American University Business Law Review

Volume 8 • 2020 • Issue 3

Conference & Symposia

International Arbitration: Friend or Foe of Corporations?

Articles

Comment

* * *

AMERICAN UNIVERSITY BUSINESS LAW REVIEW

The *American University Business Law Review* is published three times a year by students of the Washington College of Law, American University, 4300 Nebraska Avenue, NW, Suite CT11 Washington, D.C. 20016. Manuscripts should be sent to the Senior Articles Editor at the above listed address or electronically at blr-sae@wcl.american.edu.

The opinions expressed in articles herein are those of the signed authors and do not reflect the views of the Washington College of Law or the *American University Business Law Review*. All authors are requested and expected to disclose any economic or professional interests or affiliations that may have influenced positions taken or advocated in their articles, notes, comments, or other materials submitted. That such disclosures have been made is impliedly represented by each author.

Subscription rate per year is the following: $45.00 domestic, $50.00 foreign, $30.00 alumni, and $20.00 single issue. Periodicals postage is paid at Washington, D.C., and additional mailing offices. The Office of Publication is 4300 Nebraska Avenue, NW, Suite CT11, Washington, D.C. 20016. The Printing Office is Sheridan PA, 450 Fame Avenue, Hanover, Pennsylvania 17331. POSTMASTER: Send address changes to the *American University Business Law Review*, 4300 Nebraska Avenue, NW, Suite CT11, Washington, D.C. 20016.

Subscriptions are renewed automatically on expiration unless cancellation is requested. It is our policy that unless a claim is made for nonreceipt of the *American University Business Law Review* issues within six months of the mailing date, the *American University Business Law Review* cannot be held responsible for supplying those issues without charge.

Citations conform generally to *The Bluebook: A Uniform System of Citation* (20th ed. 2015).
To be cited as: 8 AM. U. BUS. L. REV.

American University Business Law Review
Print ISSN 2168-6890
Online ISSN 2168-6904

AU BLR American University Business Law Review

Volume 9 • 2019-2020

AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW FACULTY

Administration

Camille A. Nelson, B.A., LL.B., LL.M., *Dean of the Washington College of Law*
Susan D. Carle, A.B., J.D., *Vice Dean of the Washington College of Law*
Brenda V. Smith, B.A., J.D., *Senior Associate Dean for Faculty and Academic Affairs*
Jayesh Rathod, A.B., J.D., *Associate Dean for Experiential Education*
*Billie Jo Kaufman, B.S., M.S., J.D., *Associate Dean for Library and Information Resources*
David B. Jaffe, B.A., J.D., *Associate Dean for Student Affairs*
Jonas Anderson, B.S., J.D., *Associate Dean for Scholarship*
William J. Snape III, B.A., J.D., *Assistant Dean for Adjunct Faculty Affairs*
Robert Campe, B.A., M.B.A., *Assistant Dean for Finance, Administration and Strategic Planning*
Hilary Lappin, B.A., M.A., *Registrar*
Akira Shiroma, B.A., J.D., *Assistant Dean for Admissions and Financial Aid*
Randall T. Sawyer, B.A, M.A., *Assistant Dean for External Relations*
Elizabeth Boals, B.S., J.D., *Assistant Dean for Part-Time and Online Education*

Full-Time Faculty

David E. Aaronson, B.A., M.A., Ph.D., The George Washington University; LLB, Harvard University; LL.M, Georgetown University. *B. J. Tennery Professor of Law and Director of the Stephen S. Weinstein Trial Advocacy Program*
Padideh Ala'i, B.A., University of Oregon; J.D., Harvard University. *Professor of Law, Faculty Director of the International Legal Studies Program, and Director of the Hubert Humphrey Fellowship Program*
Hilary Allen, B.A., University of Sydney, Australia; BL (LLB) University of Sydney, Australia. LL.M Georgetown University Law Center. *Associate Professor of Law*
Jonas Anderson, BS, University of Utah; J.D., Harvard University. *Professor of Law and Associate Dean of Scholarship*
*Kenneth Anderson, B.A., University of California-Los Angeles; J.D., Harvard University. *Professor of Law*
Jonathan B. Baker, A.B., J.D., Harvard University; M.A., Ph.D., Stanford University. *Research Professor of Law*
Susan D. Bennett, B.A., M.A., Yale University; J.D., Columbia University. *Professor of Law*
Barlow Burke Jr., A.B., Harvard University; LLB, MCP, University of Pennsylvania; LL.M, SJD, Yale University. *Professor of Law and John S. Myers and Alvina Reckman Myers Scholar*
Susan D. Carle, A.B., Bryn Mawr College; J.D., Yale University. *Professor of Law and Vice-Dean*
Michael W. Carroll, A.B., University of Chicago; J.D., Georgetown University. *Professor of Law and Director of the Program on Information Justice and Intellectual Property*
Janie Chuang, B.A., Yale University; J.D., Harvard University. *Professor of Law*
Mary Clark, A.B., Bryn Mawr College; J.D., Harvard University, LL.M, Georgetown University. *Professor of Law and Interim Provost*
Llezlie Green Coleman, A.B., Dartmouth College; J.D., Columbia University. *Associate Professor of Law*
John B. Corr, B.A., M.A., John Carroll University; Ph.D., Kent State University; J.D., Georgetown University. *Professor of Law*
Jennifer Daskal, B.A., Brown University; B.A., M.A., Cambridge University; J.D., Harvard University. *Associate Professor of Law*
Angela Jordan Davis, B.A., Howard University; J.D., Harvard University. *Professor of Law*
Robert D. Dinerstein, A.B., Cornell University; J.D., Yale University. *Professor of Law and Director of Clinical Programs*
N. Jeremi Duru, B.A., Brown University; MPP, J.D., Harvard University, *Professor of Law*
*Walter A. Effross, A.B., Princeton University; J.D., Harvard University. *Professor of Law*
Lia Epperson, B.A., Harvard University; J.D., Stanford University. *Professor of Law*
*Christine Haight Farley, B.A., State University of New York, Binghamton; J.D., State University of New York, Buffalo; LL.M, JSD, Columbia University. *Professor of Law*
Susan D. Franck, B.A., Macalester College; J.D., University of Minnesota; LL.M, University of London. *Professor of Law*
Amanda Frost, B.A., J.D., Harvard University. *Professor of Law*
Robert K. Goldman, B.A., University of Pennsylvania; J.D., University of Virginia. *Professor of Law and Louis C. James Scholar*
Claudio M. Grossman, Licenciado en Ciencias Juridicas y Sociales, Universidad de Chile, Santiago; Doctor of Science of Law, University of Amsterdam. *Professor of Law, Dean Emeritus, Raymond I. Geraldson Scholar for International and Humanitarian Law*
Lewis A. Grossman, B.A., Ph.D., Yale University; J.D., Harvard University. *Professor of Law*
Rebecca Hamilton, BEcon, University of Sydney, Australia; M.A., J.D., Harvard University. *Assistant Professor of Law*
Heather L. Hughes, B.A., University of Chicago; J.D., Harvard University. *Professor of Law and Director of the SJ.D. Program*
David Hunter, B.A., University of Michigan; J.D., Harvard University. *Professor of Law and Director of the Program on International and Comparative Environmental Law*
Cynthia E. Jones, B.A., University of Delaware; J.D., American University Washington College of Law. *Professor of Law*
*Billie Jo Kaufman, BS, MS, Indiana University; J.D., Nova Southeastern University. *Professor of Law and Associate Dean of Library and Information Resources*
Benjamin Leff, B.A., Oberlin College; AM, University of Chicago; J.D., Harvard University. *Professor of Law*
Amanda Cohen Leiter, BS, MS, Stanford University; MS, University of Washington; J.D., Harvard University. *Professor of Law*
James P. May, B.A., Carleton College; J.D., Harvard University. *Professor of Law*
Binny Miller, B.A., Carleton College; J.D., University of Chicago. *Professor of Law*
Camille Nelson, B.A., University of Toronto; LLB, University of Ottawa; LL.M, Columbia University School of Law. *Dean and Professor of Law*
Fernanda Nicola, B.A., University of Turin; Ph.D., Trento University; LL.M, Harvard University. *Professor of Law*
Mark C. Niles, B.A., Wesleyan University; J.D., Stanford University. *Professor of Law*
Diane F. Orentlicher, B.A., Yale University; J.D., Columbia University. *Professor of Law*
Teresa Godwin Phelps, B.A., M.A., Ph.D., University of Notre Dame; MSL, Yale University. *Professor of Law and Director of the Legal Rhetoric Program*
*Andrew D. Pike, B.A., Swarthmore College; J.D., University of Pennsylvania. *Professor of Law*

Nancy D. Polikoff, B.A., University of Pennsylvania; M.A., The George Washington University; J.D., Georgetown University. *Professor of Law*

Andrew F. Popper, B.A., Baldwin Wallace College; J.D., DePaul University; LL.M, The George Washington University. *Professor of Law and Bronfman Professor Law and Government*

Jamin B. Raskin , B.A., J.D., Harvard University. *Professor of Law*

Jayesh Rathod, A.B., Harvard University; J.D., Columbia University. *Professor of Law, Director of the Immigrant Justice Clinic and Associate Dean of Experiential Education*

Ira P. Robbins, A.B., University of Pennsylvania; J.D., Harvard University. *Professor of Law and Justice, Director of the J.D./M.S. Dual Degree Program in Law and Justice, and Barnard T. Welsh Scholar*

Jenny Roberts, B.A., Yale University; J.D., New York University. *Professor of Law*

Ezra Rosser, B.A., Yale University; J.D., Harvard University. *Professor of Law*

Herman Schwartz, A.B., J.D., Harvard University. *Professor of Law*

Ann Shalleck, A.B., Bryn Mawr College; J.D., Harvard University. *Professor of Law, Director of the Women and the Law Program, and Carrington Shields Scholar*

Anita Sinha, B.A., Barnard College, Columbia University; J.D., New York University. *Assistant Professor of Law, Director of the International Human Rights Law Clinic*

Brenda V. Smith, B.A., Spelman College; J.D., Georgetown University. *Professor of Law and Senior Associate Dean for Faculty and Academic Affairs*

*David Snyder, B.A., Yale University; J.D., Tulane University. *Professor of Law and Director of the Law and Business Program*

Robert L. Tsai, B.A., University of California, Los Angeles; J.D., Yale University. *Professor of Law*

Anthony E. Varona, A.B., J.D., Boston College; LL.M, Georgetown University. *Professor of Law*

Lindsay F. Wiley, A.B., J.D., Harvard University; MP..H, Johns Hopkins University. *Professor of Law*

Paul R. Williams, A.B., University of California-Davis; J.D., Stanford University. *Rebecca I. Grazier Professor of Law and International Relations and Director of the J.D./MBA Dual Degree Program*

Law Library Administration

Khelani Clay, B.A., Howard University; J.D., American University Washington College of Law; M.L.S., The Catholic University of America. *Assistant Law Librarian*

John Q. Heywood, B.S., Northern Arizona University; J.D., American University Washington College of Law. *Associate Law Librarian*

Billie Jo Kaufman, B.S., M.S., University of Indiana at Bloomington; J.D., Nova Southeastern University, Shepard Broad Law Center. *Professor of Law and Associate Dean for Library and Information Resources*

Sima Mirkin, B.Engr.Econ., Byelorussian Polytechnic Institute, Minsk, Belarus; M.L.S., University of Maryland. *Associate Law Librarian*

Shannon M. Roddy, B.A., University of North Carolina at Chapel Hill; J.D., American University Washington College of Law. *Assistant Law Librarian*

William T. Ryan, B.A., Boston University; J.D., American University Washington College of Law; M.L.S., University of Maryland. *Law Librarian*

Ripple L. Weistling, B.A., Brandeis University; M.A., King's College (London); J.D., Georgetown University Law Center; M.L.S., The Catholic University of America. *Assistant Law Librarian*

Wanhong Linda Wen, B.A., Hunan Normal University; M.S., University of South Carolina, *Associate Law Librarian*

Emeriti

Evelyn Abravanel, A.B., Case Western Reserve; J.D., Case Western Reserve. *Professor of Law Emerita* Columbia Law School; LL.M., Harvard Law School. *Associate Professor of Law Emeritus*

Isaiah Baker, A.B., Yale University; M.A., DePaul University; M.B.A., Columbia University Graduate School of Business; J.D., Columbia Law School; LL.M., Harvard Law School. *Associate Professor of Law Emeritus*

Daniel Bradlow, B.A., University of Witwatersrand, South Africa; J.D., Northeastern University Law School; LL.M., Georgetown University Law Center; L.L.D., University of Pretoria. *Professor of Law Emeritus*

David F. Chavkin, B.S., Michigan State University; J.D., University of California at Berkeley School of Law. *Professor of Law Emeritus*

Elliott S. Milstein, B.A., University of Hartford; J.D., University of Connecticut; LL.M., Yale University. *Professor of Law Emeritus*

Egon Guttman, LL.B., LL.M., University of London. *Professor of Law and Levitt Memorial Trust Scholar Emeritus*

Peter A. Jaszi, A.B., J.D., Harvard University. *Professor of Law Emeritus*

Patrick E. Kehoe, B.C.S., Finance, Seattle University; M.L.S., Washington University; J.D., Washington University. *Law Librarian Emeritus*

Nicholas N. Kittrie, A.B., M.A., LL.B., University of Kansas; LL.M., S.J.D., Georgetown University Law Center. *University Professor*

Candace Kovacic-Fleischer, A.B., Wellesley College; J.D., Northeastern University College of Law. *Professor of Law Emeritus*

Susan J. Lewis, B.A., University of California at Los Angeles; J.D., Southwestern Law School; M.Libr., University of Washington. *Law Librarian Emeritus*

Robert Lubic, A.B., J.D., University of Pittsburgh; M.P.L., Georgetown University. *Professor of Law Emeritus*

Anthony Morella, A.B., Boston University; J.D., American University Washington College of Law. *Professor of Law Emeritus*

Mary Siegel, A.B., Vassar College; J.D., Yale University. *Professor of Law Emerita*

Michael E. Tigar, B.A., J.D., University of California at Berkeley. *Professor of Law Emeritus*

Robert G. Vaughn, B.A., J.D., University of Oklahoma; LL.M., Harvard Law School. *Professor of Law Emeritus and A. Allen King Scholar*

Richard J. Wilson, B.A., DePauw University; J.D., University of Illinois College of Law. *Professor of Law Emeritus*

Special Faculty Appointments

Nancy S. Abramowitz, A.B., Cornell University; J.D., Georgetown University Law Center. *Professor of Practice of Law*

Ana-Corina Alonso-Yoder, B.A., Georgetown University; J.D., American University Washington College of Law. *Professor of Practice of Law*

Adrian Alvarez, B.A., University of Texas at Austin; M.A., Princeton University; J.D., American University Washington College of Law. *Professor of Practice of Law*

Elizabeth Beske, A.B., Princeton University; J.D., Columbia Law School. *Legal Rhetoric Instructor*

Elizabeth Boals, B.S., Virginia Polytechnic Institute and State University; J.D., George Mason University School of Law. *Assistant Dean, Part-Time and Online Education, Practitioner in Residence, and Director Criminal Justice Practice and Policy Institute*

Hillary Brill, A.B., Harvard University; J.D. Georgetown University Law Center. *Practitioner-in-Residence, Glushko-Samuelson Intellectual Property Law Clinic*

Sherley Cruz, B.A., Boston University; J.D., Boston University. *Practitioner-in-Residence*

Paul Figley, B.A., Franklin & Marshall College; J.D., Southern Methodist University School of Law. *Associate Director of the Legal Rhetoric Program and Legal Rhetoric Instructor*

Sean Flynn, B.A., Pitzer College (Claremont); J.D., Harvard Law School. *Professorial Lecturer in Residence, Associate Director of the Program on Information Justice and Intellectual Property*

Jon Gould, A.B., University of Michigan; M.P.P., Harvard University; J.D., Harvard Law School; Ph.D., University of Chicago. *Affiliate Professor and Director of Washington Institute for Public and International Affairs Research*

Jean C. Han, A.B., Harvard College; J.D., Yale Law School; LL.M., Georgetown University Law Center. *Practitioner-in-Residence, Women & the Law Clinic*

Elizabeth A. Keith, B.A., University of North Carolina at Chapel Hill; J.D., George Mason University School of Law. *Legal Rhetoric Instructor*

Daniela Kraiem, B.A., University of California at Santa Barbara; J.D., University of California at Davis School of Law. *Associate Director of the Women and the Law Program and Practitioner-in-Residence*

Kathryn Ladewksi, B.A., Stanford University; J.D., University of Michigan. *Practitioner-in-Residence*

Fernando Laguarda, A.B., Harvard University; J.D., Georgetown University Law Center. *Professorial Lecturer and Director of the Program on Law and Government*

Jeffery S. Lubbers, A.B., Cornell University; J.D., University of Chicago Law School. *Professor of Practice in Administrative Law*

Claudia Martin, Law Degree, Universidad de Buenos Aires; LL.M., American University Washington College of Law. *Professorial Lecturer in Residence*

Juan Méndez, Law Degree, Stella Maris Catholic University; Certificate, American University Washington College of Law, *Professor of Human Rights Law In Residence*

Horacio Grigera Naón, J.D., LL.D., School of Law of the University of Buenos Aires; LL.M., S.J.D., Harvard Law School. *Distinguished Practitioner in Residence and Director of the Center on International Commercial Arbitration*

Victoria Phillips, B.A., Smith College; J.D., American University Washington College of Law. *Professor of Practice of Law and Director of the Glushko-Samuelson Intellectual Property Law Clinic*

Joseph Richard Pileri, B.A., University of California, Los Angeles; J.D., Harvard Law School. *Practitioner-in-Residence and Community and Economic Development Law Clinic*

Heather E. Ridenour, B.B.A., Texas Women's University; J.D., Texas Wesleyan School of Law. *Director of Legal Analysis Program, Legal Writing Instructor*

Diego Rodriguez-Pinzon, J.D., Universidad de los Andes; LL.M., American University Washington College of Law; S.J.D., George Washington University Law School. *Professorial Lecturer in Residence, Co-Director, Academy on Human Rights & Humanitarian Law*

Susana Sá Couto, B.A., Brown University; M.AL.D, The Fletcher School of Law and Diplomacy; J.D., Northeastern University Law School. *Professorial Lecturer-in-Residence and Director of War Crimes Research Office*

Macarena Saez, J.D., University of Chile School of Law; LL.M., Yale Law School. *Fellow in ILSP and Director of the Center for Human Rights and Humanitarian Law*

Anne Schaufele, B.A., DePauw University; J.D., American University Washington College of Law. *Practitioner-in-Residence*

*Steven G. Shapiro, B.A., Georgetown University; J.D., Georgetown University Law Center. *Director of the Hospitality and Tourism Law Program*

William Snape III, B.A., University of California at Los Angeles; J.D., George Washington University Law School. *Director of Adjunct Faculty Development and Fellow in Environmental Law*

David H. Spratt, B.A., The College of William and Mary; J.D., American University Washington College of Law. *Legal Rhetoric Instructor*

Richard Ugelow, B.A., Hobart College; J.D., American University Washington College of Law; LL.M., Georgetown University Law Center. *Practitioner-in-Residence*

Rangeley Wallace, B.A., Emory University; J.D., American University Washington College of Law; LL.M., Georgetown University. *Practitioner-in-Residence*

Diane Weinroth, B.A., University of California at Berkeley; J.D., Columbia University Law School. *Supervising Attorney*

Stephen Wermiel, A.B., Tufts University; J.D., American University Washington College of Law. *Professor of Practice of Law*

* *American University Business Law Review* Faculty Advisory Committee

AMERICAN UNIVERSITY BUSINESS LAW REVIEW
Volume 8 · 2020 · Issue 3

TABLE OF CONTENTS

* * *

The Executive Board of *American University Business Law Review*, Volume 8, would like to acknowledge the commitment and tireless work of the Executive Board for Volume 9 of this Journal, without whom this Issue would not have achieved fruition.

SYMPOSIUM TRANSCRIPTS: INTERNATIONAL ARBITRATION: FRIEND OR FOE OF CORPORATIONS? FEBRUARY 12, 2019

INTRODUCTORY REMARKS

M = Moderator

M: Good morning, everybody. First things first, I want to thank you for joining us. I'm the Symposium Editor for the *American University Business Law Review*. The *Business Law Review* is pleased to welcome you to the 2019 Symposium International Arbitration: Friend or Foe for Corporations. The *Business Law Review* is pleased to continue its academic discourse on International Arbitration from its 2015 Symposium on salient issues, [non-salient] issues, international commercial arbitration, and its companion new issue in Volume 5, Issue 3. As the oldest business law review in Washington, D.C., we are honored to facilitate further discussion in this dynamic field and to continue our tradition of publishing articles by panelists and other experts in the field. Today's event will focus on international arbitration in the corporate world, including the importance of carefully drafting arbitration clauses, recent changes in legal developments, and the role of third parties in arbitral proceedings. The fantastic faculty and staff here at WCL, including our friends in the Center on International Commercial Arbitration, the Law Review staff, particularly my symposium committee, and I, have put in a lot of time and effort into what I know will be a wonderful and informative day. Given the current state of international dispute settlement, we are honored to host the field's top legal scholars and speakers from some of the nation's premiere arbitration firms to present this relevant and exciting symposium.

Without further ado, let's jump into our first panel of the day — Negotiating Arbitration Clauses — moderated by **M1**. **M1** is [Redacted]. **M1** has a distinct experience in the interplay of construction and design as well as complex agreements in real estate development. I'll hand it off to **M1** to introduce the panelists.

*   *   *

PANEL I: NEGOTIATING ARBITRATION CLAUSES

PANEL 1: NEGOTIATING ARBITRATION CLAUSES

M = Moderator
P = Panelist
A = Attendee

M1: **M**, thanks so much. We are pleased to be the first panelists today. We are going to start with the basics, but first — a very, very quick introduction. My friend to my right, **P2** at [Redacted] and a WCL graduate, then, **P1** with [Redacted], and **P3**, [. . .], with [Redacted]. I guess they[are all global firms now. We have a couple of missions in our panel today. One we probably will not get to is careers and career paths. Maybe you can grab our panelists afterward, but I would just note that it is all fluid and friendly: private practice, in-house, and those connections. We probably will not get to it but maybe highlight it along the way.

Our two fundamental topics for the first panel would be arbitration: is it worthwhile? Does it make sense? We are going to start with **P1** at [Redacted]. [Redacted] has all kinds of agreements: domestic, international. When does it make sense to do it? When not? **P1** will set the stage. Then I have asked **P2** and **P3** to talk about where we are legally. **P2** is going to talk about the Supreme Court case, **P3** is going to talk about drafting. If **P1**, the client says, "Yes, we want arbitration. We really want it, make sure it happens," it is not always that simple. **P1**, we will start with you, maybe very quickly. We all know [Redacted], but what is [Redacted], and what is the decision making about how and when you want arbitration? So, thank you.

P1: Thank you and good morning. It is nice to see so many people here. I will say it before I jump in that this would be a lot more fun for us and probably for you guys if you asked questions or jump in. So please feel free to interrupt us; I hope you do.

Like **M1** said, I am [at] [Redacted]. I have been there for about six years. I'm in the dispute resolution group. There are four attorneys who do all of [Redacted]'s disputes worldwide, so we have a pretty broad portfolio across the globe. Just to give you an idea: right now, I have probably three or four international arbitrations going and then a bunch of court cases in the United States and in other countries. We have a broad portfolio. To give you an idea about [Redacted], the first hotel was built in 1957, and, as of last year, we are closing in on 7,000 properties. We have 1.3 million rooms in 130 countries. If you think about how it is structured, there are really two types of hotels. Does anyone know how many hotels [Redacted] owns?

