt, unfair, and failed to provide Shell due process.").

<sup>136</sup> *Id.* at 1473.

<sup>137</sup> *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1335 (S.D. Tex. 1995).

<sup>138</sup> Whytock & Robertson, *supra* note 45, at 1476.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

defendants need not demonstrate that a foreign tribunal is impartial.<sup>141</sup> Therefore, Shell argued that its forum non conveniens motion, citing Nicaragua as an adequate forum, was separate and unrelated to the enforceability of Nicaragua's judgment.<sup>142</sup>

To discourage defendants from filing a forum non conveniens motion for dismissal and subsequently retracting that motion once a non-U.S. court renders a judgment, the current forum non conveniens adequacy system must be revised. Foreign plaintiffs must prove the inadequacy of the non-U.S. forum. Defendants must then refute foreign plaintiffs' inadequacy claims by showing a diminished propensity for boomerang litigation.

## 2. Where There's Fire, There's Smoke: Disentangling Blocking Statutes from Boomerang Litigation

As enumerated by *Delgado*, it is in a multinational tort defendant's best interest to put forth more stringent requisites at the adequacy stage in order to avoid boomerang litigation.<sup>143</sup> The reworking of the forum non conveniens analysis is aimed at achieving a new equilibrium between plaintiffs and defendants in forum non conveniens cases. Thus, though blocking statutes, as proffered by foreign plaintiffs, might indicate a higher propensity for boomerang litigation, defendants can disclaim such propensity by making specific concessions.

First, defendants must demonstrate that they will be treated fairly in the foreign forum. This inquiry affords equal and desirable treatment for both plaintiffs and defendants<sup>144</sup> throughout the forum non conveniens analysis. In proving that the foreign forum is systematically adequate,<sup>145</sup> defendants can specifically highlight impartial tribunals, procedural access to tort litigation cases, and the foreign court's conditions pertaining to reacceptance of a case originally filed in the United States.<sup>146</sup>

Another way that defendants can demonstrate the adequacy of the foreign forum is by promising to adhere to their dismissal claims under a theory of estoppel<sup>147</sup> – “Where a party assumes a certain position in a legal proceeding, he may not thereafter, simply because his interests have

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<sup>141</sup> *Id.* at 1477.

<sup>142</sup> *Id.* (Shell argued that “it never made any statement in the *Delgado* forum non conveniens proceedings ‘to the effect that Nicaragua provided a system of impartial tribunals.’”).

<sup>143</sup> Whytock & Robertson, *supra* note 45, at 1477.

<sup>144</sup> *Id.* at 1520.

<sup>145</sup> *Id.* at 1498.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 1474-75.

changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.”<sup>148</sup> The foreign plaintiffs in *Delgado* set forth such a position, alleging that if the defendants were permitted to flip flop their position, there would be, “no place on this earth where an individual poisoned by DBCP may have his or her day in court.”<sup>149</sup> Estopping defendants from changing positions after receiving an unfavorable judgment in a foreign forum imposes accountability upon defendants,<sup>150</sup> ensuring that what defendants advocate for during the forum non conveniens stage is upheld after the case has been dismissed on forum non conveniens grounds.<sup>151</sup>

Requiring defendants to prove the adequacy of the foreign forum compels accountability. Allowing defendants to refute their original motions ex-post<sup>152</sup> illogically permits, “[d]efendants to succeed at both dismissing DBCP actions to be tried abroad and [to circumvent] enforcement of DBCP judgments obtained from the very countries in which they demanded to litigate, thereby preventing hundreds of victims from receiving compensation.”<sup>153</sup> Further, more stringent requirements aid the courts themselves. Granting a forum non conveniens dismissal with clear knowledge of a foreign forum’s shortcomings, United States courts are perpetuating a pattern of avoidance on the part of multinational defendants and expending time and resources litigating a case that has already been heard.<sup>154</sup> Boomerang litigation thus undermines the convenience of a forum non conveniens analysis as United States courts are forced to re-litigate cases that have already been litigated numerous times elsewhere.<sup>155</sup>

A higher adequacy threshold in which defendants propose and actually adhere to their claims imposes uniformity and fairness upon the forum non conveniens system. Further, courts are forced to address foreign, judicial tensions ex ante rather than ex post and more effectively gauge the adequacy of a foreign forum for both parties.<sup>156</sup>

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<sup>148</sup> *Id.* at 1500.

<sup>149</sup> Whytock & Robertson, *supra* note 45, at 1477 (quoting Memorandum of Points and Authorities in Opposition to Plaintiff’s Motion for Summary Judgment at 4, 12-13, *Shell Oil Co. v. Franco*, No. CV 03-8846 NM (PJWx) (C.D. Cal. Aug. 3, 2005), 2005 WL 6187868).

<sup>150</sup> *Id.* 1501.

<sup>151</sup> *Id.* at 1502.

<sup>152</sup> *Id.* at 1500-01.

<sup>153</sup> *Id.* at 1480.

<sup>154</sup> *Id.* at 1489.

<sup>155</sup> Casey & Ristroph, *supra* note 14, at 41.

<sup>156</sup> See Whytock & Robertson, *supra* note 45, at 1489.

*C. First Time's the Charm: Removing the Burden from Courts*

After hearing from both plaintiffs and defendants, it is up to the court as the final arbitrator to decide whether to keep the case within a United States tribunal or dismiss on forum non conveniens grounds. In making this decision, the court should consider the following factors.