A: Zero.

P1: Close. We were down to about five until we got [Redacted], and [Redacted] had about fifty. Slowly, they would be sold off. Right now, I think there is about fifteen, and those will probably be sold . . . . So, we really are not in the business of owning real estate. We are in the business of either managing hotels or franchising the hotels, which is licensing out the brand. When you think about a managed hotel, there is an owner who signs an agreement with us to manage the hotel. Those agreements are normally twenty, thirty, forty, even fifty years. Even as you look back at the first hotel in 1957, which is not in the system anymore, the second hotel from that year is in the system still. Some of those agreements can last for quite a while. So, as you think about dispute resolution and where the company is and where it wants to go, it is not necessarily a quick transition as you move through those 7,000 hotels. As they get sold, as new agreements get entered into, it is a slow process. So, it is not unusual for me to see agreements from thirty years ago, where the dispute resolution provisions are quite unsophisticated and different from what we are doing now.

I wanted to break down the managed hotels and franchises. The managed — we have about 2,027, and franchise — we are [at] about 4,900. On the franchise side, then, we are licensing out under a franchise agreement; those tend to be a little faster, twenty years or so. And then, we are also entering into an agreement with whoever is going to manage the hotel. So, there is a lot of tri-party agreements and a lot of agreements that are going on, you have to think about dispute resolution in all of those. Traditionally, all of the agreements were court-focused, and we would waive a jury trial. We thought we would get quicker decisions that way, we thought we would get fairer decisions that way. Corporate America does not always get a fair shake in the courts with the jury, that is my view. So that is where we have been. As we move through time, though, we see arbitration is really where we are going, particularly internationally. I think if you look in some of the countries where we are in, I will say Russia, for example, you are not necessarily going to get a great shake when you are an American company with a Russian hotel owner in a Russian court. So, we set up international arbitration, and that is kind of where we have been moving over time. I think that is where the agreements are going, so the company is very arbitration focused. I would say, me, personally, I am actually not a giant arbitration fan. I think you really have to work hard to get the benefits of arbitration. It is not always faster, unless the parties really can work together and make it faster. It is usually not cheaper, unless the parties really work together and make it cheaper. So, I think it is an imperfect forum, but really, it is the best you can get in a lot of these countries. What else? You have anything else you want me to answer?

M1: One side point: this may be particular to your industry, but you are not dealing with one franchise at a time. You might have a franchisee with ten properties [or] twelve properties?

P3: Yes.

M1: Hold on one second. Just as background, they do not want to come to loggerheads necessarily, but they have a dispute. Does arbitration help you, in a sense, mediate and get some resolution so the other eleven hotels can continue the relationship, rather than having a drawn-out fight?

P3: Yes, I think we have done a couple of things. So, there are a lot of hotels that are owned by either REITs, or corporate-owned, or multiple hotels. Those are a little easier to work out whether it is arbitration or court because it is big entities that have a lot to lose on either side. I think where we end up in disputes more often are the wealthy family that owns one or two hotels, or the second generation coming in who we do not really have the relationship with and wants to establish themselves. That is where we end up in disputes. I think arbitration helps us in those cases. The fee-shifting really helps — it puts a lot of pressure on whatever party does not have the best case. It puts a lot of pressure on them. That really helps us, but we kind of built in other mechanisms before we get there. So, one of the things I think you see in hospitality is this idea of expert proceedings. So, before you get to arbitration, for certain disputes you will set up an expert. That really gets you the efficiency, the quickness, and the cost that you are looking for because both parties submit one thing to the expert. He or she makes a decision — and that is it. So, before we get to arbitration, because we have seen that it is not really getting the cost-benefit all the time, we have tried to find other ways, whether it is required mediation or expert proceedings, to resolve disputes before you get into full-blown litigation.

M1: Great. So, by fee-shifting are you talking about the prevailing party?

P3: Correct.

M1: Okay, which I assume you have in every one of your agreements or you try to have in every one of your agreements.

P3: Yes, this goes back to what I was saying before. If you go back to an agreement that is thirty or forty years old, it does not necessarily have strong fee-shifting provisions. More and more, I see it is left to the discretion of the arbitrators, and I think this is something the other guys will talk about. I look for certainty in these arbitration provisions. I do not necessarily always care what is certain, but I want to have certainty, so that we are not fighting down the road [whether] the prevailing party get[s] fees. It is better for me if it says, "the prevailing party gets fees," and then you know what you are up against. I think in drafting a lot of times, whether it is in our agreements or other agreements, I see a little bit more discretion left to the arbitrators. From a litigator's perspective, that just creates more issues to fight about down the road as opposed to a provision that just says, "prevailing party gets their fees."

M1: Great. So, just to sharpen or to summarize: you own the [Redacted] brand in Africa, you talked about Russia. Presumably you would prefer, even though it is imperfect, to have arbitration in those regions, and maybe you would consider it for certainly the United States, maybe South America, and Europe.

P3: Internationally, where we are going — almost everything is arbitration. In the United States, where we have been, almost everything is a waiver of jury trial, but where we are going is arbitration as well.

M1: Sure. One side note, we have a mutual friend. [Redacted] had an unfortunate data breach and I got a call from —

P3: I have no idea what you are talking about!

M1: Yes — which is going to lead to class action, but I got a call from a colleague who is an excellent attorney saying, "can you call **P3** and see if you can get us on the list for this case?" To which **P3** laughed. It is a long game in practice. You cannot just call **P3** now, it is relational. **P2**, why do not you tell us where we are. We had a recent Supreme Court case; we are in law school. What is the case law? Where are we on arbitration matters?

P2: Absolutely. Thank you. Good morning.

M1: Do you want to stand at the podium?

P2: No. Good morning. My name is **P2**, I'm counsel at [Redacted]. My practice is mainly investment arbitration, but I also do some international commercial arbitration, disputes between the two companies. I have been at [Redacted] for about six months, and previously I worked with **P1** at [Redacted]. Thank you very much to the [*American University*] *Business Law Review* and to **M1** in particular for inviting me to participate in this panel. It is nice to see familiar faces on the panel as well as in the audience.

So, my presentation today is going to address the importance of carefully drafting an arbitration clause. When a company negotiates a contract, it often focuses on the commercial aspects of a contract, paying little attention to the dispute resolution clause in the agreement. Here is a quote from the general counsel of KBR. Please raise your hand if you are familiar with the company KBR. For those of you who are not, let me fill you in: KBR is a large US construction company with 35,000 employees worldwide. It has operations in forty countries, customers in seventy-five countries, and annual revenue in excess of four billion. In other words, KBR is a major international player, but just last month, the general counsel of KBR gave a keynote address where she explained that an arbitration clause is, quote, "too often overlooked until it is needed."[1] Why is this? Well, akin to a prenup, contract drafters are often reluctant to talk about the divorce while negotiating the terms of the marriage. This is only natural — companies enter into contracts with the expectation of a positive commercial relationship. Why is this? Companies are in the business of doing business, not resolving conflicts. As a result, contract drafters often use model dispute resolution clauses, which are published by one of the major international arbitration institutions such as the ICC or LCIA. In other situations, contract drafters even cut and paste dispute resolution clauses from one agreement into another agreement [with] the mentality of, "Hey, if it worked last time, it is got to work this time." However, the point of my presentation today is to explain that a carefully drafted dispute resolution clause can save major time, expense, and headaches later on if a dispute does in fact arise.

So, to illustrate this, I'm going to talk about *Henry Schein [v.] Archer & White*,[2] which is a dispute regarding who decides whether to arbitrate a dispute — a judge or an arbitrator — based on an ambiguous arbitration clause in a contract. Archer & White is a low-price seller of dental equipment; Henry Schein is the largest distributor and manufacturer of dental equipment in the United States. Archer had a dealer agreement with Henry Schein and a distribution contract with Danaher. In 2012, Archer sued Henry Schein and Danaher in U.S. federal court, alleging that they violated federal and state anti-trust laws by conspiring to fix prices and refusing to compete with each other.[3] In particular, Archer alleged that Henry Schein had conspired with Danaher to terminate or reduce Archer's distribution territory. Why? Because Archer was selling the products at discounted low prices. Archer sought millions of dollars in damages and injunctive relief. On the screen, here, is the dispute resolution clause in the contract at issue in the case: "[p]rovide for arbitration under the American Arbitration Association rules except for claims seeking injunctive relief."

So, Archer sues Henry Schein and Danaher in U.S. federal court. In 2012, defendants moved to compel arbitration based on the arbitration clause in the contract.[4] One year later, in 2013, a magistrate judge ruled in favor of the

1. Eileen Akerson, Vice President & Gen. Counsel, KBR, Keynote Address at the Int'l Energy Arbitration Conference (Jan. 24, 2019).

2. *See generally* Henry Schein v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019).

3. Archer & White Sales, Inc. v. Henry Schein, Inc., No. 2:12-CV-572-JRG, 2016 WL 7157421, at *1 (E.D. Tex. Dec. 7, 2016).

4. *Id.*

defendants.[5] The magistrate judge found that because the arbitration clause incorporated the AAA rules, the parties had intended for an arbitrator to decide the dispute.[6] Three years later, in 2016, a district court judge reversed the magistrate court judge and ruled in favor of the plaintiff.[7] The district court judge found the dispute was not arbitrable because the plain language of the arbitration clause specifically excluded claims for injunctive relief. Another year later, 2017, the Fifth Circuit rules in favor of the plaintiff.[8] Another two years later, January 2019, last month, the U.S. Supreme Court, in an opinion authored by Justice Kavanaugh, unanimously ruled in favor of the defendants and reversed the Fifth Circuit.[9] [The Supreme] Court held that when a contract delegates the question of arbitrability to an arbitrator, the courts must respect the party's decision. The Supreme Court found that the Fifth Circuit hadn't ruled on this issue, so the court remanded the case to the Fifth Circuit to determine whether the contract, in fact, delegated the question of arbitrability to an arbitrator. Now, a lot has been written and a lot has been said about *Henry Schein* and arbitration jurisprudence in the United States following this recent case. With apologies to the Supreme Court junkies in the room, I am not going to talk about that, I am sorry.

My main takeaway here is that *Henry Schein* shows that carefully drafting an arbitration clause can have real world consequences. Why? After seven years of litigation and likely hundreds of thousands of dollars, if not millions of dollars, in lawyers' fees, the underlying dispute between [the] parties have not been resolved, nor has it ever been argued on the merits. This has been a colossal waste of time and money due to an ambiguous arbitration clause.

One last point I would like to share. So, I was in the doctor's office last month getting a flu shot, and I was thinking about this panel, drafting arbitration clauses. I saw this picture: you are supposed to tell the doctor how much pain you are in, and you use the little smiling faces and frowny faces to demonstrate how much pain you are in. I came up with an analogy between drafting arbitration clauses and the pain continuum. So, please bear with me. On one extreme, the ten, the severe pain, this is the situation where contract drafters without guidance blindly draft arbitration clauses. Here, there is a high risk of encountering pitfalls and making arbitration clauses

5. Archer & White Sales, Inc. v. Henry Schein, Inc., No. 2:12-CV-572-JRG-RSP, 2013 WL 12155243, at *3 (E.D. Tex. May 28, 2013)

6. *Id.*

7. *Archer & White Sales, Inc.*, 2016 WL 7157421, at *1.

8. Archer & White Sales, Inc. v. Henry Schein, Inc., 878 F.3d 488, 497–98 (5th Cir. 2017).

9. Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 526–27, 531 (2019).

that are unenforceable; potentially, arbitration awards that are unenforceable. To give you an example: **P3** and I enter into an agreement. We put in the agreement an arbitration clause that says, "Any disputes are going to be resolved by our friend, **M1**. He is a good guy." Later on, a dispute does arise, we go to **M1**. Unfortunately, he is no longer available, or he has a conflict, or, God forbid, he has died. What do we do? Our arbitration clause may be unenforceable. If we go to arbitration, the ultimate arbitration award may also be unenforceable.

Going back to our continuum, to the five, we have the grin — I do not know, the straight face — this is using a model dispute resolution clause in your agreement. One of those that are published by the major international arbitration institutions such as the ICC or the LCIA.[10] Now, model dispute resolution clauses, they are vetted, they are tried, they are tested. So, by incorporating one of those model clauses into your arbitration agreement and your contract, you avoid the risk of creating an unenforceable arbitration agreement, [and] in turn, an unenforceable arbitration award. So, you minimize the risk, but we do not stop there.

We continue on the pain continuum down to zero where you have no pain and a really big smile. On this other extreme, the contract drafter can make the arbitration clause work for him or her. In this scenario, the contract drafter works with dispute resolution attorneys to tailor the dispute resolution clause to their advantage, taking into consideration the company, the contracts, and the commercial relationship. For example, I have a contract and there are documents that are privileged surrounding this contract, potentially privileged, or questionably privileged. To avoid the possibility that a dispute arises, it goes to arbitration, and an arbitrator orders that I have to turn over for document production these privileged, potentially privileged, or questionably privileged documents, upfront, in the arbitration clause in the contract, I can limit or exclude the possibility of document production and discovery [and] make the arbitration clause work for [me], tailored based on the particular circumstances. **P3**, you mentioned fee-shifting provisions — same thing. If fee shifting is important to you, put it up front in the arbitration clause instead of waiting until a dispute arises. Make the arbitration clause work for you.

So, to this conference's provocative question, which **M1**, it is provocative, international arbitration, we are asking, friend or foe of corporations? My

10. *See Arbitration Clauses*, INT'L CHAMBER OF COMMERCE, https://iccwbo.org/content/uploads/sites/3/2016/11/Standard-ICC-Arbitration-Clause-in-ENGLISH.pdf (last visited Feb. 9, 2020); *Recommended Clauses*, LONDON COURT OF INT'L ARBITRATION, https://www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx (last visited Feb. 9, 2020).

answer is friend, if used correctly, starting with the proper drafting of the arbitration clause.

M1: I have a couple of questions. Let's start with the very basics. Everyone might not know, ICC, LCIA, any one of you — **P1**, do you want to jump in? What do those mean?

P1: Sure. These are institutions that are ventures . . . that for arbitration . . . . I see **M2** at these institutions. Guidelines that the parties must follow, and a lot more than the parties can then such as emergency provisions.

M1: Great. Next question: in federal regulation, state regulation, county, and city, a consumer is often dealt with gently, and regulations [for] consumer protections, are strong. [In] the commercial [setting], usually, the parties are freer to engage in negotiated provisions. I'm thinking about State Farm Insurance versus car owner, there's a lot of regulation. I'm assuming **P3** in [Redacted], you are dealing with RLJ,[11] and you are also dealing with a husband and wife in Tennessee. Are the arbitration rules different there, or is it all a broad brush? I will start with **P2**.

P2: The arbitration rules?

M1: Yes. Are consumers treated or individuals treated differently, or is it all considered a commercial arbitration even for an underlying hotel property?

P2: Yes, if you go to arbitration, the parties will be treated equally. I think the bigger issue is: if you have a big company and a small company, it is similar to these contracts of adhesion where the big company says, "Here's the contract — sign it. There are some issues we may be willing to negotiate, but we can't really wiggle that much because this is our standard contract. We do not want to have a thousand variations amongst all of our different parties." So, there's an issue of bargaining power when you have a smaller company negotiating with a larger company.

M1: Right. Maybe my question was asked unartfully. Will arbitration clauses be more likely enforced if it is commercial to commercial? If it is brought to a court, they might say, "This is onerous, a consumer was forced to sign." That was more my question. **P1**?

P1: Yes, I would agree. I mean, an arbitration, depending on the jurisdiction you are in, different courts approach it differently. Typically, yes, a commercial-to-commercial contract would be given more deference by a court just instinctively. Now, if you have consumer-related issues, it does not mean that arbitration will not be enforced. But the court would probably scrutinize the clause and the impact it has on consumer regulations, especially if they are by law — certain consumer-related safety regulations

11. THE RLJ COMPANIES, https://www.rljcompanies.com (last visited Feb. 9, 2020).

must be respected. The court would probably look into it a little bit more.

M1: A1.

A1: [audience question]

M1: P3?

P3: Yes, from my perspective, I think having predictability is ultimately more important, and having certainty is more important than necessarily winning the negotiation and deciding that ahead of time. I think it is important. When **P2** was talking about "mak[ing] the clause work for you," it does not necessarily mean make it so slanted that it is favored for you. But I think to actually make it work for you, you have to understand your client and where they have been, what disputes they have had, what things are important to them. What history looks like, so you can anticipate what the issues will be coming down the road. Then you can decide which issues you can give on a little bit, which issues you want to hold firm, but I do not think anybody thinks you need to make it so slanted for you, I am not even sure you could do that. If you have a fee-shifting provision, you could lose. It does not necessarily mean you are always going to get your fees, but I think you have got to understand the company. This is something I tell outside counsel all the time or people who ask how they can work with us. I say, you have got to understand the company. You have got to go read our 10-K. You have got to see what disputes we have had in the past to understand what a well-drafted provision looks like for us as opposed to [sic]." These model clauses get stuck in different industries, different companies, different sized companies, and one size doesn't fit all for all of these companies.

M1: Maybe a quick question for all three would be, how often are the litigators brought in when either drafting a template or drafting a major agreement? Are you asked to take a look and say, "is this thing sound procedurally?"

P3: Yes. So, I have some experience with this in the very large contract negotiations where there have been different areas of the contract and the law firm team composed of different experts. Towards the dispute resolution portion of it, I have been involved in cases where they have brought in dispute resolution attorneys in order to advise on that particular aspect of the contract, that particular provision. I have also been involved in cases where a person at the law firm is drafting an arbitration clause, and they run it by a dispute resolution attorney, but the dispute resolution attorney doesn't know about the company, about the contract, about the commercial relationship, so all that they can really do is make sure that it is internally consistent. It is in accordance with best practice but may not be able to know that **P3** really cares about having certainty in fee-shifting provisions. So, that is something that we should add in. It is an area that the more you can get a dispute resolution expert involved, the more that they can do to make the clause work for you.

M1: P1, did you have an add-on?

P1: Absolutely. I would agree with what **P2** said. I would add that it is best practice, especially if it is a big transaction or an investment, to go to a dispute resolution specialist because there are commercial arbitration options, in which case you would have to think about where you want the arbitration to be seated, the rules, which had touched upon earlier, and various other considerations. Then there is also the potential for protecting your client through investor-state arbitration, which may impact where the investment is structured. The company that is investing in the host countries. So, yes, we are asked to look at that, and it is best practice, especially in a big transaction or investment.

M1: I have a question for **P1** before we get there. One practice pointer that all three have mentioned is knowing your client, 10-K, 10-Q. **P3**, if you do [not] mind, what's in them and why is it so invaluable? If you do [not] mind taking the first shot at it.

P3: Yes, of course. The 10-K, a public company files an annual statement — it is really a statement of the business. It will describe what the business is, what the past year looks like, what are some of the risks and prospects going forward. It is the best place to get an annual look at what the company is doing, what it thinks about the industry, what it thinks about its prospects. I always tell people who are coming to meet with us that they really should read it before they come to talk to us because you can't get a better background of a company without looking at that first.

M1: There is civil unrest in Venezuela, so we are going to dial down our expectations for the North part of South America. You can get some insight into thinking, as an example.

P2: I would just add that looking in the newspaper or even just setting up a Google alert for [Redacted], so you know what happens on a daily or a weekly basis. So, when you see this guy, you could be like, "Hey, I heard about what happened and I'm familiar," instead of blindly asking, "What is going on?"

M1: Okay. So, by way of analogy into **P1** and actually starting with the "no pain" to "severe pain," just very quickly, at [Redacted] and in the hotel industry there were terminations by owners, which we will not get into. **P3** and his predecessors kept drafting in response to court losses and kept redrafting in response to court losses and kept redrafting. Finally, to the point where I think [Redacted] and your brethren said, "Okay, we get the idea. The court just doesn't want to give it." So, **P2**'s slide is excellent. He is a smart guy. Then going into **P1**, can you draft if a court doesn't want to give the arbitration or how do you draft so that — maybe it is an outlier, [that] I'm talking about, **P3**.

P3: No, I do not think it is necessarily an outlier. I think you always learn a lot more from when you lose than from when you win. If you are not doing something different after you lose, you are missing an opportunity, but I think you can draft to get what you want, you just have to do it very carefully. This goes back to what I'm saying when you are having agreements over a span of fifty years and working through forward, and then you acquire [Redacted], and their agreements look different than what you have been doing for the last twenty years. You just have to streamline and think about it going forward, but it is never going to be perfect — you are never going to have every hotel agreement looking the same.

M1: Okay. So, we [have] set it up with [Redacted], at times, once the arbitration [sic]. Certainly, other clients are going to want it. **P2** set the stage for where we are especially with *Archer & White*.[12] **P1**, it is all yours on how do we go about thinking about drafting in drafting?

P1: Thank you, **M1**, **M**, and American University for inviting me today. For those of you who just joined, I'm **P1.** I'm an associate at [Redacted]. Before I start, I'm going to just focus on my remarks today on certain considerations that a party may take into account while thinking about the inclusion of an arbitration clause. I'm going to focus my presentation and remarks on international business. By that I mean I'm going to focus on FDI, what do parties have to think about when they are going into jurisdictions where the rule of law may not be as established as here, for example, Russia. Let's start here for some general context: on this slide you can see FDI flows over the last decade have been well over a trillion dollars.

M1: We want to just talk about what FDI is.

P1: Sure. FDI is "foreign direct investment." It is money that is poured into a country for the betterment of different sectors: oil and gas, telecom, hospitality, and so on and so forth. So, in the last decade globally, FDI flows have totaled over a trillion dollars. Typically, they will be private, but you also have state-owned enterprises that can go in and invest. One example could be for [Saudi Arabia Oil to] go and build petrochemical refineries in Malaysia, or you may have Chinese state-owned companies that are partially state-owned that may go into a country and invest in a joint venture with a private party — that would still be considered FDI. So, given this amount of FDI flows, it is always interesting to see how do [sic] lawyers acting for these companies, such as **P3**, like to see their disputes, if any, that may arise. How do they get resolved? Well, there was a survey done by Queen Mary in London in partnership with [Redacted] that surveyed about 900 lawyers, arbitration counsel, and in-house practitioners.[13] These lawyers and others

12. 139 S. Ct. 524 (2019).

13. QUEEN MARY UNIV. OF LONDON & WHITE & CASE LLP, 2018 INTERNATIONAL

who were surveyed were from every continent and several jurisdictions across the world. There was a strong preference; around ninety-seven percent expressed a preference for international arbitration.

Now, one caveat, international arbitration here does not mean only international arbitration. It also means about fifty percent expressed a preference for multi-tiered clauses, which is something **P3** touched upon early. Which would mean some of them preferred a clause that would first allow for negotiations, mediations, or an expert determination. If that doesn't work out, you would go escalate your arbitration. The reason they expressed a preference for that, around fifty percent of those surveyed, it helped settle the dispute before arbitration, it saves costs, and if it does proceed to arbitration, you have narrowed the issues and contentions. So, it helps crystallize the dispute, so that the arbitration panel has less work in terms of the issues that are in dispute. On the other hand, some people, not quite the majority, but a good number, did not like such clauses because they just felt like when the parties are in dispute it is going to end up in arbitration anyway. So, you might as well get there and resolve the dispute. The escalated provisions end up costing more time than money.

P3: We briefly touched upon this earlier to reflect this increased popularity in international arbitration. We have the Queen Mary survey,[14] [which] identified the five most popular institutions in the world for resolution of these disputes: ICC Paris; I think it was LCIA in London, that was the second most popular; Singapore International Arbitration Center, which probably was not so well-known twenty years ago, is now the third most popular. Then you had the Hong Kong International Arbitration Center and the Stockholm Chamber of Commerce as the fifth most popular institution. As you can see here, the caseload is increasing steadily at many of these institutions over the last ten years. Do you have a question?

M1: Do you mind if I jump in?

P3: Sure.

M1: For each of these that you have mentioned — Singapore, Hong Kong, London, Paris — I assume it governs the rules, procedures, and also the forum. Can you just give us a little bit of background?

P3: Sure.

M1: I'm sorry to interrupt.

P3: No, not at all. So, those institutions would administer the proceedings. It would be the rules that they publish that would apply. The parties can still choose a different jurisdiction for seating the arbitration; they could pick

---

ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION 2 (2018).

14. *Id.*

LCIA and seat the arbitration in Singapore and have New York law apply. So, that is the beauty of arbitration is that you have flexibility.

M1: **P2**, do you want to add something?

P2: How are the arbitrators selected?

P3: So, again, one of the beautiful things about arbitration is its choice. So, the parties get to select their arbitrators. It is advisable for the reasons **P2** explained it earlier. You do not want to identify the arbitrator in advance, but you get to pick the arbitrator you want, provided there are no conflicts and other issues. Sometimes the [arbitrator] may be appointed by the institutions, if the parties cannot agree.

M1: Do you have a question?

P3: Yes, there are jurisdictions we want to avoid, I think we generally try to avoid. We will find a neutral third country to seat arbitrations. If the United States is not acceptable, and if there is a hotel in Colombia — well, Colombia is okay — but let's say Venezuela, maybe we will seat it in Chile or somewhere like that. So, we try to find a neutral spot as opposed to getting on someone else's home turf. I think the thing we look most at is if we get an award — are we going to be able to enforce in the country? Are that country's courts going to enforce the award? Do they have a good history of enforcing the arbitration awards? That is really the main factor for us on that.

I did want to say, on choosing experts, I mean, this is something that I care a lot about because I think when you get into the hospitality industry it is pretty specialized. So, it gives you an opportunity to pick someone who is familiar with it as opposed to if you go straight to AAA arbitrations. Sometimes you are going to get whatever the arbitrator is who is doing it that day and not necessarily someone who knows about your industry or your issues. To me, that becomes a foe to a corporation, when you have essentially a judge who is not really familiar with your issues. You might as well be in court. If in arbitration you get an opportunity to pick an expert in your industry or someone who is familiar with the issues that you are presenting, that is when I think arbitration can work better for a company.

M1: I'm just going to interrupt for one second. In the hotel law program, we spend probably a day and a half just explaining who the parties are. So, they need to do that in court — that is not always an efficient use of time, but you are dealing with people who still might not know the nuances of those interweaving relationships.

P3: You know, you would be amazed how many people think that [Redacted] owns every hotel in the system. Really sophisticated people, that is just the way the business presents itself. So, if you can get someone already familiar with those issues, you are one step ahead.

M1: Great. **P1**, we interrupted you.

P1: Not at all. So, how do parties, to a contract or an agreement, express a clear, binding requirement for arbitration whether it is institutional or ad-hoc, so, that they can avoid clauses, the risk that their clauses later would be deemed as a pathological or defective clause.

Well, to illustrate how parties can avoid this, let me walk you through two cases: one quite recent and one very old to explain how parties can avoid being scrutinized for their clause being potentially defective. This case, in 2015, a company called Sinolanka in Columbo awarded an Italian company, Interna, a contract for refurbishing works for the Grand Hyatt Hotel in Columbo.[15] The document was titled "Contract Agreement." It was a contract, essentially, that was signed between the parties along with the Memorandum of Understanding ("MOU"), in January 2015. So, Interna, the Italian company, starts work, and then there is a dispute. The Sri Lankan company decides to terminate the contract. So, what Interna does then is they wisely negotiated an arbitration clause, or so they thought, and they went ahead [and] sued Sinolanka. I do not know if it is super clear, but at the bottom, you can see a slide that provides for ICC arbitration. Defeat, itself, is not clearly listed, but it does say the arbitration venue shall be Singapore. So, an ICC tribunal was formed, and they decided that the seat would be in Singapore, and they went ahead and heard the case. Now, during the case, during the ICC case, Sinolanka, which is the hotel company in Sri Lanka, made a jurisdictional objection. They argued that the ICC tribunal did not have jurisdiction over the dispute, which is a bit funny, given you have this clause at the bottom of the screen. Sinolanka argued that the arbitration must be conducted pursuant to the Sri Lankan rules (which is the middle of the slide) because a document that was provided for during the tender process to the Italian company provided for Sri Lankan arbitration. Essentially, the Sri Lankan company was arguing that Interna, the Italian company, made its offer on the contract based on the Sri Lankan arbitration clause during the tender period. They insisted that the Sri Lankan clause was never displaced by the ICC arbitration clause. The ICC tribunal rejected this argument. They went ahead and awarded $12 million to the Italian company, but you would think that is the end of the story — it is not.

What happens next is that the Sri Lankan company, Sinolanka — remember I said this arbitration was seated in Singapore — so they decide to seek set aside of the award, vacatur, or annulment of the award in Singapore. They approached the Singapore courts and argued that the tribunal — the ICC tribunal — lacked jurisdiction, or, in the alternative, that the tribunal had found jurisdiction invalid arbitration clause [sic]. The

15. Sinolanka Hotels & Spa (Private) Ltd. v. Interna Contract Spa, [2018] SGHC 157 (High Ct. Sing. 2018).

Singapore court rejected this argument, and they said they looked at the negotiating history, and they focused also on the interpretation priority of documents doesn't [sic]. The letter of acceptance, which was the clause that I had provided for ICC arbitration, had been listed in the contract as second in order of priority. The document that was given first priority was the MOU, which did not contain an arbitration clause. The second document, in terms of priority as identified in the contract, was the letter of acceptance, and then ultimately the Singapore court rejected and set aside argument.

So, this case is important because it illustrates the importance of ensuring that a contract includes only, ideally, one dispute resolution clause, unless there is a specific reason to have more than one, which I can't really think of, but maybe there is. Anyway, in this case, you can see that the two dispute resolution clauses were just included by happenstance. So, when you are looking at voluminous documents, tender period, pre-tender, and then ultimately the contract is signed, and it does not include an arbitration clause — make sure you do your due diligence and ensure the clause you want is there.

One other case I think that is very interesting and also relevant is a famous permits case. This case is for a very simple point — make sure that you ensure that an agreement clearly identifies the parties, all relevant parties, to a contract, as simple as that; otherwise, you run [into] the risk of encountering the problems the claimant did in this case. In brief, this case involved an ICC arbitration and later an ICSID arbitration, which was heard at the World Bank, in relation to the decision of Egyptian authorities to cancel the project for a hotel near the pyramids.[16] The agreement was initially signed by SPP, the claimant, the Egyptian government, and the Egyptian tourism organization. Later, a supplemental agreement was signed where the Egyptian government was not a party to the contract, but the Egyptian tourism minister approved, signed, and ratified the contract. Well, after the Egyptian government canceled the contract, SPP sued. They sued under the ICC rules in an arbitration seated in Paris. They sued both the tourism organization and the government. The government argued that they were not a party to the contract because they had not signed the main contract. The ICC tribunal rejected this argument and said [that] the minister's signature approving signing and ratifying the contract meant that Egypt was a party. Egypt was asked to pay $12 million. Well, what happens, again, is Egypt now tries to set aside the award in Paris, while SPP, the hotel builder, tries to enforce the award in Amsterdam. Coincidentally, on the same day, the two courts reached a different decision: the Paris court decides

16. Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3 (May 20, 1992).

that Egypt was not a party to this agreement, and the Amsterdam court decides that they were. So, again, very illustrative to show that different jurisdictions, both sophisticated, can reach different conclusions on the same set of facts and really the same agreement. Now, in short, what happened in this case, which spanned about fifteen years in total, the SPP went ahead and sued Egypt at the World Bank, brought a claim under Egypt's foreign investment law. They won there, Egypt sought to annul the award, and then the dispute was ultimately settled.

So, the Sinolanka and SPP case that we just talked about are from two different eras, really. One relates to a contemporary hotel project, while the second one relates to project from the '70s — but one common lesson persists. Despite the explosion of international arbitration and the increased study of subject, counsel must always remain alert to ensure that arbitration clauses are carefully drafted. So, coming back to the basics. We had discussed this earlier: when you are counsel, and you are working with your client, you should always try and go to the model clauses offered by these various institutions. I have picked three. Now, they have different levels of detail, but these are good model clauses, which can serve as a starting ground. It touches upon a lot of what we just discussed. You can use these model clauses [as a] starting point, and then look to these different elements that you may want to ensure are included in your clauses.

So, on the critical elements list, I would point out, it is very important to state the arbitration is binding, identify the institution, the seat, the governing law, and the language. On the right-hand side, confidentiality is one issue that I think is quite important, especially if you are dealing with proprietary trade secrets, those kinds of issues, or politically sensitive investments. Then, as **P3** had touched upon earlier, you should definitely evaluate the pros and cons of multi-tier dispute resolution clauses. Thank you.

M1: Great. **M**, are these slides available for the attendees? That would be great. I think that last slide, in particular, was invaluable. That is great, **P1**. So, we started with **P3** on pros and cons of arbitration when he values it, when he is perhaps indifferent, **P2** on the Supreme Court case, and **P1** with the drafting. But, maybe, we should take a moment to look ahead. **P3**, right now, [Redacted] is signing agreements that will be in effect for 2060 or 2055. You can't lie about the future, so **P2**, what do you see for the future of arbitration? Are we heading that way more? Is it going to replace litigation, stay where it is? Where do you think we are heading?

P2: Yes, I think that as there are more and more international business transactions, there are going to be more and more international disputes. I think we will be seeing more and more international arbitration. With the Supreme Court case, you should talk to your Supreme Court professor about the relevance of it, but I do think that despite that it was unanimous and that it was Justice Kavanaugh's first opinion, I think it is a real wake-up call that arbitration clauses are really important. People are writing about the subject now. They are having panel discussions on this subject. Lawyers are advising their clients how to properly and carefully draft arbitration clauses. I think that the Supreme Court, regardless of what the jurisprudence in the United States on arbitration law is going to look like, I think it is a real wake-up call of the importance of carefully and properly drafting an arbitration clause. So, I think we are going to be seeing more attention paid to that upfront instead of after the fact once the dispute has arisen.

M1: **P3**, your business leaders are always making strategic decisions about whether to go to China, whether to go to India, what is next. Right now, we have unrest in Venezuela. **P1**, we have tension, at least politically, with China. I'm assuming you are not writing these templates and putting them in a drawer. You are constantly measuring them, evaluating them, tweaking them, I guess. Yes or no?

P1: Absolutely, yes. One thing I would add to what **P2** mentioned is international arbitration, commercial arbitration is booming, there is no doubt about it. Investor-state, which is a different form of arbitration, there is a backlash, but I think it is a very vigorous debate on whether it is going to be booming or not. That is for another day, but I would say that is also very active and prominent right now, but there's talk of, "Is winter coming?"

M1: For sure. Everyone, I know, is busy. We all have busy lives and great pressures, but I know **P3**, **P1**, and **P2** have a great spirit of helping students, helping the community. I will speak on their behalf and urge you to contact them. See if you can meet them for coffee. [Redacted] has a wild commute — but come to Bethesda and try and learn more. I'm right upstairs, three floors, and there are a lot of topics worth having. I do not know, is there such a thing as an arbitrator clerkship? Are there ways to learn about potential arbitration career paths?

P3: There are some.

M1: How would students get more involved on their own or professionally? I will make that the last question.

P1: Sure. So, there is a number of things you can do. If you are a student here, there are some very prominent arbitration practitioners who are adjunct professors. There are some very prominent arbitration practitioners who are tenured professors, like Susan Franck. There is also the arbitration institution here run by Horacio [Grigera Naón] and Susan [Franck]. They are really wonderful resources, and really some of the world's experts in arbitration are here in this building on a daily basis. So, there are a lot of resources at your disposal, but you should also feel free to reach out to **P3** and me. But there is really a sense of helping people out in the international arbitration community, and people love to talk about what they do and helping people out who are interested in the field.

M1: I want to thank **P1**, **P3**, and **P2** for taking time out. This is a tremendously important topic, and thank you to [*AUBLR* Symposium Editor], [*AUBLR* Editor-in-Chief], and [*AUBLR* Managing Editor] for inviting us and all of the *AUBLR*. Thank [you] so much.

M: I want to take a quick break. We will be back in a little bit. About twenty-five minutes or so.

PANEL II: RECENT RULE CHANGES AND LEGAL DEVELOPMENTS

PANEL 2: RECENT RULE CHANGES AND LEGAL DEVELOPMENTS

M = Moderator
P = Panelist
A = Attendee

M: Welcome back, everyone. Our second panel, Recent Rule Changes and Legal Developments, will be moderated by **M2**, a professor of law at [Redacted] and an associate reporter of the Restatement of the Law of the US Law of International Commercial [and Investor-State] Arbitration. I will hand it over to **M2** to do the introductions for the rest of the panelists.

M2: Thank you, **M**, and thanks for your hospitality, the Law Review's hospitality. Thank you, all, for being here in this lovely DC winter weather, which at least is rain rather than ice. Our panel is on, I will confess, current events. So, a little bit of everything, but I do think there are some themes that I will talk about in just a second. First, I do want to introduce the rest of the panelists, and we will go down from my right, immediate right, further to the right, and we are going to be very brief. So, following **M1**'s lead. **P4** is a partner at [Redacted]. Then, next to him, is **P3**, who is an associate at [Redacted] and an American University alum. The only college mention there will be. **P2**, partner at [Redacted], next to her, and then **P1,** an associate at [Redacted] next to him. Frankly, the most important qualification that all of them have is they are all actively involved in international arbitration practice and international dispute resolution more generally.

The panel, as I said, could be seen as a catch-all of current legal developments, but I think the underpinnings are a cross-current of political and market events. I mean, hopefully — you may . . . have a sense [that] there is a lot of competition among jurisdictions and institutions to attract arbitration business, so some of the topics that will be talked about today are changes in institutional rules. In part, that is in response to competitive pressures. Similarly, jurisdictions, like countries, revise, to the extent that they can, national laws to try to attract arbitration business. The United States has not been really successful at that since the key governing statute, the Federal Arbitration Act,[1] is approaching its 100^{th} anniversary. A few changes, but not many. But the Restatement is a way to try to help the US law along in ways that Congress hasn't been able to do. But the countercurrent is, arbitration is not always popular, and so there are countervailing political pressures to reduce, regulate, the arbitration process. I think we may see some of that — we are seeing some of that — in the United States right now. That seems to be a way that the individual presentations you'll be hearing in just a second, connect. So, we are going to start with **P4** who's going to talk about the Restatement project.

P4: Thanks, **M2**. I will point [out] immediately that **M2** is one of the reporters on the Restatement project and therefore knows a great deal more about it than I do. He's reserving his fire to disagree with me after I stick my neck out. Back when I was in law school, which coincided roughly with the end of the last ice age, you walked into the library, and immediately by the door was a bookshelf with a handsome set of books called "The Restatement of the Law" of this and "The Restatement of the Law" of that. Everybody knew they were there. Whatever subject you were studying, there was a Restatement, and it was a terrific resource, and the books were never on the shelves because somebody was always using them somewhere. Now, nobody has books, and I am not sure how accessible the Restatement is online. So, consider this, to some extent, a commercial for the Restatement because it does not exist yet. It is about to come into existence, and it is going to be a huge asset to everyone who practices international arbitration.

So, for starters, since the books do not exist and the libraries are gone, what is a Restatement? I hope some of you know, maybe even most of you know, that Restatements of the Law are produced by a group called The American Law Institute, which is a very venerable [institution]. It is probably 100 years old, isn't it, **M2**? A group of mostly law professors, judges, and practicing lawyers in varying proportions. The law professors tend to dominate the discussions, [and] take it upon themselves, on a particular topic, to put together — a "restatement" is a carefully chosen word — of what the courts have said on that subject. It is basically a practical way of coping with common law. I've found often that European lawyers trying to get a grip on American law cling to it because it is the closest thing to a code that we have. Up to now, there has been no such resource for arbitration law, even though arbitration law in this country is largely a creature of common law. The Arbitration Act, in many ways, resembles the Sherman Act[2] in that it pronounces broad principles, but it does not provide much

1. 9 U.S.C. § 1–2 (2018).
2. 15 U.S.C. § 1 (2018).

detail. Over the ninety-three years that the act has been in effect, it has accumulated a very thick crust [of] judicial opinions, but it takes a while to sort through them and find the ones that matter to whatever issue you're dealing with. The Restatement is finally about to impose some discipline and order on that subject.

The Restatements are drafted principally by a very small group — in this case, five — called Reporters, who are all law professors, chaired by George Bermann of Columbia University. Then it is massaged, critiqued, whatever, by a larger group of about twenty-five Advisors, [of] which I have the privilege to be one. Then it is subjected to further critique by a larger, about a 200-lawyer group called the Members Advisory Group. Then, eventually, provision-by-provision, it is voted on at the annual meeting of the ALI, which often has 1,000 [or more] people in attendance.

The structure of the Restatement is to state principles of law distilled from the cases very succinctly in what's called black letter, which is literally — in the old days, at least, when there were books — it was large black type, which tried to capture in a sentence a principle that summed up [the] law on a subject. Followed by a couple of pages of what are called comments, which explain the black letter. Followed by often many pages of what are called reporter's notes in smaller print, which give you the case citations and explain the pros and cons, which way the courts have gone, and why the black letter statement is a reasonable summary, if you will, of what the courts have said. Every once in a while, the reporters get a little adventurous, and the black letter departs a bit from what the courts have said.

This project was launched in 2007, so, it is twelve years old. It is scheduled to be subjected to a final vote [of] the ALI membership at the annual meeting in May, so it is just about to be launched, and I hope shortly thereafter will appear in a handsome bound [set] of books that probably only three or four of us will actually ever possess. But somewhere, it will be online. So, to illustrate the process a little bit and also to see if I can provoke **M2** into — I've never seen **M2** lose his temper, actually — but at least into responding; [let me] just pick one small point, which happens to be the one small point [on] which I disagree with the learned reporters.

I won't try to describe the structure of the Restatement except to emphasize that it deals [mostly] with international commercial arbitration. So, the starting point I hope all of you appreciate, and I think you're all either lawyers or law students, is that that means that it comes into American law [through] the gateway of Chapter Two of the Federal Arbitration Act, not Chapter One.[3] Although, those of you who have dealt with [that] Chapter

3. *See generally* Federal Arbitration Act, 9 U.S.C. §§ 201–208 (2018). The gateway will be Chapter Three, if the applicable treaty is the Panama Convention. *See* 9 U.S.C.

Two understand Chapter One comes back in the backwash with almost every question,[4] but the basic structure is international. How do the courts deal with, basically, the application of the New York and Panama conventions and the very rare . . . international case, that isn't governed by either? How do they distinguish between cases governed by the convention that are seated in the United States, as opposed to cases seated outside the United States? How do they deal with the enforcement of agreements to arbitrate [and] with enforcement of awards, with setting aside of awards, and all of the reasons courts get involved?

Because the Restatement sees itself as a manual for judges, it does not tell you how to conduct an arbitration. It does not tell the arbitrators how they should behave. It is a resource for judges confronted with an issue of law involving an arbitration. So, one of the subjects tackled is, when a court has to rule on a question of arbitrability, and this is especially important at the beginning of a case when a court is enforcing an arbitration agreement or declining to. [If] the contract that contains the arbitration clause incorporates the institutional rules of an arbitration [institution], such as the American Arbitration Association, which contains a provision that says, "Arbitrators may rule on their own jurisdiction," [d]oes the court consider that [provision] a delegation of the power to pronounce on questions of arbitrability to the arbitrators or does it not?

Questions of arbitrability come in many flavors. The Supreme Court has sliced and diced them into procedural and substantive, and issues that Professor Bermann calls "gateway issues." Others that he calls "twilight issues." There are any number of them, but the core question is when a court gets one of these, does the court say, "That's for the arbitrators"? The court almost always would. For example, if the question is, "Has the condition precedent been complied with?" Or does [the judge] say, "That's for a court"? The court almost always will, when the question is, "Is the party before me one of the signatories to the contract?"

The question that resulted in a lot of controversy in the Restatement [is what to do] when the arbitration clause incorporates by reference . . . arbitration rules that give arbitrators the power to pass on their jurisdiction, "Does that constitute what the Supreme Court in the first options case called clear and unmistakable evidence of an intention to delegate [to] the arbitrators the power to decide the arbitrability question at the front end?"[5] When the question is, "Do you compel arbitration . . . ? Or does it not? This

§ 301 et seq. (2018).

4. *See* 9 U.S.C. § 208 (2018).

5. *See* Howsam v. Dean Writter Reynolds Inc., 537 U.S. 79, 83 (2002); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).

is one where almost every circuit in the United States, the Second Circuit, the DC Circuit, the First Circuit, the Ninth Circuit, has said, "You have such clauses in the ICC rules and the UNCITRAL rules, the LCIA rules, as well as the AAA rules, that the presence of such a clause constitutes clear and unmistakable evidence of intention to delegate."[6] The Tenth Circuit and the reporters of the Restatements say, "No, it doesn't."[7] The Reporters, at least, start to explain the reason; they say that [such a clause] amounts to what the French call *positive competence* — that the arbitrators have the power to decide — but it does not include what the French call *negative competence*, which excludes the courts. So, the critique is because it does not specifically exclude the court from intervening, it does not delegate as clearly and unmistakably the power to pronounce to the arbitrators.

Now, the argument I have been trying to make for a long time, and I haven't got time to go into detail, but it is basic federal law that parties may not by agreement confer on a district court or take away from a district court its jurisdiction. To me, therefore, to say, "The parties must have specifically agreed to exclude court jurisdiction," means the parties must have specifically agreed to do something which they may not do. Also, as a practitioner, and I've been practicing [in] this [area of] law for a very long time, I can tell you that the rule of the Second Circuit, which says, "This goes to the arbitrator, reviewable after the award by a court, but, in the first instance, goes to the arbitrator," it means your case moves along smoothly and quickly without a two-year detour into the courts to get a ruling. This is a point very difficult to get through to professors. So, I . . . have to tell you the Restatement lays out the law [on] this meticulously, it cites all of the cases, it explains the reasoning pro and con. It is a fantastic resource — just do not assume it is always right.

M2: Thank you, **P4**. I am not so provoked that I am going to jump in right now and respond because, frankly, **P4**'s description of the Restatement position was better than I probably could have done. So, we can talk more about [this] in question-answer if people want to. In the meantime, we will move on to **P2** who will be talking about some of the political cross-currents, I think, and his topic is the new NAFTA, also known as USMCA in its very catchy parlance. So, anything but NAFTA, I guess, is maybe the name for it.

P2: . . . . **P4**, . . . I think [the Cold War] was the most pivotal moment in

6. *E.g.*, Contec Corp. v. Remote Solution Co., Ltd, 398 F.3d 205, 209-10 (2d Cir. 2005).