Courts dismissing on forum non conveniens grounds “usually stipulate that they will reaccept a dismissed case if any stated conditions are not met.”<sup>157</sup> In keeping with the ‘allowing a plaintiff her day in court’ sentiment,<sup>158</sup> United States courts usually allow a re-hearing in the United States based upon a showing that the foreign plaintiff exhausted all avenues within the foreign forum.<sup>159</sup> Despite its intended goodwill, such a provision suggests that the court doubts its decision to dismiss.<sup>160</sup> Instead, after foreign plaintiffs point to a foreign forum’s blocking statute, and absent plausible refutation from the defendants, United States courts can limit incidents of boomerang litigation—by denying dismissal at the offset.<sup>161</sup> If courts are weighing heavily in favor of a forum non conveniens dismissal premised on a ‘rehearing provision,’ the court ought to deny dismissal.<sup>162</sup> Addressing such a propensity *ex ante* will narrow the likelihood of a burdened court docket and increased judicial costs.<sup>163</sup> Judges will thus be able to litigate a case one time, and one time only.

Another factor for courts to consider is the likelihood of an enforceable judgment: “[t]he lower the likelihood of enforcement, the more heavily [the court] should weigh against dismissal.”<sup>164</sup> Careful consideration of this factor will not only grant plaintiffs their ‘day in court’<sup>165</sup> but will also hold defendants accountable for their conduct abroad. “When tort liability falls into the gap between forum non conveniens and judgment enforcement, that risk and safety calculation necessary

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<sup>157</sup> Muttreja, *supra* note 43, at 1631.

<sup>158</sup> *Id.* at 1631.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1631-32 (“A conditional dismissal can protect against the possibility of getting the foreign court’s actual availability wrong.”).

<sup>161</sup> Whytock & Robertson, *supra* note 45, at 1489.

<sup>162</sup> Muttreja, *supra* note 43, at 1632.

<sup>163</sup> Whytock & Robertson, *supra* note 45, at 1489.

<sup>164</sup> *Id.* at 1497.

<sup>165</sup> Muttreja, *supra* note 43, at 1631.



changes...potential tort liability becomes a less effective deterrent to harmful conduct.”<sup>166</sup>

Not only will the enforcement consideration increase equality for both plaintiffs and defendants,<sup>167</sup> it will also permeate efficiency throughout the judicial system. When there is a possibility that an unenforceable judgment will be rendered in the non-U.S. forum, United States courts should deny the forum non conveniens motion.<sup>168</sup> Hearing the case creates less of a burden on United States courts than re-litigating a case: “It is quite possible the United States courts have expended more resources in dealing with these lengthy proceedings than they would have faced if they had denied the forum non conveniens motions, sent the cases to trial, and handled a single appeal from the final judgment.”<sup>169</sup>

Throughout the forum non conveniens procedure, there are numerous considerations courts should contemplate when deciding whether to dismiss a case on forum non conveniens grounds. If courts are prefacing dismissal on certain conditions, the court is insulating itself from a potential error and therefore should weigh against dismissal.<sup>170</sup> The court should also consider the possibility of unenforceable judgments rendered in the non-U.S. forum so as to re-instill efficiency into the forum non conveniens analysis.

### III. CONCLUSION

Expanding the adequacy aspect of the forum non conveniens analysis will restore forum non conveniens to its former glory: ensuring that a case is tried in a forum that, “will best serve the convenience of the parties and ends of justice.”<sup>171</sup> Expansion of the forum non conveniens adequacy analysis will afford foreign plaintiffs greater deference as those plaintiffs demonstrate the inadequacy of the non-U.S. forum by pointing to blocking statutes. Further, defendant’s routine pattern of avoidance will be eradicated as defendants are forced to demonstrate a decreased propensity for boomerang litigation between the United States and the non-U.S. forum. Additionally, requiring the court to include specific considerations in their analysis will aid the judicial system as a whole: by giving a foreign plaintiff his or her day in court, imputing responsibility and accountability upon a

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<sup>166</sup> Whytock & Robertson, *supra* note 45, at 1490.

<sup>167</sup> *Id.* at 1520.

<sup>168</sup> Muttreja, *supra* note 43, at 1631-32. (“A conditional dismissal can protect against the possibility of getting the foreign court’s actual availability wrong.”).

<sup>169</sup> Whytock & Robertson, *supra* note 45, at 1489.

<sup>170</sup> Muttreja, *supra* note 43, at 1631-32.

<sup>171</sup> Waples, *supra* note 4, at 1512.

multinational defendant, and reinstalling efficiency within the judicial system.

Reworking the adequacy prong of the *forum non conveniens* analysis by placing the initial burden upon a foreign plaintiff makes the *forum non conveniens* analysis more efficient. After hearing from both plaintiffs and defendants about foreign law, U.S. courts are equipped with the information to make a successful and irreversible *ex ante* decision. Thus, these courts are insulated from threats of boomerang litigation and excessive judicial fees. Knowledge, after all, is power. Courts are empowered by issuing a final, declaratory judgment; foreign plaintiffs are empowered by deferential treatment in making the initial stand for the inadequacy of the non-U.S. forum, and multinational defendants are empowered by accountability.