7. See Reporters' Notes to Sections 2.8 and 2.9 of the Restatement of the Law – The U.S. Law of International Commercial and Investor-State Arbitration (proposed final draft, April 24, 2019).

post-World War II history, at least until now. We will see what happens next. One of the reasons that it was critical was because of a broad . . . policy consensus, known as the Washington Consensus. Basically, because . . . policies of multilateral institutions here as well as policies of the U.S. government in the aftermath of the Cold War, regarding the best way to try to develop economies. If you looked at Eastern Europe after the end of the Cold War, you saw a massive transformation both politically and economically . . . . You saw the same in Latin America . . . . In that context, NAFTA is . . . a watershed moment. And one of the things that is particularly interesting about NAFTA, if you look at the signing of NAFTA . . . , you see not only Bill Clinton, but you see former Democratic and Republican presidents, you see Democratic and Republican leaders of the House. Democratic and Republican leaders of the Senate all joining together in this moment of Washington Consensus. A far cry from where we stand today in the city of Washington.

. . . [T]he core theme of this conference is whether arbitration is friend or foe of corporations. I think that you've got to understand NAFTA from a few angles . . . .

If you look at the preamble of NAFTA, and indeed most investment protection treaties, it is clear that the aim is not to help corporations or states, but rather to promote development. For example, I once was in a hearing, and an opposing party, which was a corporation, said, "This treaty exists to protect investors." That is one component of what an investment protection treaty or NAFTA does. Another component, of course, broadly construed, is to nurture development, in the broadest sense over a long period of time. That was [part of] the Washington Consensus that through openness of investment, free trade, creating new vehicles for promoting the rule of law, we would help states, corporations, citizens, and all stakeholders.

One of the things that is a critical element, of course, of NAFTA is access to international arbitration. . . . [W]hat happen[ed] if there was a dispute between an investor and a state prior to these treaties? In most instances, there was no clear framework for resolving those disputes. So, you can look back through the 20th century, and you can find examples littered through history of the problem of not having a clear framework for resolving cross-border disputes other than the most obvious default — go to the local court — which was not a sufficient risk management tool to facilitate investment.

So, think of it in the simplest terms. If you go to the World Cup, you need some basic rules, you need to know where the arbitrators are going to be to resolve your problems. So, the emergence of investment arbitration was specifically designed to create a way to resolve problems derived from cross-border investment, thereby incentivize cross-border investment because you would know how you could try to resolve your dispute. I would add one more angle to that — to de-politicize those disputes, which can often be highly contentious, high profile. A lot of the matters that I have worked on over the past twenty-five years show up on the front page of international newspapers. It just happened a couple of days ago. So, putting a more neutral forum to resolve these disputes. Now, that is not only of benefit to investors, it is a benefit to states because it is a burden on states to have diplomatic pressure, political pressure, coming from the United States, the United Kingdom, or whatever government they may be dealing with in trying to resolve a dispute related to foreign investment.

One of the interesting things about the era of the Washington Consensus was after NAFTA, the dream was much bigger. The vision was that NAFTA was a step toward what would become the FTAA — the Free Trade Agreement of the Americas. So, we start off with NAFTA: we've got Canada, United States, Mexico, and then we will move on throughout the rest of the region. Now, that never happened. Instead, what happened over a period of time was a series of bilateral agreements and CAFTA, the Central American version of NAFTA. Then you had treaties with Chile, treaty with Peru, with Columbia. So, it was done on a bilateral basis but not a regional integration basis until the Trans-Pacific Partnership.

The . . . Trans-Pacific Partnership . . . was theoretically on the verge signature and ratification . . . prior to the presidential election. The big focus is usually on, "What does it mean for China?" Which was not, and is not, part of the TPP. But the fascinating thing about the TPP is that it effectively constituted a new NAFTA and a free-trade agreement of the Americas. For the first time you saw likeminded countries, Canada, United States, Mexico, Peru, Chile, aligning on a free trade agreement that spans the western hemisphere. The vision was that once TPP would be in place, others would follow. Most certainly Columbia would have come, Panama would have come, maybe even the post-Kirchner era of Argentina would have come. That is particularly noteworthy because it reflected twenty-five years, almost, after NAFTA . . . a victory for the Washington Consensus, as well as the reasonable modernization of components of NAFTA.

. . . . What has played out over the last couple of years has been basically a path to see what happens after the TPP, which basically died a difficult political death really crossing party lines. It is noteworthy that it has been a risk . . . that there could be a hard exit from NAFTA. Hard exit just like a hard [Br]exit from the EU for England, really. What are the other states that have had hard exits or terminations, enunciations, of these kinds of investment protection treaties? They have been Venezuela of Hugo Chavez, Ecuador of Rafael Correa, and Bolivia of Evo Morales. You can see these explosions, which were basically movements away from these treaties and this consensus. . . .

. . . . In many ways, there are components of the new NAFTA that are TPP elements repackaged and sold differently. But what is particularly noteworthy is that, for the first time, the United States has taken a significant step away from its position of the past twenty-five years with respect to investment arbitration. Now, there have long been debates about the efficacy of investment arbitration. We can address those in question time, if you like, but on a bipartisan basis, administration after administration has favored investment arbitration. Now, for the first time, through Chapter 14 of the USMCA,[8] we see the United States taking a step away from investment arbitration, . . . restricting the scope of investment arbitration. What has yet to be seen is does this mark the end of the Washington Consensus? A permanent move by the United States away from that Consensus? Or is it simply a hiccup in that road? That is what the fight will play out right here in Washington in the next year, as we see what direction we are going to head. It is . . . tied up with a lot of broader questions about globalization and where things head next for corporations, for states, for the United States, and for . . . people. Thank you.

M2: So, moving from the broad question of whether in fact there will be investment arbitration. **P1**'s presentation will address those features of investment arbitration and . . . changes by [those] administering [investment] arbitrations. One quick note on the Restatement: it actually does have a chapter on investor-state arbitrations, but because we only focus on the role of courts relative to the arbitration process, [the relevance here is] very low. So, it is there, and there are parts of it that I think have important contributions, but it is not as important as ICSID. With that interlude, my apologies.

P1: Thank you. So, I am going to pick up where **P2** left off. Like he mentions, my discussion [is] quite related with his because I am going to be discussing the amendments to the ICSID rules. The ICSID administers seventy percent of investor-state arbitrations, so it is a very significant development that ICSID is amending its rules, that it is doing so in a very long process. The current set of rules is from 2006,[9] so this is the first time in thirteen years that ICSID is doing this, but it is really the most significant revision that ICSID has done for fifty years. Just to put this into context, ICSID, as you know, is down the street, it is at the World Bank. They

8. United States — Mexico — Canada Free Trade Agreement, USTR (Nov. 30, 2018), https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement.

9. *See* International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulations and Rules,* 99–128, https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf.

administer cases, investor-state arbitrations, and they derive their power [from] the ICSID convention, which has 154 member states. Now, you might ask the question, "Why is it that they are amending the rules and not the ICSID convention itself if the[re] are big foundational issues that they need to deal with?" The answer to that is because it would be extremely difficult to amend the ICSID convention because we would have to get all 154 of the countries to agree, and then they would have to go through the ratification process of ratifying the [revised] treaty. Whereas, with NAFTA, for example, which **P2** just discussed, we have three countries. That in and of itself has been very difficult and contentious. He mentioned the ratification process is certainly not certain at this point.

So, broadly speaking, why is it that ICSID has decided to amend its rules? ICSID has done it because it wants to modernize the rules. It wants to put things in more plain language. It wants to eliminate inconsistencies between the different language versions of the rules in French, English, and Spanish. In a more mundane sense, it wants to reorganize the numbers because they're not necessarily logical in the way that they're numbered. ICSID has also revised more than just the arbitration rules. That's what I am going to talk about. But they've also revised their administrative regulations. They've revised a separate set of rules, which we refer to as the "additional facility rules," which appl[y] to either the state involved or the national involved, if not from a member state.

The process to date started in 2016. ICSID has gotten comments, both from the states, which have to end up agreeing with it, two-thirds of what they call the Administrative Council, it has to agree with the amendment at the end of the day. If you look online, and this is something that is really pretty interesting, you can find on ICSID's website comments that have been posted from all types of stakeholders in investor-state arbitration. This goes beyond states: it includes practitioners, law firms; it includes thinktanks; it includes professors. For example, Professor Franck, here at American University, has submitted a very thoughtful letter that is posted right up there on the ICSID website. It includes arbitrators including, for example, Charles Brower, who I worked with for several years. It includes bar associations. It includes a wide, wide group of people who have taken the time to think about this and write out detailed comments. The process moving forward is that we have a draft set of the new rules as of August of last year, and most likely a vote will take place either this year or next year. So, it is a fairly long process.

So, without getting into the weeds too much, basically the types of amendments that ICSID has made to the rules include things like the following. The evidentiary aspect of the rules [is] largely unchanged, largely also something that is not too controversial. There is more transparency in the new rules. Where do we see this? For example, in the publication of awards. The default position now is that awards from ICSID will be published unless a party to the dispute objects within sixty days. Even if that takes place, ICSID is going to publish a sanitized version of the award. We also have a new provision on security for costs. Now, for those who aren't familiar with the concept of security for costs, it essentially means the paradigm example is a claimant brings a case against a respondent state, the respondent state thinks that the case is not strong. Not only that, but that the claimant does not have a lot of financial resources. So, when the claimant loses, the respondent's state is hoping to get a cost award, and it does not know that there is going to be any money there from the claimant to pay the cost award. So, it requests that the tribunal force the claimant to pay a certain amount up front, that way the money, the funds, are there after the fact in the eventuality of a cost award. Previously, this was not something that was reflected in the ICSID rules. In fact, ICSID tribunals have disagreed over whether or not they had the authority to order security for cost. They disagreed, also, on what the criteria were to do such an analysis. Now, we have a new stand-alone rule that eliminates doubts on that — it allows a tribunal to order [security for cost and] also includes criteria for that. Whether or not this is going to make a difference, we have yet to see. Just for a statistical, quick snapshot: I think there has been twenty cases where parties have filed an application for security for cost and one successful one. So, that may change, that may not change.

What else do we have? A lot of changes on the way that arbitrators are on the constitution of the tribunal, not so much the appointment process but the disclosure process. When an arbitrator is appointed, he or she typically must disclose up front whether there are certain professional affiliations that he or she has that might raise conflicts. ICSID has now proposed an enhanced disclosure form — arbitrators have to disclose more than they used to, including any links to third-party funders, which I am going to discuss in just a moment. That has been the area that has received the most attention related to the ICSID rules. Arbitrators also have to disclose — you may have heard the term "double hatting," which means that an arbitrator also serves as counsel, as an expert, or a mediator. Then he or she will have to say the prior cases in which he or she has done in the past so that the parties are aware of any potential conflicts. One thing that I would note about that that is kind of interesting is the new ICSID disclosure form for arbitrators only requires the arbitrator to disclose prior cases where they've served in those capacities for investor-state arbitrations, not for commercial arbitrations. That raises a lot of questions. We will see how that plays out, but there are plenty of conflicts that could also arise from commercial arbitrations. There are also commercial arbitrations that are really investor-state arbitrations that look like commercial arbitrations. You have a state-owned entity, for example, on the other side or [a] state on the other side.

Challenges — there has also been a lot of changes to challenges. One thing that makes ICSID quite unique is the process reflected in the ICSID convention for a challenge when a party wants to remove an arbitrator. They file the challenge, and the people who decide that challenge in the first instance are the other two arbitrators. ICSID is really unique in that sense, it is reflected in the conventions. They really cannot get around that without amending the convention, which is very difficult, as I discussed earlier. So, what have they done? The convention language says, "If the two other arbitrators are equally divided, they can kick it back to ICSID and let ICSID decide." We've seen in recent years that play out fairly often. Why? We do not know if the arbitrators are necessarily equally divided, but they might not necessarily want to stand in judgment of their colleague, so they prefer to say they're equally divided. Then, it pushes it back to ICSID to decide. Well, the new rules deal with this issue by saying that the two arbitrators who are sitting in judgment of their colleague can send a challenge back to ICSID if they are unable to decide the challenge for any reason. That gives them an out in order to do that, and it brings ICSID in line with other arbitral institutions.

Lots of other things to discuss. I am going to just get on third-party funding quickly. So, for those who aren't aware, third-party funding means that a party is receiving funding from a third party so that it can prosecute its case. This usually happens for claimants in investor-state arbitrations. It is something that has received a lot of — it is really come onto the scene [in] the last, let's say, ten years. It tends to be controversial. ICSID has a new rule that says that if a party is receiving third-party funding, it must disclose that. So, the issue is really the existence of the funding must be disclosed and the name of the funder must be disclosed. Why has the rule received so much attention? In large part because the definition of third-party funding is extremely broad, it includes the provision of funds or other material support not only to a party, but also to an affiliate of a party or to a law firm of a party. So, just to give you an example [of] something that might fall under that category: provision of funds or other material support. Other material support, in that instance, could encompass, for example, a witness. Would a party have to disclose that at the onset of the case? This provision of third-party funding is also linked to the arbitrator declaration I discussed recently, so arbitrators have to disclose if they have connections to anything that falls under that definition of a third-party funder. Why do not I wrap it up there, and we can discuss more.

M2: Very good. Thank you, **P1**. Our final presenter is **P3**, who is going to bring us back to commercial arbitration and talk about changes to the rules of the ICC, International Chamber of Commerce.

P3: Thank you. Good morning, everyone. Thank you for coming. It is great to see a full room. So, I wanted to round out this panel that has spanned from legal developments, to investor-states, to general frameworks for investment like **P2** discussed, by talking a little bit about some recent rule changes at the International Chamber of Commerce. Just to begin with a little bit more of a broader context, this is specifically commercial arbitration, business-to-business arbitration. If we think about arbitration, friend or foe of corporations — well, I would argue it is a friend of corporations. Why? Because corporations, like business, like the autonomy to decide the rules of procedure. Arbitration gives you and your counterparty the option to develop the rules pursuant to which you will resolve a legal dispute.

Why else would you prefer arbitration over litigation? Well, there is a presumption of more fair or equal treatment and playing field as opposed to being subjected to the local courts of a different country or different jurisdiction. The focus now is increased cost efficiency and increased time efficiency. So, these are all reasons why business-to-business disputes would be, perhaps in many cases, best resolved through commercial arbitration as opposed to domestic litigation.

I am focusing on the International Chamber of Commerce because it really is the preeminent arbitral institution to resolve commercial disputes in the world. The ICC is based in Paris. Actually, the director of the Commercial Arbitration [Center] here at the law school is a former secretary of the ICC. It is just an incredible resource for all students. Since the ICC last revised its rules in 2012, there is been a strong push to develop more regional arbitration centers around the world. So, a lot of development in Asia, for instance: we have the Hong Kong International Arbitration Center, the Singapore International Arbitration Center, and various centers in Europe. All of these centers are competing for business, they want to administer — they want to be the institution administering the dispute. Again, going back to cost and time efficiency, the ICC has tried to pick that up in its most recent rule amendments of 2017. So, on March 1, 2017, new rules took effect. These rules [amendments] are by and large nothing major, with one exception.

The biggest development is the addition of expedited procedure provisions that would apply [to] or be available for users of ICC arbitration. So, the expedited procedure provisions constitute a separate annex to the rules, and they have several interesting characteristics. So, first of all, when do they apply? They apply as a default to any arbitration agreement, any arbitration clause that was signed after March 1, 2017, the amount in dispute does not exceed $2 million, and the parties haven't opted out. So, if those requirements are satisfied, the expedited procedure would apply. What does that mean? That means that the arbitration would be resolved by one sole arbitrator as opposed to a tribunal of three.

There are other procedural differences as opposed to a standard ICC arbitration. For instance, the expedited procedure dispenses with the Terms of Reference. So, in ICC arbitration the Terms of Reference are a mutually agreed upon document that basically contains all relevant aspects of the case: who are the parties, who is counsel, what are the legal issues to be resolved in the dispute, what is the language, what are our procedural rules on witnesses and document production, other things like that. Because the terms of reference are agreed upon by both parties and the tribunal, it can take quite some time to negotiate and agree upon. So, the expedited procedure dispenses with the terms of reference. In addition, the case management conference that the arbitrator would hold, must take place within fifteen days of the arbitrator receiving the case. Then, the final award must be issued within six months of receiving the case of that case management conference. So, six months to resolve a commercial dispute is fast, but that is the intent here.

The arbitrator also has quite a bit of discretion to limit the scope of submissions, to limit witnesses. For instance, they can decide to not have witnesses participate in the arbitration so as to resolve the dispute more expeditiously. In general, the arbitrator has quite a bit of discretion to manage the case in an expeditious manner. So, this is something important for users to be aware of because, again, it applies as a default. It can be opted out of if the arbitration clause specifically states that the expedited procedure shall not apply. I think the panel earlier this morning talked about drafting arbitration clauses, and this is an illustration of how important it is to draft a clause that is clear and draft a clause that is well informed by the institutional rules that are going to apply to resolve that dispute.

I think, I am probably going to stop there. There are some other issues that we can discuss in questions and answers, such as whether this affects party autonomy, whether this is a good thing or a bad thing. But in short, the expedited procedure that ICC is now offering is pretty forward-thinking in the sense that while other regional institutions do have expedited procedures available, the ICC is different to the extent that it applies as a default to all claims that do not exceed $2 million in dispute — that is a very high threshold. You'll have other institutions that have a lower threshold, such as $250,000 for really small claims, but this really is forward-thinking in that respect. Thank you.

M2: Thank you, **P3**. So, the panel has done a great job of sticking to time limit, which was intentional on our part, anyway, to give you all a chance to raise issues you're interested in. As you can tell from the presentations, there is a broad range of topics that have been raised, but a very wide range of expertise among the panelists. So, at this point, basically, we will open the floor for questions. Yes.

A1: Hi, my name is **A1**. I am a member of the *Business Law Review*. The questions that I have pertain [to] what **P1** was saying about the amendments [to ICSID]. The first one that I have is: you had mentioned that ICSID will now be publishing [awards, and the advantage of] international arbitration was that these would be confidential. But taking away this confidentiality, do you foresee parties being driven away from international arbitration and going back to [the courts]?

P1: Great question. Thank you, **A1**. Can you hear me? Thanks, **P4**. It is a great question. So, the answer is, we have to keep in mind the difference between investor-state arbitration and commercial arbitration. [C]onfidentiality has always been described as one of the main things that attracts parties who want to arbitrate, especially businesses that do not want all of their secrets getting out there. I mean, if you think about it, do you all know what PACER is? For anyone who does litigation, you can go on PACER, and you can find on a federal court docket virtually every exhibit that is filed in a case, including all business information — anything at all. When you're in arbitration, you do not have to do that, you can have everything remain confidential. The award will eventually come out. Now, the award itself, when it gets enforced, will oftentimes have to go to court, which means that it'll be filed in court, which means that it will become public anyway, but the key is that for most information you can try and keep it confidential.

Let me get to your question, though, directly, which relates to ICSID. ICSID only administers cases that relate to states, so it is investor-state arbitration, and we have a fundamental difference between a dispute between two business entities, or an investor and a state, because the public interest is just more involved in an investor-state arbitration. You have taxpayer money at stake. Investor-state arbitration has simply gotten a lot more mainstream press in recent years because of that. There is a demand from the public to want to know things about disputes relating to investor-state arbitration. For that reason, you've seen a real push towards transparency. I can tell you, for example, ICSID has also done things when they have a hearing, which is what we call a trial, they will open it up to the public or they will live-stream it, maybe slightly time delayed, so that anything that is very sensitive could be removed. People can actually watch it on their laptops, which you usually do not see in a case of just commercial interests.

P4: Can I jump in on that a second?

M2: Go ahead.

P4: Understand, most ICSID awards are already published. What they have done is flipped from an opt-in to an opt-out. So, at the moment, states have to consent, which they sometimes do and sometimes do not do, under the new rules as I understand it, they'll have to opt-out specifically. The hope is fewer of them will do that.

P1: I would just add one additional comment. The data for transparency is central to arguments about the validity of investment arbitrations. I think that if you look at the available cases, you will see that the vast majority of investor-state decisions are publicly available. Most of them are published with consent, or just one party releases them. So, you have available a very broad range of cases that are critical resources and precedents for understanding foreign investment and law related to foreign investment. You can look at specific issues and decisions in some of the key cases. For instance, we have *Abaclat v. Argentina*,[10] and there was a critical decision in January of 2010 that balanced transparency versus privacy and due process. Because there were certain privacy issues, individuals who were involved and their due process issues — in other words, there was a desire not to have every single detail and piece of paper subject to public debate, but all procedural decisions, key documents, and decisions were made public. So, I think there has been a balancing act, and I can see movement towards greater transparency.

M2: I will add on commercial arbitration. It is actually interesting: in the United States, commercial arbitration is not confidential, it is private. So, you cannot get to the dockets, as **P1** said, other than for class arbitration, where actually the AAA does put docket information in some of the filings online. But it is secret, so you cannot attend the hearings like you could a court case. But, unlike some countries, where when you agree to arbitration, you imply the promise to keep everything about the process confidential — that is not U.S. law. So, if you want to protect confidentiality in an arbitration, you really need a separate contractual agreement to do so, otherwise, the parties are free individually [to release information, although] sometimes not awards. The institutional rules may address that, but otherwise, there is no confidentiality obligation on the parties to the arbitration proceeding unless there is a separate agreement. I mean, you see this come up all of the time in some of the domestic cases involving employment contracts and some of the #MeToo issues. Frankly, arbitration is not confidential, unless there is a separate confidentiality provision. Most of those contracts have separate confidentiality provisions, and that is really what a lot of the concerns are about. Yes.

A2: [audience question]

10. Abaclat v. Argentina, ICSID Case No. ARB/07/5, Procedural Order No. 3 (Confidentiality Order) (Jan. 27, 2010).

P3: Yes, that is a good question. So, early in the case, by the case management conference, the parties or the ICC court of international arbitration can decide to remove the case from the expedited track. If by that time, which is still very early on, if by that time it is apparent that the case is going to require more time, it presents complicated issues, and is just not going to be able to stick on this fast track. But in the case where the arbitration proceeds under the expedited provisions; the fee structure incentivizes, in a way, the arbitrator to stick to the given timeline. So, the ICC actually started using its fee structures with the 2012 rules to incentivize the timely and efficient administration of its cases. So, that is one way in which the case is to remain on track. In addition, the language has now been updated to reflect the party's obligations to also manage and proceed with the case in a time-efficient manner. If you look at the ICC arbitration rules, there are case management tips in there that are strongly encouraged, such as narrowing the issues in dispute, such as not producing witnesses or extraneous information that really is not necessary to resolving the dispute. So, there are tools at the disposal of parties and arbitrators to try and stick as much as possible to that timeframe.

Now, in reality, I think we have to see how this plays out. The new rules have only been in place for one year, so 2018 was the first year in which the expedited provisions applied. I have to be honest with you, I have not looked to see how that played out. But, certainly, that will be some area of interest to see, "Is this working as intended?" One of the unique features of ICC arbitration is the mechanism of internal review, so it is within six months that the arbitrator must provide a draft award to the ICC court for review. But then the ICC itself does an internal review of the award to make sure that it satisfies: one, that it resolves the issues that were in dispute; two, that it will be an unenforceable award under the New York Convention. Meaning, there are no excess or manifestly excess — that the arbitrator has not exceeded its authority, manifestly exceeded its authority, that the award does not contravene fundamental public policy considerations of the seat. So, really, the six months is the timeframe for the draft, and then the review process takes place, which should be fairly short, but that can also be a little bit long.

M2: P1, is ICSID doing anything about making sure or trying to speed the process up?

P1: Yes. So, it is a great question. ICSID has now in the new rules instituted deadlines for three types of decisions or awards. The first one is what we used to refer to as 41(5). It now has a new rule number because they've shifted all of the numbers around.[11] It is 35(4) now. What it means is you can file an application early on in a dispute and say, "This is manifestly without legal merit." A tribunal has to decide that, now, within two months. For a preliminary question, a jurisdictional objection, has to happen within six months. For everything else, which is really the award, it has to happen within eight months. Then I ask, "Eight months [from] what?" I think it is eight months [from] the last submission from the parties on the issue. Does this have teeth? Not necessarily — it is a best effort standard. So, we do not have something like the arbitrators are not going to get paid or they get paid only after they issue the relevant award or decision.

But I would just also add in keeping with this broader trend for transparency, the field is developing very quickly, and there is an initiative called Arbitrator Intelligence, which you should know about. It is essentially an online collection of information from people who use arbitration about arbitrators. One of the questions that is asked of parties or their counsel after a case is, "Were you satisfied with the speed with which the tribunal acted and who were the tribunal members?" Arbitrators are aware of that as well, so their reputation is something that will separately motivate them to want to act quickly.

M2: I am on the board of directors at Arbitrator Intelligence. **P1** is going to get his check after the event. Arbitrator Intelligence is a non-profit, so there actually [are] no checks, there is no budget. It collects data on arbitrators after their performance, and then it'll provide [that data] to clients in reports and that would be how it sort of funds itself . . . . If you're interested, please do take a look [at Arbitrator Intelligence's web page]. The most important part of the process . . . is to get people to fill out the questionnaires because there is, frankly, a lot of freeriding that goes on. So, it is getting better, but we can always use more information. Let me just put it that way — we are now to the point of early stages of coming up with draft reports and that hopefully we will keep moving forward as well. So, thank you, **P1**.

P4: M2, can I jump on that one?

M2: Of course.

P4: I couldn't provoke you to a fight on the Restatement, [but] you [have provoked] me on Arbitrator Intelligence. Strong caveat: Arbitrator Intelligence relies on reports from parties. The AAA, with which I've been associated for a very long time, has for years tried to collect feedback from parties after the conclusion of a case on how the arbitrators, how the institution, did. They get lots of feedback from the losing party, largely

11. *See id*. at 119.

negative. It is very hard to get feedback from the prevailing party, which presumably is happy. I suspect the same psychology is going to create a real problem for Arbitrator Intelligence. It is going to collect a lot more complaints than it is going [to] collect pats on the back. I would advocate real caution in looking at anything from that source because I think the psychology is very difficult to overcome. The loser complains, the winner just takes the money and runs.

P4: I have one additional comment. Some of the aspirational elements for the field that we've been discussing — the efficiency, transparency, diversity of arbitrator appointments — these are things which at the level of looking at the field, or looking at it academically, there is broad consensus in favor of those elements. If you are managing a particular dispute, however, as an advocate, your task is to succeed for your client. So, sometimes that mitigates against these different elements. For example, it is easy to say, "All cases should go very quickly." Until you have a $2 billion dispute that you're very concerned could come out the wrong way. It is very easy to say there should be diversity in arbitrator appointments, which I included in every memorandum when I am proposing candidates to people. If you are a board or a general counsel, whether it is a sovereign or a company, you have to make a judgment call about the appointment that makes the most sense for the particularities of your case, because your objective is to protect your company, state, et cetera, not to generally promote healthy policies for the field. The same could be said for transparency as well. I see the arbitrator issue, in part, as related to transparency. I was at one event about a year ago, and somebody said, "Isn't it true that it would unfair if on one side [is] White & Case." They mentioned White & Case, but I could mention some other firms of my colleagues. "White & Case has a lot of information about arbitrators. It is a huge practice with many deeply experienced partners. Wouldn't that give an unfair advantage to the White & Case client?" To which I said, "Exactly."

M2: To which Arbitrator Intelligence says, "Yes, exactly." So, **P4**'s concern is absolutely a fair one, . . . people comment when they're unhappy, and that is going to be their focus. Clearly, it is something that we are aware of and are working to try to combat through various means of collecting data more systematically than just having random losing parties complain. I guess, the other thing to keep in mind is this is all in comparison to something. You cannot just say, "Yes, in the ideal world, we will have perfect information." There is information now, but as **P4**'s comment illustrates very nicely, it is one-sided information. The whole idea of Arbitrator Intelligence is trying to provide another side even for the White & Case clients because there are a lot of other arbitrations out there, particularly for the people who do not have White & Case. We'd all [like to] have [a] perfect world, but that is not the comparison. The comparison is, "What do we have now and what can we do better?" So, to your question.

P4: That is a good question. I do not see that issue as relating so much to efficacy, as I see it bringing ICSID in line with other practices because ICSID is really *sui generis* in the fact that it goes to the other two arbitrators, which creates this tension among the tribunal members. But to answer your question as it relates to efficiency and challenges, the new rules do tackle that because they say that challenges must now be brought — the old rules said "promptly", whatever that means. The new rules say it has to be within twenty days of either the appointment or the knowledge that you got that led to the challenge. That is bringing the challenge, and then the decision on the challenge has to happen within thirty days, so, concrete deadlines are given. I think the debate in the community is probably more, "What's a meritless challenge?" or, "What to do when parties bring repeated challenges?" Because you still have to continue to follow this procedure. Every time, you've got twenty days and then you have thirty days, this can happen. What happens with challenges late in the proceeding, which can be more disruptive?

Let me add a caveat on that. The ICSID rule, which is novel on this, says, "For challenges, if the challenge is successful, then when a new arbitrator is appointed to the tribunal, the parties have the option of asking the tribunal to revisit every decision that the old tribunal came up." Consider what that means then for a successful challenge that happens late in the proceeding.

P4: Can I just weigh in on the subject of challenges? If you're interested in challenges, the LCIA, the London Court of International Arbitration, has, as far as I know, a unique policy that it publishes decisions on challenges. If an arbitrator is challenged at the LCIA, the LCIA court, which is the body that passes on arbitration questions, will appoint an officer or a panel of three to decide the challenge. Whoever gets that appointment has to write an opinion explaining why the challenge was rejected or accepted. With the names laundered, the LCIA has begun publishing those. It is developing a body that you can look at to get explanations for why a challenge is accepted or rejected.

M2: Other questions? Yes. Back in the corner.

A3: [audience question]

P2: Thank you for your question. First of all, I think that it is going to be hard to put the genie back in the bottle because this has been a historic break from U.S. policy over the past twenty-five years. Now, there is a benign [way] to look at it, which is that it is normal over time to adapt, evolve, constrain different dispute resolution mechanisms, be it at the treaty level or be it at the level of rules. So, that much is unsurprising. But here, clearly, what has motivated this change is something more fundamental, called sovereignty. Our perspectives that this Administration and this U.S. Trade Representative have with respect to sovereignty and submitting the acts of a sovereignty to an international decisionmaker. So, there has been a historic move away from the approach that the United States has endorsed, which has been internationalist, globalization-oriented. There is a fundamental shift, and obviously the next election could determine where this goes next.

I would only add one other thing, which is that we are now in an unusual environment where effectively the right wing of the Republican party and the left wing of the Democratic party seem to be aligned in their opposition to key elements of free trade agreements. So, I will put in quotation marks, the "populist wings" of the two parties are aligned against this. Whereas, for the past twenty-five years, basically since the Cold War, there has been a centrist, bipartisan consensus at the executive branch level; whatever people say during elections. At implementation time it is been somewhat of a consistent bipartisan approach. So, we do not know. The same as we do not know, "Where is Brexit going to lead us? Where is NAFTA going to lead us?" We could be in a very ugly debate right now with the Democratic House, obviously, with great tension with the White House. Is there a risk of a hard exit from NAFTA? What would that mean? I think that the jury is out, and I think that we need to step very carefully because Humpty Dumpty is breaking in front of eyes, and that could have a lot of repercussions if we are not careful.

M2: To echo what **P2** said, a little less diplomatically, whenever you find Donald Trump and Elizabeth Warren in agreement, you should be very concerned.

M2: So, on that cheery note, I think we are right on track to finish at 11:45 AM on schedule. So, thank you again to the *BLR*. Now that I know the proper abbreviation to refer to you all as. Thank you to you all in the audience for being here. Thank you to the panelists, and it is a great event. I am very glad to be here for it. Thank you.

PANEL III: NEW PARTIES IN ARBITRATION

PANEL 3: NEW PARTIES IN ARBITRATION

M = Moderator
P = Panelist
A = Attendee

M: Welcome back. I hope everybody enjoyed their lunch. Our third and final panel of the day, New Parties in Arbitration, will be moderated by WCL professor **M3**. **M3** is the director of the Business Law Program here at WCL, and his teaching and research interests are primarily in contracts and commercial law, including their international and comparative aspects. He was chair of the Section on Contracts of the Association of the American Law Schools 2005–2006 and chair of the Washington Steering Committee for the 18th International Congress of Comparative Law in 2010. He is an elected member of the American Law Institute and a titular member of the International Academy on Comparative Law. He has served on the board of directors of the Washington Foreign Law Society, on the board of editors for the American Journal of Comparative Law. Unfortunately, we do not allow video or audio recording, third-party video or audio recording. I will give it away to **M3**.

M3: Thanks very much for the kind introduction and thanks for all of you for being here. I am pleased that we have such a distinguished panel to talk about new parties and arbitration in what, I dare say, is the capstone and highlight of what I am sure has been an excellent day. So, we have three panelists, I will keep the introductions brief. **P1** graduated from WCL in 2017, so those of you who are current students, look up here. In two or three years, that is what you turn into. He does international arbitration at [Redacted]. I have a particular soft spot for [Redacted], my old law firm. He also does international trade work.

P2 is the managing director at [Redacted], that is a third-party funder in arbitration. Really, the debate among the panelists early was whether [Redacted] is big or huge, so that will give you an idea. He is at the forefront of life on the ground and third-party funding. He practiced international arbitration at [Redacted] and was the chief investment treaty negotiator for

Colombia. In addition, he teaches international arbitration as an adjunct professor at [Redacted]. In addition to those two fine gentlemen, we have **P3** — a tenured associate professor[1] at [Redacted]. She literally wrote the book on third-party funding and international arbitration. In addition, [she] has over a decade of experience in international arbitration.

So, **P3** will go first. After each of the presentations, we will have some interaction from the panel, and we will proceed that way. At the end, we will have time for questions from all of you. **P3**.

P3: Thank you so much, **M3**. I am so excited to be here. Thank you so much to the *American University Business Law Review* for inviting me to speak with you today. I am going to start us off talking about a particular new party in arbitration that has been something I have been studying for a decade at this point, which is third-party funding. Third-party funding was introduced in one of the earlier panels. So, one of our previous panelists gave you a quick, brief definition of what third-party funding is. I will go a little bit further into that in my remarks.

Basically, what I would like to focus on, in the brief time that I have, are three controversial issues in third-party funding and three less controversial issues in third-party funding that still have not been fully addressed. So, starting with the three controversial issues: I would say one of them, the first one, of course, is the definition. While one of my fellow panelists in the earlier panel gave a simple definition of third-party funding, I am talking about three challenges in third-party funding. The first is definitional. So, whereas on the earlier panel we received a very excellent short definition of third-party funding, in reality, the third-party funding has morphed and changed over the past several years. There are actually many different types . . . . [This] is making it much more challenging to figure out what it is we are regulating or what it is we are studying. So, [a] traditional third-party fund[er] is thought of as an outsider to the disputes, so a non-party and also not a lawyer — so we are not talking about contingency fee arrangements here — a non-party to the dispute offering one of the parties funds, and traditionally it is in exchange for some portion of the proceeds that the party might receive if they win the case. That is the traditional garden-variety classic third-party funding, if you will.

Now, we have got other types that are questionable as to whether they even are third-party funding. So, we have corporate finance where we have funders that are offering money to companies to finance their operating expenses while they go through arbitration. We also have equity investment by third-party funders where they take an equity stake or an ownership

1. Since Promoted.

position within a party or ownership over some of the party's assets. For example, in patent cases, there are sometimes some rights to the intellectual property [or shares in the company] that are traded in exchange for the third-party funding, that sort of thing. We also have philanthropy. We also [have] non-profit funders, so funders that exist with another primary motivation besides profit. Those funders are actually investing in arbitration for ideological reasons — they want a certain result, or they want to support a certain policy goal. These are all things that go into this definitional problem. So, we can talk about that further as we continue our discussion. I just wanted to put that out there as one controversial issue.

A second controversial issue is awarding the cost of funding to the winning party. Something that is very common, generally, in arbitration is that — not all arbitration, but in some arbitration, particularly if it involves a UK party or UK arbitrators, or any other jurisdiction that follows the "loser pays" rule — if you win the arbitration, then you get awarded cost. So, the losing side has to pay the cost[s] of the winner. That is very common, and the cost[s] include things like attorney's fees, evidentiary costs, and other things that you would expect to be included in cost[s].

So, a question that has come up is whether the cost of funding, meaning if a party has to obtain third-party funding, of course the third-party funder is typically — most third-party funders are in it for profit. So, there is a cost, meaning the party has to pay a little more than purely reimbursing the funder for having paid the attorney's fees and evidentiary costs. The question is, is that cost something that is recoverable if the party wins? There has been at least one case, court case, in the United Kingdom — *Essar v. Norscot*.[2] In that case, the UK court — this is a domestic court case, so not an international arbitration — ruled that the cost was recoverable because, this is a narrowing of that rule, the court found that the losing party had created a situation that required the winning party to seek third-party funding in order to vindicate its rights. Meaning, the losing party had made the winning party impecunious, and, therefore, they had to get third-party funding. That is why the court said that the cost was recoverable. That has been a controversial decision: some say that it has far-reaching implications, others say that it is limited to its own facts. So, that is something that is controversial. It has not yet fully been addressed in third-party funding guidance or rules.

The last thing that I will mention, which was also discussed a little bit in one of the earlier panels, is investment arbitration. So, third-party funders do investment arbitration. The challenge is that investment arbitration, for those of you who do not know about how it is structured, in most situations,

2. Essar Oilfield Serv. Ltd. v. Norscot Rig Mgmt. PVT Ltd. [2016] EWHC-2361 (appeal taken from Eng. and Wales).

it is very one-sided in the sense that the investment treaties provide for rights for the investors and obligations for the states, which means, the investors — these are the corporations, sometimes individuals, but usually corporations — the claimants and the states are generally always the respondents. If the funders are trying to make money, they are going to invest in the claimants but may not necessarily invest in respondents. So, some states, many states, are outraged at this, and they do not want third-party funding involved in investment arbitration. So, there are some questions about whether or not third-party should either be treated differently, or some have argued it should not even be allowed. That is one of the debates that is out there. So, those are the three controversial issues.

I want to quickly mention three less controversial issues that nevertheless have not yet been addressed. There is a question mark there about how these issues will actually be addressed in future rules and guidelines, but, for now, they have not yet been addressed. One is privileges. As you know, evidentiary privileges are ways in which a party can block having to put information or give information to the opposing side. So, there is a question about whether or not information shared with a third-party funder can maintain a privilege. If you have an attorney-client privilege, or some other privilege over documents or information, if you share that with a third-party funder, that is technically not your attorney or not part of your attorney, have you waived your privilege? Most would agree. Most jurisdictions would agree, at least in principal, that the answer would be, "No, that is not an implicit or even an explicit waiver." Yet, we do not have rules in the books to protect parties that are sharing information with third-party funders. Here, in the United States, we only have, as far as I know, three jurisdictions that have a statutory privilege, which would be Indiana, Nebraska, and Vermont.[3] Other than that, you're basically relying on case law. So, this is an issue that is not really controversial and yet has not yet been addressed, so I think more jurisdictions, not just in the United States, but worldwide, need to address it.

The second issue that is relatively uncontroversial is what I call a funder code of conduct or ethics. So, we have a few jurisdictions in the world in which funders have, themselves, come up with their own codes of conduct and codes of ethics. In the United Kingdom, we have the Association of Litigation Funders that has their own code of ethics.[4] "Code of Conduct" is what they call it. We also, in the United States, have an American Legal

---

3. Ind. Code Ann. § 24-12-8-1; Neb. Rev. St. § 25-3301; Vt. Stat. tit. 8, § 2255.

4. *Code of Conduct for Litigation Funders*, ASSOCIATION OF LITIGATOR FUNDERS (Jan. 2018), http://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf.

Finance Association[5] — they have a code of conduct. But, for the most part, those are not mandatory associations; those are voluntary, and they aren't widespread across the entire world. So, there is a question of, "How do we govern funder conduct and funder ethics?" I mean, in the attorney field you have to abide by the rules of professional conduct or whatever rules apply in your particular jurisdictions in which you are licensed. So, I think this is something that everybody agrees: funders should have ethics; they should have a code of conduct, or at least some sort of governing principles for their behavior. Yet, we do not have widespread adoption of written codes. That is something I think we should look at.

Tribunals have the power to order a party to disclose the existence of third-party funding and the name of the third-party funder. We do not really have any particular rules, as far as I am aware, in any particular arbitration institution yet that say that tribunals have to ask this question or that parties have to disclose. We do have guidelines; we have the IBA Guidelines on arbitration conflicts of interest.[6] That does say that arbitrators should ask, but, again, those are guidelines, those aren't rules. But everyone agrees that tribunals have this power to ask the question. There is this gap between practice, which when tribunals feel they need to they do ask, and the guidelines and rules that do not necessarily make it explicit — that this is something that they have the power to do. That is something that is relatively uncontroversial, but still has not yet been addressed.

So, those are three controversial issues that are still being debated and three uncontroversial issues that I think need to be addressed formally. I look forward to the discussion. Thank you very much for listening.

M3: Thanks very much, **P3**. So, now there is a chance for the other panelists to give any comments or questions. Thoughts?

P1: Thanks, that was great, a wonderful overview. I have a couple of quick questions, particularly on your last point about the code of conduct for third-party funders. Namely, do you have a perspective on [who] should draft that document, who should administer it, and what type of institutions should administer it? If there are any particular substantive issues that you think should be tackled, primarily focused on such a code of conduct.

P3: Thank you very much, **P1**. That was a great question. So, who should administer it is a complex question. There are a few jurisdictions, off the top of my head, I am thinking of Singapore and Hong Kong, that by statute allow

5. *The ALFA Code of Conduct*, AMERICAN LEGAL FINANCE ASSOCIATION, https://americanlegalfin.com/alfa-code-of-conduct/ (last visited Mar. 20, 2019).

6. *IBA Guidelines on Conflicts of Interest in International Arbitration*, INT'L BAR ASS'N (2014), https://www.ibanet.org/Document/Default.aspx?DocumentUid=E2FE5E72-EB14-4BBA-B10D-D33DAFEE8918] (on file with speaker).

third-party funding in international arbitration. As part of their statutes, they require a code of conduct to be developed. Yet, those two jurisdictions have not yet developed that code of conduct. So, there is a code of conduct coming from the government of Singapore[7] and the government of Hong Kong.[8] We do not have it yet. So, that is one answer. You also have in the UK, I mentioned this, the Association of Litigation Funders. The government of the UK has said, "We are going to let you self-regulate third-party funders. So, as long as you can self-regulate successfully, we won't interfere. We will let you do it yourself."[9] So far, that is what has been happening there. Then there are funders that actually have their own internal codes, they came up with a code, [and] that is their internal company policy. I know Bentham IMF has put theirs [sic] [code] out on their website. There are other funders that have them whether they may or not be public. So, I think right now it is sort of a hodgepodge of different possible regulators including self-regulation. I do not really have an ideal sense of who should regulate, but I do think that the biggest concern in my view is consumer protection, making sure that whoever is hiring the funder is sure that they are getting a funder that is reputable, that is well-capitalized, that is going to be supportive of their lawsuit, not interfere too drastically, or interfere at all, in their attorney-client relationship. I think those are important; and then legitimacy of the system. So, those are things that I think the funder code of conduct should address. Thanks.

M3: **P2**, do you want to make a comment, or do you just want to head straight into your presentation? I will leave it to you.

P2: I will do a little bit of both.

M3: Okay, great.

P2: Just a comment, because **P3** referenced to one of the more controversial points is a good segue into why we are discussing third-party funding here. Why is it now so controversial mainly in investor-state arbitration? As you explained, part of the reason is that a state is there, there is the perception that because of third-party funders, there are more cases or there will be cases in investor-state arbitrations. Some of them may be frivolous. I will leave it there because I want to sort of demystify that idea that because there is third-party funding in the world, there should be more cases. Quite to the contrary, in many respects.

Now, before explaining one of my points in the presentation, which is the

---

7. CIVIL LAW ACT OF 2017 [CIVIL LAW ACT] § 5B (Singapore).

8. Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, No. 6, (2017) A143 O.H.K., § 98P.

9. *See generally* Code of Conduct for Litigation Funders, 2018, Ass'n of Litig. Funders.

procedure that we go through to determine whether we would fund a case or not, I would like to say that it is entirely true in investment-treaty arbitration [that] the most likely party that would be funded are claimants. Mainly because the treaties do not provide obligations for investors, and therefore the most a state can do in a case is not lose or get an award for cost in its favor. It cannot be given any damages awards if it is strictly an investment-treaty arbitration. If we are referring, however, to a commercial contract arbitration, and a state or a state-owned entity is involved, there is nothing preventing the state or the state-owned entity from being the claimant. That in itself puts you in a position where the state or the state-owned company can be funded. In fact, we are actually funding a state-owned company in the enforcement of an award currently. So, there is a concrete example. Also, states have been funding [sic] by non-for-profit funders, and that is a case that you may have already heard of. It is *Philip Morris v. Uruguay* case,[10] but that was for a non-profit. So, all-in-all, it is true that [in] investor-treaty arbitration, most of the companies are being funded, not the state. If you put into the equation a contract, either investment-related or not, the possibility for the state-owned company or the state is there for getting funding. With that, let's talk about the process.

I won't go into the definition, I think that **P3** has done a marvelous job in terms of providing the more specific and wider definitions. I personally subscribe to the wider definition. I would only say that a third-party funder could be the lawyers if there is, in fact, a contingency fee. Who is funding the case [are] the lawyers in many respects because they're reducing their fees for a profit. The damages award is favorable. It could be the bank, or it could be your aunt. The thing here is, in many of those cases, nobody asks, "Why?" and, "Where is the third-party funding?" I think that third-party funding has become sort of the public eye with investors at arbitration and with questions on ethics.

Let's tackle three questions here. First, I will go beyond the definition, I do not want to define anything. I just want to say what happens — and I want this to be clear — if the case is lost, the claimant loses, then the third-party funder loses everything, the whole investment. If the claim is $5 million in lawyer's fees, the funder loses $5 million. But does the lawyer lose [it] or the claimant? They lose their case, of course, but they are not losing the investment — that is a clear element here. What happens if they win? If they win, then the funder gets, because of his investment, a percentage of the damages award or a multiple of the investment. It is for-profit or at least the institutional fund[ers] that I am referring to.

10. Philip Morris v. Oriental Republic of Uruguay, 56 ILM 1 (2017).

These are the issues, and I will not address all of them, but the presentation will be there for your reading later. As far as national requirements, what is the due diligence process? Who controls [it]? Which is the key question in this whole discussion. Let's look at this slide here. That is the whole financial process. The one that you cannot see, and I apologize for that, says, "due diligence process." This is what we go through. We are first approached by either a client or counsel; eighty percent of our portfolio includes cases that have been originated by counsel. So, counsel really becomes our target if we are speaking in terms of marketing processes. After being approached, we run a conflict check, just like a law firm would do, to make sure that we have no conflict with the parties, to make sure that we have no conflict with the counsel, to ask ourselves whether the experts that we may be consulting later on have any conflict [with] either party, et cetera. We run a conflict check, as any firm would do. Then, we enter into a non-disclosure agreement, basically, for everyone's protection — we will protect your information, you will protect our financial information, and the model that we work on. Then we go into the slide that you cannot see, and I apologize for that. The due diligence process — that is the most important part [of what] we do. After doing the due diligence process, we enter into a term sheet or offer terms — commercial terms, and that is a provisional offer. While we do that, we [go] outside of the third-party funding company, and we ask for a second opinion both on damages and on the substance of the case. If everything goes well, we then enter into a funding agreement. Then, the case begins being funded. While the funding happens, we receive reports from counsel as to what is going on in the case.

So, that brings me to one of the issues that **P3** raised about ethics [and] the code of conduct. One of our key elements, at least in many of the companies [where] I work, is [that] we are funders, and we are not counsel. We do not control the case. We do a very, some may think, annoying due diligence process, very in-depth, but once we launch the case, once we launch the funds, we step back, and counsel is counsel. We do not interfere with counsel's decisions. That, in part, is because we belong to the one of the associations that **P3** mentioned, which is the Association of Funders in the UK. Under their code of conduct, the lines between counsel and funders [are] very well determined.[11] In addition to that, in our business we are all licensed attorneys, and we understand very well that if we mess with the obligations that counsel has with its party, we may be disbarred. I love being licensed.

So, let's take one step and let me answer one of the main criticisms. Do

11. *See generally* Code of Conduct for Litigation Funders, 2017, Ass'n of Litig. Funders, ¶ 2.

we fund frivolous claims? You'll answer that question after I explain the process that we go through. So, what do we ask for? We ask for there to be a one-to-ten ratio between the cost of the arbitration, from point zero to the payment of the award; that is the cost of the whole arbitration, ten being the damages award. If that ratio is met, it becomes an interesting case financially. If that cost is not met, we simply say, "We are sorry that you have been mistreated, but we cannot have a funding conversation." It is refreshing because we are not abusing anybody's time, we are simply saying we would, or we would not be interested in it financially. If that is met, then we move forward, we look into the budget of the arbitration. Who provides a budget? The lawyers. We look into whether it could be enforced. There are jurisdictions, for instance, investment arbitration, where you know that it is more difficult to enforce an award. In Latin America, you may have some thoughts; in other countries, you may have some thoughts. If it is not enforceable, we may not go in. If it is enforceable, but it is difficult to enforce, that gets into our model. It may be difficult, so it may take not one year, but three years, so that needs to be taken into the financial model, so that at the end of the day we can think, "What kind of proposal will we make to the party and to counsel?" We look into the merits and into jurisdiction. All these elements are analyzed by people who have done ten or fifteen years of their legal career into international investment arbitration or international commercial arbitration. If that goes well, then we offer terms. The terms normally go as follows; these are examples. This is not the offer that we always [sic], but these are examples. In year two, we would expect about twenty-five percent of the damages award or two and a half times the investment. That increases every two years: thirty percent, thirty-five percent, up to forty percent. With the objective that the funded part[y] never gets less than fifty percent of the damages award that they receive. If it is earlier in time, then you will get more.

With that, I think that I have answered the question of whether we fund frivolous claims. There is no reason why we would do that because ultimately if we did it, we would be just wasting money, so, rationally, there is no way that we would do that. Is there a risk? Yes, there is a risk, but the idea is that through, what we call, the gold standard of the review, we get to a point where we can say to the party, "Your case is good," or, "Your case has these flaws."

Just to finalize that is the process, and we will be discussing a few issues that you may also be interested in learning about. Such as, disclosure and what should be disclosed off the third-party fund. Thank you.

M3: Thanks very much. So, maybe some reactions from the other panelists?

P3: Thank you so much, **P2**. I have a question about, after you do your due diligence or at least you've started to look at the legal merits of a case; if you decide you're not going to fund it, how do you break that news to the party? Do you give them any information about how you came to that decision or do you just say, "We are not going to fund you. The end?"

P2: That is a great question. Yesterday I had a conversation with one of the counsels that we have received leads from. I knew that there might be a little bit of a thorny relationship because we rejected one of their cases. To my good surprise, it was completely the opposite. They were thankful because we take the time, or we try to break the news quickly enough, so that they won't lose time, and we try to walk with them through the reasons that they do not allow us to fund the case. If it is a financial reason, the conversation is very quick. I mean, I didn't use to like discussing money issues before, and I thought, "Well, am I going to be able to do this?" It is very quick because you say, "Listen, there is nothing that we can do." An ICSID case costs, at the very least, I would say at the low end — this is being very optimistic — $3.5 million, around $3 million; and that is really working with a very slim budget. It could go up to $6 million, et cetera. If you do not have the multiple $60 million for a $6 million in cost claim, then there is no conversation there. But if there is, for instance, a good damages perspective, but you have severe flaws in jurisdiction or severe flaws on the merits, then you have to analyze that and tell that to counsel. In this particular case that I am referring to, counsel basically came back to me, after we had to know, and she asked me whether — she knew that we were not going to fund it. But then the question became whether she should encourage the client to self-fund it. She came back to me to say, "I do not see the right in the concession. I am having second thoughts about this. What do you think?" Yesterday she came back with another case. So, the idea is to become part of the conversation in legal terms.

M3: I am going to just interject something for **P3** and **P2**. You do not have to respond now because I think we will have [sic] after the conclusion. But when we were talking about setting up the panel, I thought maybe there would be some interesting areas of disagreement. It is interesting to hear you all talk about this. Just from the scholarly and judicious perspective, following my usual subtlety, let me just say, I think this whole situation is outrageous! When you said that there were these controversial issues about definitions and codes of ethics, to me the controversy is that it exists! We seem to have skipped over that.

We might ask ourselves, why did it get skipped over? The potential answer is that there is an enormous conflict of interest — the people working on this are the lawyers who make money out of international commercial arbitration. Then you say, "Oh, no, we have these prestigious jurisdictions — the UK, Singapore, all of whom are doing everything they can to promote their arbitral markets." I mean, Singapore's whole business model. So, if we move away from the perspective of counsel, arbitrators, the bar associations, and the people who will write the codes of ethics and think about the question from the symposium: is this a friend or a foe of corporations? It seems to me what underlies [sic] — and now being a little more serious. The question people keep on talking about, "All right, well, it is the claimant, not respondent." Is this a friend or a foe? A lot of depends on, are you going to be the claimant or respondent?

I am interested to hear how the process works, but it is hard to avoid the idea that the number of arbitrations will be greater than the number of arbitrations than there were without the availability of extra money. I do not know that there is any way, theoretically, logically, or empirically, to refute that unless you say, "Oh, this was going to get brought and was going to get self-funded, and we dissuaded them when there was a hint of that." But that would have to be fairly large number of cases. So, I will put that out there, and then hand the microphone over to **P1** to talk about some other issues. Then, I think, maybe we will have more stuff to talk about.

P1: Thanks, **M3**, and thanks to the *BLR* for organizing this event and having all of us here. I look forward, very much, to the discussion afterwards, given **M3**'s points there. I will also like to add, just before moving into my presentation, that the ICSID rules committee has proposed some amendments to the rules. I do not know if either of you have had an opportunity to review amendments to Rule 21 suggesting a definition for a third-party funding.[12] Then, two obligations on parties that do engage in or have a third-party funder to both disclose the fact of third-party funding and the identity of the third-party funder. I think that goes to some of the disclosure issues that you didn't get an opportunity to discuss, and then also some of the definitional issues that you discussed briefly. If you could both, maybe, talk about that more, I would love to hear your thoughts on the proposed rule.

The objective in including me in this panel is to round out the discussion of third parties involved in investment arbitration or in arbitration. I am not going to speak about third-party funding, but rather a third party being a state involved in arbitration.

Before diving into my discussion, I think it might be helpful to set up an example. If you imagine that there is state A and state B that have a bilateral investment treaty between them; and there is investor A and investor B, investor A being a national with a qualifying investment from state A, and investor B being the same of state B. The instance that I am talking about is

12. ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) (Aug. 2018) (proposed amendment to rule 21).

where an investor, say investor A, decides to submit claims against state B. State A then becomes involved in the arbitration in some form. Usually, they are requested to partake in the interpretation of certain terms of the treaty or in some form of consultation with the state to see if there is a way to seek mutually agreeable solution to the dispute and find a settlement opportunity. The questions that I have contemplated in making this presentation are, "Why would my state want to become involved in a dispute between an investor and another state? When may a state participation [sic] under the law? What implication does a second state's involvement in investment arbitration have for the investor-state dispute settlement system?" How this ties in with our discussion is primarily a question of conflicts of interest, but I do not think we really addressed it fully. Hopefully, it will get addressed in the questions and answers portion of the panel.

So, my first point, why states might want to participate in an investor-state dispute settlement? I think, in part, the answer is obvious — self-preservation is a big interest. When two states have a treaty with each other, and an investor of one state sues the other state, the two parties to that dispute are that investor and the opposing or contrary state. So, to take our example, investor A sues state B. State B is a party to that dispute and is able to submit its interpretation of the relevant treaty, but state A is left out in the cold where the interpretation of that treaty might eventually be used against state A. Of course, it is a member of that treaty or that investment instrument.

One of the perpetuating — not issues in investment arbitration, but something that makes this issue more prevalent — is we have this notion that there is no stare decisis in investment arbitration. So, there is no binding precedent, each case is *sui generis*, or is taken on its own merits, but that is not exactly true in practice. Tribunals regularly rely on other cases, and if you review a brief of investment arbitration submissions, it is rife with references to other interpretations of similar provisions. That is part of how the system functions; it is supposed to be a reliable and predictable system for investors. In fact, Carey Bourne and Gabrielle Carencro (ph), two very prominent arbitrators have suggested that this is the way of the future, that relying on precedent is how we build a predictable system. The problem is that that leaves the interpretation of the applicable treaty to the tribunal and the other state. So, again, taking the example: Investor A suing state B in [what is] a closed universe, where investor A gets to submit its interpretation of the treaty to the tribunal. The tribunal gets to interpret that. Potentially, state A doesn't get any part of that interpretation; it doesn't get to submit its own interpretation, despite having been party to the treaty negotiation and having built the treaty along with the other state party. As we see more multilateral agreements formed, this issue is compounded. If we take, again, the example and look at now state A, and let's suggest that state A joins the

CPTPP — the TPP that went forward without the United States. If now, let's say, Japanese investors choose Australia, then state A — not to mention the other ten parties to that treaty — also has an interest in how the terms of that treaty are interpreted and applied, so the case had issue. So, this issue, then, is mediatizing, essentially, as these multilateral treaties are entered into more prevalently. There are some pretty clear manifestations of states' frustration with this approach. If you look at the more recently negotiated investment chapters of treaties, states have tried to define the protections that are afforded to investors more carefully —dropping any number of footnotes, for example, if you look at CPTPP trying to define what fair and equitable treatment is or what full protection and security is.

So, the states are taking into their own hands this interpretation. If you look at the USMCA, a similar example is provided where the state parties, the treaty, have tried to narrow the investment chapter by narrowing both the substantive investments that are protected by that chapter and the substantive protections afforded by that chapter. I know that WCL has a pretty big trade interest, so I think there is an interesting parallel in the WTO world where the United States has voiced its real frustration with the appellate body taking the same approach. Essentially taking former interpretations of these agreements, as opposed to taking the tech [sic] steps *sui generis*. Now the United States has refused to permit the election of an appellate body member, essentially frustrating that branch of the system.

So, it is clear that states have an interest in being party to these disputes in a way that lets them interpret the treaties that may be used against them at a later date. Time is going quickly. The second interest that a state might have in becoming involved in a dispute is the protection of an investor. Obviously, again, if an investor of state A sues state B, and the investor's claim is somewhat tenuous, state A might have an interest in interpreting the treaty and submitting its interpretation of the treaty to the tribunal in a way that is expansive but provides grounds for investor A to have a claim against state B. I will discuss some of the substantive and procedural interpretations that might be an issue that a state might take up in the second portion of this discussion.

So, secondly, when may states participate under the law? Without getting into too much detail, both the UNCITRAL rules and ICSID rules, as two of the most popular rules applicable to investment arbitration, provide for non-disputing party submissions to be submitted to the tribunal. But both sets of rules set up the tribunal as the gatekeeper of submissions, so the arbitrarial [sic] tribunal is endowed with significant discretion to decide whether it is going to accept these submissions or not. Treaty texts also sometimes provide avenues for interpretations of the treaty. In particular, I think an interesting example is [that] the NAFTA and the USMCA set up an interpretive body that in 2001 rendered an interpretation of the NAFTA, while there were investments arbitrations ongoing under the NAFTA. This caused significant uproar. You can imagine an investor who has submitted a claim against the state, then, while that investment arbitration is going on, the state parties, including the state party that is the respondent in that investment arbitration, submits an interpretation of the treaty narrowing the scope of the protections provided to the claimants, investors, and potential claimants under that treaty. So, there is an inherent conflict of interest in that type of interpretation and that type of procedure.

There is another important type of provision that is included in a lot of treaties and has been ruled on recently in a number of cases, which is the denial of benefits. This type of provision, I think, is particularly interesting in this framework of the second state involvement in investor-state dispute settlements because of all of the procedural hurdles that can come up in the denial of benefits. If you think about this in practical terms, one state party's interpretation of all of the procedural hurdles involved in the denial of benefits could effectively either deny or provide access to the denial of benefits to another state. This is a huge, huge benefit or disadvantage, too, depending on how the state decides to interpret that provision. If you look at, again, [the] USMCA or the CPTPP, both of those treaties contained denial of benefits clauses that would be interpreted by one party; if another state is prevented to participate in the arbitration, up to eleven other parties.

So, to conclude: what implications does second state's participation have on the system? It has implications for the value of precedent — states being permitted to weigh in and particularize the meaning of texts may decrease the value of precedent. You can imagine that the state's interpretation of a particular term in a treaty would be valued greater than an alternative tribunal's interpretation of protections in a treaty. The alternative approach is to go further down this hole, or approach of stare decisis being essentially the practical approach to investment arbitration. It could frustrate states further, making them reluctant to continue with or sign up for more investment arbitration protection regimes. So, of course, there is a balance to be struck between the certainty for the investor and the certainty for the state. When the question is, "Who gets to interpret the treaty? Is it just the investor and just the opposing state? Is it the states that are also the party to the treaty and have a vested interest in the outcome and interpretation of the treaty at issue?"

Finally, just to conclude, so we can get back to our discussion on conflicts of interest, I think it is fairly clear from the first portion of this discussion that there are inherent conflicts of interest in a state's involvement in an investment arbitration. States have held out a consent to arbitration in a dispute settlement mechanism, and it is up to the investor to accept that consent to arbitrate and go to the arbitration with that investor on the basis of the treaty. When the adverse states, or the state of the investor at issue, are then able to interpret the treaty, it has these other interests that are inherent in that issue. It can either benefit itself by narrowing the protections afforded by the treaty, so that later claims brought under that treaty have to be narrowed by the precedent that is caused by that disputed issue. It could potentially benefit the investor by broadening the definitions of the protections afforded under the treaty to let the investor have an effective claim against the state.

M3: Great. Thank you. So, I think it is now open to the panel for a bit of discussion. In that time, maybe the audience can be thinking about your questions. We have a few minutes left, we've managed our time reasonably well for plenty of interaction between the panelists and with you in the audience. Is there somebody that has a mic or something? Do people come up? Just shout. So, we will start with the panel because I may have floated a little question here or there in between.

P2: P1, thank you. I have some comments and reactions. Some may allow us to go back into third-party funding. I have a bit of a reaction to the idea of the investment treaty arbitration or investment arbitration system being informally ruled by the idea of stare decisis. I think that I understand what you meant, but I take a little bit of a different approach. I think that, technically, it is not stare decisis, but at the same time it is completely that, if you read any brief either from responder or claimant, you will see a plethora of decisions being cited. What I see in the system is both counsel for claimant and respondent looking and exploring into the lines of case jurisprudence that there are. Basically, taking into account those decisions to support their cases. That is what I see really happening. That being said, I think that the system, the investor-state arbitration system — we haven't discussed this, but I will put it out there — is one that has been unfairly treated because there is this perception that everything is inconsistent. But there is no consistency at all, and you can basically argue whatever you want in an investment treaty case, which I think is not true. The system has really about thirty years of real existence or forty years, fifty years, of real existence. The system has, indeed, decided a few topics, which I would call *jurisprudence constante*. Basically, these issues that have been decided, and no tribunal would ever try to modify it. I will give you a couple of examples.

The question of whether federal agencies create responsibility for the state, which is an easy public international law question. But in the investment treaty arbitration, the question was posed, and it was answered. I think it said a lot. Another one could be things such as whether minority shareholders or minority investors could bring a claim. The question was posed, and it has been settled. Nobody would think of bringing that question.

I mean, they might, but they may not have learned anything in thirty years. So, I think that all in all I would depart from the idea there is strong stare decisis, and I would embrace the idea that on some topics there is this idea of *jurisprudence constante*.

Now, on other issues, I think that your presentation was so good because it ultimately encapsulated the idea of these cases which [are] controversial because they involve public interest of the nation and, sometimes, of the world. Think about the projects that are involved: sometimes, healthcare issues are involved; sometimes, the environment is involved. So, that is why it is so true that the states, and sometimes the states that are not party to the controversy, may have a say. I could talk a little bit more, but I won't. Thank you.

P3: I do not know if **P1** wanted to respond, or I could jump in. I will just say I really thought your presentation was fascinating, and I am particularly fascinated by this idea states having a say in the interpretation of treaties to which they are party. So, just to be a little controversial along the lines of **M3**, here, I would like to say, what if the treaty is gigantic? So, the ICSID treaty, for example, has 158–159 parties or so. The New York Convention, which is the other treaty by which international arbitration awards are enforced, 150-some odd parties as well. So, if it is just a free trade agreement between state A and state B, it is a little easier to say, "Okay, if there is a claim against state B, let state A be in amicus." But if it is a debate about the meaning of the New York Convention, or an issue of the meeting of the ICSID convention, can you have 150-some odd amici? Is there a limit? I do not know. What would you say to that?

P1: I think I can tie together a couple of points here and addressing [sic] both of your questions. The idea that I think states should be able to participate in these investment arbitrations in order to help to find terms, in particular, the protections that they have agreed to offer to investors under the treaty. So, when, again, it is investor A suing state B, state A has an interest in the outcome of how the treaty, and the protections in particular, are interpreted. So, I think, as opposed [to] the New York Convention on the enforcement and protection of awards or the ICSID convention, those aren't necessarily substantive protections that are being afforded to the investor. Rather, they are either jurisdictional hurdles that an investor has to overcome in order to gain access to arbitration or similar jurisdictional hurdles for the enforcement of an award, usually interpreted by the courts. I do not think that a state has as large of an interest in the interpretation of those types of provisions, as, essentially, the protections that it has offered already to afford to investors, but they are interpreted in a way that may be expanded following the negotiation of the treaty. So, not by their own terms. Not by the terms of how the state A and state B concluded this treaty, but by state B's interpretation of the treaty and investor A's interpretation of the treaty.

Then, to address **P2**'s concern that stare decisis isn't exactly germane in investment arbitration — I totally agree. I would suggest that it is something like stare decisis-like because, as these protections are interpreted over and over again, there is consistency in the way that they are interpreted , but there are slight differences if you look at fair and equitable treatment and the inclusion of an investor's legitimate expectations, for example. That has been a contentious and controversial issue in a number of awards. Certainly, as you say, it is a young system, and as more awards are rendered on these issues, it is refined and whittled down to a point. But the point is that the whittling down is happening by virtue of an investor's interpretation and a state's interpretation, as opposed to a state-to-state agreement that was entered into by the terms of those two states as opposed to a private entity.

P2: I think that we agree, and I would only add that the beauty of the investment treaty arbitration system is that it gets that input from caselaw for its development. At the same time, this is the other part, there is a treaty-making power that also helps that development. It is kind of a symbiotic relationship because the jurisprudence is there, and then the drafters read the jurisprudence and sometimes adopt what has been there and qualified into new treaties. There are examples of that. So, for instance, one example of this is, for those of you that are aware of the use of the MFN to import procedural provisions from one treaty into the applicable treaty or dispute settlement provisions of one more favorable treaty into the applicable treaty. That is a doctrine called the Maffezzini Doctrine after the case that created it.[13] After that was implemented in many, many, many cases, there was a backlash, and the United States proposed in the old Free Trade Agreement of the Americas in a little footnote. That agreement never came to life. The United States proposed a little footnote in which that Maffezzini Doctrine was prohibited, mainly. That in itself was adopted in many other treaties throughout the world. Now, new treaties have a rejection to that doctrine. So, ultimately there is this relationship between treaty-makers and cases, which makes this all more fun.

M3: Questions from the audience?

A4: [audience question]

---

13. Maffezini v. Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objestions to Jurisdiction (Jan. 25. 2000); *see* Tribunale federale [TF] [Federal Tribunal] June 29, 2017, 4A_600/2016 (Switz.); *see also CAS Award in the Platini Case Upheld by the Swiss Supreme Court*, SWISS INT'L ARB. DECISIONS, http://www.swissarbitrationdecisions.com/cas-award-platini-case-upheld-swiss-supreme-court (last visited Aug. 28, 2019).

<u>P3</u>: Absolutely. Great question, thank you raising that. So, here is something to consider. If you look at the domestic court context, one of the things that judges are very embarrassed [by] is when they get reversed. So, if you can think about that in the arbitration context, similarly arbitrators do not like for their awards to be overturned for whatever reason, whether it is on the merits or otherwise. So, let's say the arbitrator could have willful ignorance about whether there is a funder, "I do not ask, I do not want to know. Do not tell me whether there is a funder. I am going to decide the case." Then, later on, the losing party, and it usually is the loser, is unhappy with the award for some reason and is looking for any possible reason to challenge it. Whether it is a legitimate reason or not, they are just looking for some reason to challenge the award. They find out that there was a funder; they find out that the arbitrator didn't disclose some connection to that funder because the arbitrator didn't know about. They intentionally tried not to know about it, but they can still use that to challenge the award. The arbitrator wouldn't be able to argue, "Well, I didn't know. That is why I was not affected." That would not be an argument that would stand up in court. It would be an assumption made that by not disclosing this connection, or at least not asking about it, there must be some malicious intent on the part of the arbitrator to hide it. That would be the way the court would view it, and, therefore, the award would be potentially set aside, vacated, or whatever the court decides to do with it.

To avoid that on the back end because the parties have spent time, money, energy, frustration, all this to get through this arbitration, and to have an award, and then it be overturned, is frustrating for everybody. So, to avoid all of that, it is better for arbitrators to ask the question at the front end, get an answer, and then there is the key, they can disclose, "Actually, you're being funded by funder A. Well, five years ago I was at the council in a case funded by funder A." Disclose that to the parties. Often the parties will waive a conflict if it has specific parameters with respect to time and there is repetition, and also to things that you would have to look at. But the parties can say, "That is okay. We will let you still serve as our arbitrator. Thank you for disclosing that." Therefore, you then neutralize the possibility of the award being challenged on the back end. So, that is the reason.

<u>P2</u>: Just to supplement that. When I was still counsel to parties, I have been before tribunals, whereas counsel for the state, we didn't even raise any question as to the identity of the third-party funder. We didn't even ask the tribunal for anything. The minute the tribunal learned that there was third-party funding, they wanted to know who it was because the most valuable asset that an arbitrator has, it is his or her reputation. They want to know whether she or her law firm ever had a relationship with a funder to make sure that they have no conflict of interest. So, it is obvious that they want to know.

I want to answer one question from **M3**, which is, "Why should this exist?" I mean, is it legitimate that third-party funding exists? The other question that you had is, "The numbers are not right. If there is party funding, there is going to be more cases overall." I agree with that. Mathematically, that is true, but not with the premise that there will be more frivolous cases. So, where does that [take] us? That takes us to the first question. That takes us to — why is it legitimate to have it? Think about claimants that will not be able to bring their cases except for there being a funder. So, ultimately, it is related to an issue of access to justice. Is the issue [of] access to justice related to a profit? Yes, it is. Is the legal practice for profit? Yes, it is. So, the idea that you can actually do good for profit is not irrational and is not based on "la la land." Ultimately, the basis is more access to justice — yes, for profit in some cases — and having all the actors follow a set of ethical and substantial controls, so that it can happen.

P3: May I be a little controversial? I will push back on that a little bit. So, yes, the legal industry is for profit and yes, we have allowed contingency fees — we allow attorneys to invest in their own cases. But we also have robust codes of ethics and conduct that are enforced by the bar with teeth: you can be disbarred; you can be suspended. You can be publicly reprimanded as an attorney if you engage in some practice that violates the rules regarding contingent fees. Pretty much every jurisdiction has some cap on contingent fees and things like that. So, we allow it, but we have all of these restrictions and rules. The third-party funding industry is not, at this point in time, governed by a similar set of rules, guidelines, and consequences. I am pushing back on that.

P2: No, that is a great question. Thank you, **P3**. I thought that we were not going to be able to disagree on something, but I am glad that we are.

M3: On that note, let me say that Karl Llewellyn, one of the great law professors of all time, said, "The job of the law professor is to stir up the students." So, if we've achieved our goal, you go out and come to blows over third-party funding of arbitration over dessert and coffee outside. I think there are some concluding remarks.

*   *   *

CLOSING REMARKS

CLOSING REMARKS

M = Moderator

M4: Thank you. So, thank you to everyone for coming today. Especially, of course, our panelists and our moderators, especially those who came from far away. We really appreciate and are grateful for your time, energy, and expertise. This has been a great program, and I'm really, particularly, proud of *American University Business Law Review*'s Volume 8 Staff, especially **M**, our Symposium Editor, and our Junior Staff members on the symposium committee. *BLR*'s Associate Managing Editor and *BLR*'s Managing Editor. I'd also like to express sincere gratitude to all of the American University Washington College of Law's faculty and staff, especially *BLR's* faculty advisory board members who connected us with the panelists.

The Symposium would not have been possible without generous help from the dedicated individuals at WCL and the WCL community. We'd like to especially thank Dr. Grigera Naón, Professors Snyder, Shapiro, and Franck, Jennifer Dabson, and, of course, our journal coordinator Sharon Wolfe. *BLR* would also like to thank the Office of Special Events and the Office of Technology, the Office of Facilities Management for their tireless efforts. As you can see, there are a lot of people who put today's event on. Last but not least, we're extremely grateful for the Center on International Commercial Arbitration for its generous assistance and sponsorship. *BLR* has always had a wonderful partnership with the Center, and we're grateful to continue this. The Center has a summer program, so, please, if you're interested pick up a flyer outside, they should be on the second table.

Finally, this spring, we'll be publishing Charles Rosenberg's — he was on the first panel — article entitled "Henry Schein and the Archer & White: A Lesson in the Importance of Carefully Drafting an Arbitration Clause." We're also publishing an upcoming lecture by Professor William Park who is an expert in international arbitration, but who is not here today. So, please be on the lookout for these and other forthcoming *BLR* pieces through our website. Thank you. Have a great afternoon and safe travels.

* * *

DISCRIMINATION AS A BUSINESS POLICY: THE MISUSE AND ABUSE OF CORPORATE SOCIAL RESPONSIBILITY PROGRAMS.

MARC A. GREENDORFER*

* Marc Greendorfer received his Bachelor of Arts degree from the University of California, Davis in 1986. He received his Juris Doctor from Benjamin N. Cardozo School of Law in 1996 and is admitted to practice in California and New York and before the United States Supreme Court. He graduated magna cum laude and served as Articles Editor-Submissions of the Cardozo Law Review from 1995 to 1996. After working at AmLaw 100 law firms in New York and San Francisco as a corporate attorney for more than a decade, Mr. Greendorfer founded Tri Valley Law in 2008, a corporate law practice, where he is currently a partner. Mr. Greendorfer is also the founder and President of Zachor Legal Institute, a non-profit legal foundation that produces scholarship on constitutional matters and works to enhance civil liberties and the rule of law. Zachor Legal Institute's website is www.ZachorLegal.org. Mr. Greendorfer's other scholarly papers, including versions of his Supreme Court briefs, are available for download on his Social Science Research Network page, at http://ssrn.com/author=2133013.

I. INTRODUCTION AND SUMMARY

The traditional view of for-profit corporations has been that they exist primarily to serve their shareholders and, more specifically, to maximize the value of the shareholders' investment in the corporation.[1] This norm, often referred to as the shareholder primacy theory or norm,[2] has been the

1. *See* Dan Pontefract, *Should Companies Serve Only Their Shareholders Or Their Stakeholders More Broadly?*, FORBES (May 9, 2016, 11:31 AM), https://www.forbes.com/sites/danpontefract/2016/05/09/shareholders-or-stakeholders/#3a54e1b013d2 (citing the mission statements of numerous organizations that state that their primary purpose is to work for the benefit of their shareholders, but also noting a recent trend toward the use of the term "stakeholder" which refers to all parties whose support is so necessary that the organization would cease to exist without them). Business entities can take any number of forms, including limited liability companies or partnerships. Because this article includes an analysis of state corporation law statutes, only incorporated business entities will be discussed herein. Many other legal principles discussed in this article, including those relating to state and federal anti-discrimination laws, would apply to limited liability companies, partnerships and other business entities as well.

2. *See infra* pp. 301–10.

dominant theory since the earliest days of corporation statutes. While state corporation statutes have not expressly enumerated maximizing shareholder value as the primary objective of corporations, the actions of corporate directors and supporting caselaw in relevant states have repeatedly affirmed that corporations exist for the primary objective of benefitting their shareholders.

In recent years, however, other constituencies, including employees, local governments, environmental advocates and social welfare organizations have succeeded in making claims that they, as non-shareholder stakeholders in corporations, should also be considered when the governing bodies of corporations make decisions on how the corporation operates and whose concerns should be added to deliberations. In contrast to the shareholder primacy theory, this developing doctrine is known as the corporate stakeholder theory.[3]

To bridge the gap between the traditional shareholder primacy norm and the burgeoning calls for corporations to elevate stakeholder interests, corporations have implemented so-called corporate social responsibility ("CSR") programs. In some cases, corporations that were faced with boycotts or other public campaigns in response to incidents, such as environmental disasters or labor abuses, adopted narrow CSR programs to address specific complaints while in other cases CSR advocates, backed by activist investors operating under the mantle of "socially responsible investing" platforms, forced law-abiding corporations to adopt CSR programs under the guise of good corporate citizenship.[4] Socially responsible investing programs can be seen as the means through which activist investors compel corporations to adopt and implement CSR.[5] There is no single agency or organization responsible for the socially responsible investment agenda, but a United Nations ("U.N.") affiliated organization known as the Principles for Responsible Investment ("PRI") is a primary driver of the socially responsible investing movement and has over 1,700

3. *See infra* pp. 310–13.

4. *See* Sheila Bonini et al., *Valuing Social Responsibility Programs*, MCKINSEY & COMPANY (July 2009), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/valuing-social-responsibility-programs (stating that companies have responded to concerns ranging from environmental impacts to obesity by implementing social responsibility programs, and these programs help mitigate risks and allow companies to uphold their end of the social contract they have made with the public).

5. *See* Ronald Paul Hill et al., *Corporate Social Responsibility and Socially Responsible Investing: A Global Perspective*, 70 J. BUS. ETHICS 165, 166–67 (2007) (linking corporate social responsibility and firm financial performance, further stating that investors evaluate firms according to their attention to their important stakeholders).

signatories with over $70 trillion of assets under management as of 2017.[6]

In many ways, the rise of CSR programs can be seen as a logical interim development to help boards of directors balance the need to respond to aggrieved constituencies, on the one hand, with the relative paucity of tools meant to deal with such issues available under corporation statutes, on the other hand. Those who promote CSR programs, however, have myriad agendas, some as benign as ensuring that companies are responsible for pollution emitted into local communities and others acting as a facade for political campaigns that punish targeted groups or entities.[7] In the worst of cases, activists have used CSR programs as cover to promulgate campaigns of racial and national origin discrimination.[8]

Beginning in 2010, in response to the rise of CSR programs, a number of American states formally addressed the need for a new corporate form that tempered shareholder primacy and elevated corporate stakeholder interests by creating a new statutory corporate form that allows shareholders to adopt non-financial objectives for the corporation (these entities are known as "Benefit Corporations").[9] A majority of American states now have some form of Benefit Corporation statute.[10]

---

6. *See generally About the PRI*, PRINCIPLES FOR RESPONSIBLE INV., https://www.unpri.org/about-the-pri (last visited Feb. 9, 2020) (stating that the PRI is a leading advocate for responsible investment and works to act in the long term interests of its signatories and the financial markets in which they operate); *Annual Report 2017*, PRINCIPLES FOR RESPONSIBLE INV. (2017) https://www.unpri.org/download?ac=3976 (providing an overview of the 2017 signatories' activity and assets).

7. *See generally* Pamela N. Danziger, *When Corporate Social Responsibility Veers Into Political Action: Safe Or Sorry?*, FORBES (Mar. 12, 2018, 6:50 PM), https://www.forbes.com/sites/pamdanziger/2018/03/12/when-corporate-social-responsibility-veers-into-political-action-safe-or-sorry/#4fc67b6257d3 (discussing the recent change in corporate responses to political issues which oftentimes now includes contentious social and political activism).

8. *See* discussion *infra* Section V.B.i.

9. *See Certification Requirements*, CERTIFIED B CORP., https://bcorporation.net/certification/meet-the-requirements (last visited Feb. 9, 2020) (outlining the requirements necessary to become a certified B corporation and reviewing that a corporation that is not a statutory benefit corporation could attain benefit corporation status by undergoing B-Lab certification, but the non-benefit corporation code of that company's jurisdiction of incorporation would still govern traditional corporate governance matters); *General Questions*, BENEFIT CORP., https://benefitcorp.net/faq (last visited Feb. 9, 2020) (stating that a benefit corporation is a legal tool that allows organizations to create solid foundations built upon mission alignment and value creation and referencing statutory benefit corporations, rather than similarly labeled organizations that are certified by the non-profit organization B-Lab).

10. *See General Questions*, BENEFIT CORP., https://benefitcorp.net/faq (last visited Feb. 9, 2020) (highlighting active legislation regarding benefit corporations in over half the country, and numerous states are working to implement their own as well).

The question of how an American corporation can adopt and abide by a CSR program containing guidelines that conflict with local and federal American laws is one that has received minimal scholarly attention to this point, a task this article tackles.

This Article provides an overview of the shareholder primacy norm and competing theories of the corporation followed by a brief history of CSR programs in Europe and the United States ("U.S."). This Article then examines whether CSR programs are viable under state corporation law generally and, specifically, under Delaware corporation law, where many publicly traded corporations are incorporated and where a strong Benefit Corporation statute exists. Next, this Article examines how CSR programs have been used to compel corporations into adopting discriminatory policies and how those policies constitute violations of state and federal anti-discrimination laws, putting companies that adopt such CSR programs at risk of legal sanction. Finally, this Article examines the legal risks faced by a corporation that adopts a CSR program that incorporates unlawful discrimination.

II. THEORIES OF THE CORPORATION

Though a full discussion of the history of corporations in the U.S. is beyond the scope of this Article, it is generally acknowledged that private business corporations began forming in the U.S. shortly after the effective date of the Constitution in 1789 and by 1832 the underpinnings of modern American corporation law had been established.[11] The first of what can be described as modern state corporation statutes was enacted in New Jersey in 1888, followed by Delaware in 1899.[12] By the early twentieth century, Delaware's corporation code had become the dominant state code, as it remains today.[13] At present, most corporations are formed pursuant to state

11. *See generally* Douglas Arner, *Development of the American Law of Corporations to 1832*, 55 SMU L. REV. 23 (2002) (noting that early American corporations were formed through the establishment of private articles of agreement and special acts of state legislatures, rather than pursuant to state or federal incorporation statutes, and approximately 350 such corporations were created by 1801); *id.* at 44 (setting the publication of the first treatise on American corporations in 1832 as the beginning of the era of modern American corporations); *id.* at 50 (citing JOSEPH K. ANGELL & SAMUEL AMES, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE (1832 ed., New York: Arno Press 1972)).

12. *See* Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910*, 32 J. CORP. L. 323, 327, 340 (2007) (acknowledging that New Jersey's 1888 statute expressly gave corporations the right to purchase and hold stock in other corporations).

13. *See id*. at 325, 361 (observing that Delaware emerged as the dominant force in the race to have the highest number of companies incorporated within its state borders);

corporation statutes.[14]

Because Delaware is the leading state for incorporations of publicly traded corporations and the corporation code of Delaware, the Delaware General Corporation Law ("DGCL"),[15] is considered the lodestar for American corporate law principles,[16] this article will focus on the DGCL. Moreover, as this article also focuses on corporate legal principles applicable to publicly traded corporations, the DGCL will be deemed to be representative of all state corporation laws, solely for purposes of the legal analysis contained herein.

A corporation is organized by an incorporator who files a certificate of incorporation with the Secretary of State (some states refer to this document as articles of incorporation).[17] The certificate of incorporation can take any number of forms to reflect the founders' reasons for forming the corporation, but it must include the name of the corporation, the name of the incorporator, the address of the registered office of the corporation in the state, the purpose of the corporation (which is frequently nothing more than "any purpose allowed by the DGCL"),[18] and basic details about the capitalization of the

---

Jeffrey W. Bullock, Sec'y of State, *Delaware Division of Corporations 2016 Annual Report*, CORPFILES (2016), https://corpfiles.delaware.gov/2016AnnualReport.pdf (stating that as of 2016, over 65 percent of Fortune 500 companies were incorporated in Delaware and 89 percent of U.S. companies undertaking an initial public offering of securities were incorporated in Delaware). *See generally* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003) (tracing the history of Delaware's rise to prominence among state corporation statutes).

14. *See, e.g.*, KEVIN R. KOSAR, CONG. RESEARCH SERV., RS22230, CONGRESSIONAL OR FEDERAL CHARTERS: OVERVIEW AND ENDURING ISSUES (2013), https://fas.org/sgp/crs/misc/RS22230.pdf (demonstrating the idea that corporations can be formed with congressional or federal charters).

15. DEL. CODE ANN. tit. 8, §§ 101–398 (2019).

16. *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 212–13 (Harv. U. Press, 1996) ("[Delaware's] success comes from its enabling statute, its large body of precedents and sophisticated corporate bar, and its credible commitment to be receptive to corporate needs because of the large percentage of its state revenues derived from franchise fees and taxes."); *see also* Jack B. Jacobs, *Fifty Years of Corporate Law Evolution: A Delaware Judge's Retrospective*, 5 HARV. BUS. L. REV. 141, 145 (2015) (discussing how Delaware has been able to "transform and evolve corporate law into what it has become today").

17. *See How to Form a New Business Entity*, DEL. DIVISION OF CORPS. [hereinafter *How to Form a New Business Entity*], https://corp.delaware.gov/howtoform/ (last visited Feb. 9, 2020) (giving an overview of the incorporation process in Delaware including the "Delaware Incorporation Form").

18. *See, e.g.*, *Certificate of Corporation for Stock Corporation*, DEL. DIVISION OF CORPS., https://corpfiles.delaware.gov/incstk09.pdf (last visited Feb. 9, 2020) (providing a sample certificate of incorporation provided as part of the Delaware Incorporation Form); *How to Form a New Business Entity*, *supra* note 17 (providing additional links and samples for incorporating in Delaware).

corporation, such as how many classes of equity the corporation can issue, preference of those shares, if any, and the number of shares thereof.[19]

After the certification of incorporation has been filed with and accepted by the Secretary of State, the existence of the corporation commences. Thereafter, it is customary for the incorporator to appoint the initial members of the board of directors, adopt bylaws that govern the conduct of the corporation and then resign (thus allowing the newly appointed members of the board of directors to select officers for the corporation), and begin operating the business of the corporation.[20]

Under the DGCL, a business can be formed as either a traditional for-profit corporation where shareholder primacy is the guiding principle ("Traditional Corporation") or as a Benefit Corporation (referred to in the DGCL as a "Public Benefit Corporation").[21] If the corporation is a Public Benefit Corporation, it must include two additional components to its certificate of incorporation: a statement that it is a Public Benefit Corporation and the specific social benefits that the corporation is to provide.[22]

With a Traditional Corporation, unless the certificate of incorporation has specified a corporate purpose, the corporation can conduct any lawful business allowed by the state.[23] A Public Benefit Corporation, on the other hand, is limited under the laws of the jurisdiction of its incorporation to engaging in acts that are in furtherance of the social benefits it was formed to provide. As a result, when compared to a Social Benefit Corporation, a Traditional Corporation might be viewed as having an existential question: if a Traditional Corporation can do anything lawful, what should guide its board of directors in operating the business? The answer to this question can be found in what is known as primacy theory.

---

19. DEL. CODE. ANN. tit. 8, § 102.

20. STEVEN R. GERSZ, LEXISNEXIS ANSWERGUIDE NEW YORK BUSINESS ENTITIES § 5.07 (2018) (stating that incorporators often do not serve on the board but appoint the board soon after filing the certificate of incorporation).

21. *See* DEL. CODE. ANN. tit. 8, §§ 361–368 (governing Public Benefit Corporations).

22. *See id.* § 362(a) (defining a public benefit corporation).

23. *See, e.g.*, Lurie v. Arizona Fertilizer & Chemical Co., 421 P.2d 330 (Ariz. 1996) (finding that certain acts regarding a corporation incorporated to manage hotels and other real property entering into an agreement relating to farming were *ultra vires*). *See generally* Stephen J. Leacock, *The Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom, and Commonwealth Caribbean Corporate Common Law: A Triumph of Experience Over Logic*, 5 DEPAUL BUS. & COM. L.J. 67 (2006) (discussing how a generalized corporate purpose statement is so frequently used and therefore there is a dearth of modern caselaw on corporate actions that violate the stated purpose of the corporation, a doctrine known as *ultra vires*).

A. The Traditional Shareholder Primacy Norm and Duties of Corporate Directors

A century's worth of caselaw has demonstrated that maximizing the value of the shareholders' investment in the company is at the core of each Traditional Corporation's being.[24] In *Dodge v. Ford Motor Co.*,[25] decided in 1919, the court explained the importance of shareholder value maximization:

> [a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.[26]

Nine decades later, in *eBay Domestic Holdings, Inc. v. Newmark*,[27] the Delaware Chancery Court reiterated that this principle continues to govern the conduct of the Traditional Corporation's board of directors:

> The corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. [Its founders] opted to form craigslist, Inc. as a for-profit Delaware corporation and voluntarily accepted millions of dollars from eBay as part of a transaction whereby eBay became a stockholder. Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that. Thus, I cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders—no matter whether those stockholders are individuals of modest means or a corporate titan of online

24. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 681 (Mich. 1919) (memorializing the principle of maximizing the value of the shareholder's investment by finding that the board of directors of a Traditional Corporation that gave preference to benefiting non-shareholder interests over paying dividends to shareholders had breached its duty to the shareholder); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 46 (Del. Ch. 2010) (continuing the trend of maximizing the value of the shareholder's investment into the early part of the twenty-first century by finding that the board of directors of a Traditional Corporation that adopted a plan to deter third parties from making offers to acquire the corporation had breached its duty to shareholders).

25. 170 N.W. 668 (Mich. 1919).

26. *Id.* at 684.

27. 16 A.3d 1 (Del. Ch. 2010).

> commerce . . . . Directors of a for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duties under Delaware law.[28]

The enduring impact and relevancy of *Dodge* in corporate law was noted by Professor Johnathan Macey, who wrote:

> [t]he case is not a doctrinal oddity. *Dodge v. Ford* still has legal effect, and is an accurate statement of the form, if not the substance, of the current law that describes the fundamental purpose of the corporation. By way of illustration, the American Law Institute's ("ALI") Principles of Corporate Governance ("Principles"), considered a significant, if not controlling, source of doctrinal authority, are consistent with *Dodge v. Ford's* core lesson that corporate officers and directors have a duty to manage the corporation for the purpose of maximizing profits for the benefit of shareholders. Specifically, section 2.01 of the Principles makes clear that "a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain." Significantly, the Principles specify that the goal of the corporation is shareholder wealth maximization . . . . Moreover, the ALI expressly emphasizes shareholder wealth rather than corporate wealth, and specifically excludes labor interests as something that should be maximized . . . .[29]

The principle that a Traditional Corporation exists primarily to maximize the value of its shareholders' investments is the essence of what is often referred to as the "Shareholder Primacy Norm."[30] As with so many other corporate law theories, there are a number of variations of the Shareholder Primacy Norm. The two theories that have garnered the most traction are traditional and radical shareholder primacy theories.[31] Professor David

---

28. *Id.* at 34–35.

29. Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 178 (2008) [hereinafter *Commentary on* Dodge v. Ford]; *see* Sec. Exch. Comm'n v. Transamerica Corp., 163 F.2d 511, 517 (3d Cir. 1947) ("A corporation is run for the benefit of its stockholders and not for that of its managers."); *see also id.* (indicating that federal courts have also concluded that the purpose of a corporation is to serve its shareholders rather than other parties).

30. *See* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278 (1998) (defining the Shareholder Primacy Norm as shareholder-centric focus of corporate law found specifically within the law relating to fiduciary duties to make decisions that are in the best interests of the shareholders); *see also* Lyman Johnson & David Millon, *Misreading the Williams Act*, 87 MICH. L. REV. 1862, 1899–1907 (1989) (detailing one of the first formal scholarly expositions on the use of the term shareholder primacy and the substance of that term); David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1014 (2013) (exploring the contours of radical and traditional shareholder primacy theories).

31. *See, e.g.*, Stephen M. Bainbridge, *Corporate Social Responsibility in the Night-*

Millon, a corporate law scholar who is well known for advancing the premise that social welfare should become a corporate duty,[32] has examined both radical and traditional shareholder primacy and, as part of his analysis, posits that under radical shareholder primacy the board of directors can be considered agents solely of the shareholders with a duty to their interests (the maximization of the value of their investments in the corporation) alone.[33] Millon further explains that under radical shareholder primacy it is the duty of the board of directors to maximize short term shareholder returns at the risk of long term returns, if that is what the shareholders choose.[34] With traditional shareholder primacy, on the other hand, the board of directors may act to achieve objectives other than short term shareholder value maximization, such as expanding market share or developing new products that are expected to hurt short term profits but result in longer term enterprise value increases, so long as the primary longer term objective remains providing benefits to shareholders, rather than third parties.[35]

Professor Millon acknowledges that radical shareholder primacy "enjoys broad currency among corporate executives and major shareholders" and is "widely — though not universally — embraced by legal academics"[36] but concludes that there is no legal basis for radical shareholder primacy, while there is for traditional shareholder primacy (and its focus on ensuring that the board of directors focuses on providing benefits to shareholders, rather than to third parties, even if those benefits are not short-term profit

---

Watchman State, 115 COLUM. L. REV. SIDEBAR 39, 41–42 (2015) (citing Leo E. Strine & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335 (2015)) (noting that Justice Strine and Mr. Walter conflate radical and traditional shareholder primacy theories when they discuss "conservative corporate law theory" and also arguing that Strine and Walter overstate the extent to which Citizens United has resulted in corporations externalizing costs to society in general); Millon, *supra* note 30, at 1014.

32. *See* William W. Bratton, *The Separation of Corporate Law and Social Welfare*, 74 WASH. & LEE L. REV. 767, 768 (2017) (highlighting Millon's institutional vision to use corporate law to protect people from the free market).

33. Millon, *supra* note 30, at 1018.

34. *Id.* at 1019 (noting that for many institutional investors, short term returns are of primary importance, and if those shareholders have the requisite vote under the corporation's governing document, they can require the board to forego other matters that the board might otherwise consider, such as employee welfare or long-run sustainability).

35. *Id.* at 1022–23 (distinguishing traditional shareholder primary from radical shareholder primacy by arguing that under the traditional theory, the board of directors are not agents of the shareholders and, in fact, are free to act as they wish subject only to the limitation that they "may not prioritize non-shareholder interests over those of shareholders").

36. *Id.* at 1043.

maximization).[37] In claiming that there is no legal basis for radical shareholder primacy, Professor Millon discusses both *Dodge v. Ford* and *eBay v. Newmark*.[38] Interestingly, when looking at the arc of caselaw traced by these two cases, Professor Millon demonstrates that courts have consistently ruled that in most situations (hostile takeovers being an exception),[39] the board's duty is to maximize shareholder value, but he then argues that radical shareholder primacy theory is nowhere to be found in the text of statutory corporate law.[40] While Millon's statement is literally accurate — corporate statutory law does not explicitly state that short-term profit maximization is the objective that the board must work towards — statutory duties of the board (discussed *infra*), have been consistently interpreted and applied by courts in a manner that is not only consistent with traditional shareholder primacy, but is often also consistent with radical

37. *Id.* at 1044.

38. *See id.* at 1034–35 (emphasizing that shareholder power is not grounded in corporate law, but rather in Delaware corporate law highlights that fiduciary duties are owed to "the corporation and its shareholders").

39. *See generally* Daniel R. Fischel, *Efficient Capital Market Theory, the Market for Corporate Control and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1 (1978). A hostile takeover bid is an unsolicited offer by a third party to acquire control of a corporation from then-existing shareholders that is opposed by the board of directors of the target corporation. The potential acquiror appeals directly to the shareholders, generally offering a premium to the then-current price of the shares being sought. Often, the incumbent board of directors of the target corporation will oppose the bid on grounds that it undervalues the future value of the corporation or otherwise is likely to materially and adversely impact shareholders and third-party stakeholders, such as the communities that the corporation operates in. Delaware courts routinely allow the target corporation's board of directors to recommend against the bid and take defensive measures to thwart the acquisition. *See, e.g.*, Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1152 (Del. 1990) (allowing directors to use defensive measures in response to a merger proposal where an existing corporate transaction that might lead to enhanced long term shareholder value maximization was already under consideration); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (allowing directors to consider the effect of a tender offer on non-shareholder parties); *id.* ("If a defensive measure is to come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed. This entails an analysis by the directors of the nature of the takeover bid and its effect on the corporate enterprise. Examples of such concerns may include: inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally) . . . ."). *Contra* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184–85 (Del. 1986) (holding that defensive measures taken to prevent a hostile takeover that are not considered as measures that also maximize shareholder profit breach the duty of care and are not entitled to deference under the business judgment rule); *see* discussion *infra* note 53.

40. *See* Millon, *supra* note 30, at 1014, 1023 (noting that radical shareholder primacy differs from traditional shareholder primacy, which still claims to privilege shareholders, but is weaker than under the radical version that has no ground in statutory law or common law).

shareholder primacy.[41]

Even in the unusual doctrinal situation of corporate takeover law, where the board of directors is allowed to deviate from radical shareholder primacy, traditional shareholder primacy is still the rule and, as will be discussed in more detail in this Article, there are no cases that say a Traditional Corporation can sacrifice shareholder wealth maximization to further the aims of third parties.[42]

According to Professor Millon, the clear language of *eBay* regarding the board's duty to elevate shareholder interests over external matters should be seen as an anomaly because the opinion does not cite to precedent[43] and it is a case where a board blatantly eschewed profit to pursue a social mission, rather than a more difficult case of a board choosing one form of shareholder benefit over another, such as long term versus short term wealth maximization.[44] This, again, is an accurate analysis of the case, and while Millon may not have intended to do so, and because he shows no case where traditional shareholder primacy and its requirement that the board only work to promote shareholder interests is denigrated in Delaware in favor of non-shareholder interest advocacy, he has bolstered the case for shareholder primacy over corporate stakeholder theory.[45]

Other scholars have explicitly noted that "in no case has the all-important Delaware Supreme Court held that directors will be permitted to prefer the interests of other constituencies over shareholders or that they ought, as a normative matter, to take such interests into account."[46] To put an

41. *See* Jonathan Macey, *Sublime Myths: An Essay in Honor of the Shareholder Value Myth and the Tooth Fairy*, 91 TEXAS L. REV. 911, 917 (2013) [hereinafter *Sublime Myths*] (reviewing LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012)) (noting that the shareholder primacy norm is an ideology, rather than black letter law but "it is an ideology with a basis in reason and in fact."); *id.* at 918–19 (exposing the flaws in Professor Stout's groundless derogation of the shareholder primacy norm); *id.* ("A lot of important legal doctrines, like the corporate opportunity doctrine, the duty of loyalty, and the duty of care are anchored in the shareholder value-maximization model/myth. It would be bad simply to jettison these doctrines because, notwithstanding that they may be grounded in the myth of shareholder primacy, these doctrines reduce managerial pilfering and negligence and make corporations more valuable than they would be if they did not exist.").

42. *See Corporate Social Responsibility*, *infra* note 46 and accompanying text.

43. Millon, *supra* note 30, at 1036.

44. *Id.* (reading the facts of the case narrowly to endorse the shareholder primacy idea in a highly unusual manner).

45. Bratton, *supra* note 32, at 786 (spotting that Professor Millon's colleague concluded "shareholder maximization is confirmed as the firm's theoretical objective function.").

46. Jonathan R. Macey, *Corporate Social Responsibility: A Law & Economics Perspective*, 17 CHAP. L. REV. 331, 344 (2014) [hereinafter *Corporate Social*

exclamation point on the certainty of the shareholder primacy norm, the legendary corporate law scholar and current Chief Justice of the Delaware Supreme Court, Leo E. Strine, explicitly stated that "American corporate law makes corporate managers accountable to only one constituency — stockholders — and that accountability has been tightened because of market developments concentrating voting power in institutional investors and information technology innovations easing communication and joint action among stockholders."[47] Chief Justice Strine predicted that progressive scholars and activists would try to divine exceptions to the shareholder primacy norm in favor of a form of stakeholder theory from Strine's own words,[48] and in a 2017 law review article he rebutted these attempts by referring to the projection of stakeholder theory into Delaware law as "wish-fulfillment" and equating these positions to a "dream world" exercise in arguing what the law ought to be rather than what it actually is.[49]

This is not to say that the board of directors of a Traditional Corporation are utterly handcuffed to the will of shareholders. As long as the board acts in a manner that fulfills its duties to shareholders, it can have wide latitude in making corporate decisions as it sees fit.[50] To wit, a board of directors of a Traditional Corporation is under an obligation to fulfill two general duties to the corporation and its shareholders: the duty of loyalty and the duty of

---

Responsibility].

47. Leo E. Strine, Jr., *Making It Easier for Directors to "Do the Right Thing"?*, 4 HARV. BUS. L. REV. 235, 241–42 (2014) [hereinafter *Do the Right Thing*].

48. Leo E. Strine, Jr., *The Dangers of Denial: The Need for A Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 766–67 (2015) [hereinafter *The Dangers of Denial*] (taking to task those who claim that Delaware statutory and caselaw do not really enshrine the shareholder primacy norm into law by noting that "these commentators argue that the business judgment rule is cloaking a system of law giving directors the ability to act for any reason they deem appropriate. These commentators argue that cases with contrary holdings have simply been misinterpreted and misunderstood. For example, these scholars argue that one of the most important cases in Delaware law history, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, is really a marginally important decision, and that it has been misinterpreted. Indeed, these commentators essentially argue that Delaware judges do not understand the very law they are applying, and the Delaware General Assembly does not understand the law it has created. It is not only hollow but also injurious to social welfare to declare that directors can and should do the right thing by promoting interests other than stockholder interests.").

49. Leo E. Strine, Jr., *Corporate Power is Corporate Purpose II: An Encouragement for Future Consideration from Professors Johnson and Millon*, 74 WASH. & LEE L. REV. 1165, 1174 (2017) [hereinafter *Corporate Power is Corporate Purpose II*].

50. William M. Lafferty et al., *A Brief Introduction to the Fiduciary Duties of Directors Under Delaware Law*, 116 PENN. ST. L. REV. 837, 841–42 (2012) (explaining the general fiduciary duties that the board of directors owe to the shareholders of a company).

care.[51]

Under the duty of loyalty, the board of directors must put the interests of the corporation and its shareholders above any interests of the board, as a whole, or individual directors.[52] Under the duty of care, the board is required to ensure that it makes decisions through a deliberative process where appropriate information is obtained and considered[53] and, as needed, experts are consulted,[54] though there is no expectation that the board of directors will be informed of every fact or make a perfect decision.

Indeed, an entire doctrine known as the "Business Judgment Rule" exists to protect the board of directors of a Traditional Corporation from judicial second-guessing.[55] The Delaware Court of Chancery artfully explained the balancing act between duties of the board and inevitable negative outcomes represented by the Business Judgement Rule in a 2005 opinion:

---

51. *See id.* at 841, 847–48 (stating that there are also ancillary duties that derive from the duties of loyalty and care: the duties of good faith, confidentiality and disclosure); *see also* DEL. CODE ANN. tit 8, § 141(a) (2019) (stating that duties are not statutory; rather, they have been judicially derived from the statutory requirement that the board of directors manage the business and affairs of the corporation); Smith v. Van Gorkom, 488 A.2d 858, 872–73 (Del. 1985) ("Thus, a director's duty to exercise an informed business judgment is in the nature of a duty of care, as distinguished from a duty of loyalty."); MODEL BUS. CORP. ACT § 8.30(b) (AM. BAR ASS'N 2016) ("The members of the board of directors or a board committee, when becoming informed in connection with their decision-making function or devoting attention to their oversight function, shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances.").

52. *See* Lafferty et al., *supra* note 50, at 845 ("In general, the duty of loyalty means that directors of Delaware corporations may not (i) cause the corporation to engage in an interested transaction which is not entirely fair to the corporation; (ii) profit from the use of confidential corporate information; (iii) take any action solely or primarily to entrench themselves in office; or (iv) otherwise place benefits to themselves or to affiliated entities ahead of benefits of the corporation.").

53. *See id.* at 842–43 ("Determining directors' compliance with the duty of care is a fact-specific inquiry. Factors considered by Delaware courts addressing this issue include whether directors (i) are supplied in advance with notice of the purpose of the meeting and documentation describing the essentials of the matters to be considered, (ii) are informed of all developments relevant to the issue under consideration, (iii) conduct extensive discussions with competent and independent legal and financial advisors, (iv) review relevant or key documents or summaries thereof, (v) make reasonable inquiry and receive a knowledgeable critique of the proposal, and (vi) take sufficient time under the circumstances and act in a deliberative manner to consider and evaluate the pending decision.").

54. DEL. CODE ANN. tit. 8, § 146.

55. *See generally* Robert Sprague & Aaron J. Lyttle, *Shareholder Primacy and the Business Judgment Rule: Arguments for Expanded Corporate Democracy*, 16 STAN. J.L. BUS. & FIN. 1 (2010–2011) (describing the history of the business judgment rule and explaining how the business judgment rule does not hold the board of the directors accountable for not maximizing shareholder profits).

> The decision-makers entrusted by shareholders must act out of loyalty to those shareholders. They must in good faith act to make informed decisions on behalf of the shareholders, untainted by self-interest. Where they fail to do so, this Court stands ready to remedy breaches of fiduciary duty.
>
> Even where decision-makers act as faithful servants, however, their ability and the wisdom of their judgments will vary. The redress for failures that arise from faithful management must come from the markets, through the action of shareholders and the free flow of capital, and not from this Court. Should the Court apportion liability based on the ultimate outcome of decisions taken in good faith by faithful directors or officers, those decision-makers would necessarily take decisions that minimize risk, not maximize value. The entire advantage of the risk-taking, innovative, wealth-creating engine that is the Delaware corporation would cease to exist, with disastrous results for shareholders and society alike. That is why, under our corporate law, corporate decision-makers are held strictly to their fiduciary duties, but within the boundaries of those duties are free to act as their judgment and abilities dictate, free of post hoc penalties from a reviewing court using perfect hindsight. Corporate decisions are made, risks are taken, the results become apparent, capital flows accordingly, and shareholder value is increased.[56]

In other words, courts will not substitute their judgement for that which was made by the board of directors so long as the board adhered to their fiduciary duties in making the ultimately unsatisfactory corporate decision.[57] Here, again, we see the court explicitly endorsing the shareholder primacy norm, and charging shareholders, rather than the courts, with the obligation to reward or punish directors for the consequences of their actions. While maximizing shareholder value may not be a statutory duty of the board, it is clearly the governing principle of corporate behavior.[58] Some scholars, acknowledging that the shareholder primacy norm is the guiding principle in American corporate law, note that shareholders can be left without sufficient power to protect their financial interests in a Traditional Corporation due to the breadth of the business judgment rule and the undemocratic nature of the board nomination process (where the board itself selects nominees), both of

56. *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 698 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006).

57. *See id.*

58. *See, e.g.*, Sprague & Lyttle, *supra* note 55, at 3–4 (noting that the interplay of the shareholder primacy norm and the Business Judgment Rule results in the board of directors having an incentive to prioritize short term gains over long term viability of the corporation, for example share repurchases and permissible accounting "tricks" such as accelerating income recognition while deferring expenses, lead to short term share price spikes but have little or no long-term benefits).

which conspire to entrench incumbent directors.[59] While this concern may have validity, it is a critique of established law and a call for future reforms that give sharper teeth to shareholder rights, rather than an argument that the shareholder primacy norm and its directive that a corporation exists to maximize shareholder value are not currently the guiding principle in corporate law. Until such reforms are enacted, the shareholder primacy norm prevails.[60]

It is at this juncture that the interplay of certain state corporation statutes and the shareholder primacy norm may appear to be in conflict. Among the significant deviations from the DGCL in other states' corporation codes is the "constituency statute" concept, which allows a board of directors to consider how decisions will impact third parties, such as employees, local and national economies, and other societal considerations.[61] Importantly,

---

59. *See id.* at 38 ("The shareholder primacy norm remains the 'bedrock principle of U.S. corporate law.' And under the business judgment rule, unless shareholders can rebut the presumption directors were not acting in the best interests of the corporation, those shareholders have no legal recourse against those directors no matter how stupid, egregious, or irrational board decisions may be. Shareholders not only lack recourse in the courts, they lack recourse in the selection and retention of directors."); *see also* Grant M. Hayden & Matthew T. Bodie, *Shareholder Democracy and the Curious Turn Toward Board Primacy*, 51 WM. & MARY L. REV. 2071, 2076–77 (2010); Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 722–23 (2007).

60. *See, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS AND THE PUBLIC 24–25 (Berrett-Koehler Publishers, 2012) (attempting to argue that the shareholder primacy norm does not guide American corporate law theory by conflating prospective policy arguments for replacing shareholder primacy with stakeholder theory with claims that stakeholder theory is, in fact, already the guiding principle); Millon, *supra* note 30, at 1036 (discussing the eBay case and noting that the court ruled in favor of eBay's claim of breach of duty because the board of directors of Craigslist had chosen to "eschew profit in order to pursue a social mission"). *But see* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interests*, 80 N.Y.U. L. REV. 733, 738 (2005) (basing his argument that shareholder wealth maximization is not the guiding principle for the board of directors by noting that boards "have always had some legal discretion (implicit or explicit) to sacrifice corporate profits in the public interests"). This is typical of progressive scholars' arguments against shareholder primacy and it is a hollow argument. An exception on the fringe of a rule, such as the ability of a board of directors to engage in minor acts of social philanthropy with corporate assets, does not vitiate the rule. Just as a board that donates a small amount of corporate profits to, say, a local school, can do so without fear of claims it has breached its duties, a board that managed the corporation in a way that favored giving to local schools over producing returns for shareholders would most certainly run afoul of the applicable corporate law statute of its jurisdiction of incorporation.

61. *See, e.g.*, OHIO REV. CODE ANN. § 1701.59(F) (2019). *See generally* Mark J. Loewenstein, *A New Direction for State Corporate Codes*, 68 U. COLO. L. REV. 453 (1997) (describing the various forms of state constituency statutes); Joseph R. Shealy, *The Corporate Identity Theory Dilemma: North Carolina and the Need for Constructionist Corporate Law Reform*, 94 N.C. L. REV. 686 (2016).

while constituency statutes give directors of a Traditional Corporation discretion to consider non-shareholder interests, they do not vest third parties with legally enforceable rights and do not obligate directors to consider third party interests.[62] Connecticut, prior to amendments to its corporation code in 2010, was one state that required directors of publicly traded corporations to consider third party interests in making decisions relating to business combinations, but that requirement was considered antithetical to traditional theories of the corporation and was eliminated.[63]

Furthermore, while constituency statutes exist, they have rarely been used to support board actions that favor stakeholder theory over shareholder primacy, and it is likely the case that constituency statutes would not survive challenges if a board were to ever use one as a basis for denigrating the financial interests of shareholders in favor of third parties.[64]

Finally, the fact that states have had to enact constituency statutes, and corporations have had to adopt provisions in governing documents (all of which require shareholder approval), to allow for deviations from the shareholder primacy norm reinforces the notion that absent explicit statutory and shareholder action to permit the consideration of third-party stakeholders, American corporate law, and Delaware's in particular, does not allow the board of directors to favor non-shareholder constituencies over shareholders.

B. Stakeholder Theory

Under U.S. corporate law, stakeholder theory is not a legal doctrine other than in several isolated situations, such as Benefit Corporation statutes, states with constituency provisions of their corporate codes (which generally do not apply to publicly traded companies since most such companies are

62. Shealy, *supra* note 61 (arguing policy arguments for and against the implementation of constituency statutes).

63. David A. Swerdloff, *Connecticut Updates Business Corporation Act; Clarifies Director Obligations, Shareholders Rights*, DAY PITNEY LLP (May 17, 2010), https://www.daypitney.com/insights/publications/2010/05/connecticut-updates-business-corporation-act-cla__.

64. *See* Nathan E. Standley, *Lessons Learned from the Capitulation of the Constituency Statute,* 4 ELON L. REV. 209, 223 (2012) (citing Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land*?, 42 LOY. L.A. L. REV. 765, 784 (2009)) ("In the states that have enacted constituency statutes, very few judicial opinions have evaluated and interpreted these statutes. The opinions concerning constituency statutes appear to conform them to the Delaware common law. These courts have hesitated to deviate from the longstanding principle of shareholder primacy, even though state legislatures have enacted statutes that purport to change the longstanding principle. Instead, 'constituency statutes currently function only to the extent that they do not conflict with shareholder primacy.'").

incorporated in Delaware), or in Delaware under the specific circumstance when the board of directors of a Traditional Corporation is defending against a hostile takeover.[65] As a general rule, though, stakeholder theory under U.S. corporate law is nothing more than an aspirational progressive policy goal; something without enforceable legal effect under corporate law.[66]

One example of the few exceptions to the shareholder primacy norm for Traditional Corporations is the allowance for the board to consider third party interests in defense of a hostile takeover attempt (that is, a scenario where a potential acquirer makes an offer to acquire control of a company in spite of the fact that the board of directors is opposed to the potential transaction).[67] While Delaware courts initially indicated that the impact of a transaction on non-shareholder constituencies could be considered by the board of directors when faced with a hostile takeover (known as the "*Unocal* Exception"), subsequent decisions rendered that exception much narrower than originally thought.[68] At this point, while there is still some applicability of the general contours of the *Unocal* Exception for stakeholder theory in Delaware corporate law, it is not at all clear that the doctrine has any practical impact on the incorporation of stakeholder theory into Delaware corporate law.[69]

---

65. *See* Fischel, *supra* note 39, at 30–40; discussion *supra* note 39 (hostile takeover defenses).

66. *See* Andrew Keay, *Stakeholder Theory in Corporate Law: Has It Got What It Takes*?, 9 RICH. J. GLOBAL L. & BUS. 249, 249 (2010) ("Notwithstanding the fact that the United States, United Kingdom, and other Anglo-American jurisdictions regularly embrace shareholder primacy, there are many who feel that some of these jurisdictions are moving towards more of a stakeholder approach to corporate governance."); *id.* (hypothesizing that stakeholder theory may become the corporate law standard in the U.S. in the future, but shareholder primacy occupies that position until such time).

67. *See* Fischel, *supra* note 39 (describing the remedial defense tactics in order to prevent hostile takeover of a corporation).

68. *See* Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 980–84 (1992) (analyzing case law pertaining to structural decisions made by a board of directors in a corporate control contest).

69. *See id.* at 981 (posing, after examining the post-*Unocal* decision of Revlon, Inc. v. MacAndrews and Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986), the hypothetical of a corporate raider making an otherwise fairly valued offer for a company but indicating that she planned to lay off the a large part of the workforce upon consummation of the acquisition, and asking whether under *Unocal* the court would allow the board of directors could determine that the harm to the workforce outweighed the benefits to shareholders.); *id.* (concluding that the board in his hypothetical could not favor the workforce over shareholders and stating that *Revlon* modified *Unocal* in the following ways: "First . . . any management action benefiting stakeholders must produce ancillary shareholder benefits. In other words, directors may only consider stakeholder interests if doing so would benefit shareholders. Second, where a corporate control auction triggering the so-called Revlon duties has begun, stakeholders become entirely irrelevant. Instead, shareholder wealth maximization is the board's only appropriate

Stakeholder theory recognizes shareholders as just one of the many parties that have an interest in a corporation and, as such, must be heard by the directors when corporate decisions are to be made.[70] Under stakeholder theory, constituencies such as employees, the local community, creditors, and even governments[71] constitute the body to which the board of directors is responsible.[72] The board of directors must balance the interests of all stakeholders when making decisions, taking a role that has been described as the mediator for stakeholder interests.[73] As for what comprises the universe of stakeholders, Professor Andrew Keay has reviewed the work of other scholars on this question and concludes that the primary universe of corporate stakeholders is made up of "employees, shareholders, suppliers, financial institutions and lenders, general creditors, customers, the local community, local and national governments, and the environment."[74]

As for what the directors of a stakeholder-oriented corporation should attend to when making decisions, Professor Keay cites to the work of Janice Dean, who proposed the following:

> A director of a public limited company shall in all his/her conduct and decision making so act as to advance the development of the company in the interests of its customers, its employees and its shareholders and with proper regard for the effect of its operations on the environment and on the community. The interests to which a director of a public company should give due consideration include:
>
> - The provision for customers of safe and effective goods and services of good quality at fair prices;
> - The provision for employees of fair remuneration and secure work with reasonable opportunity for their interests to be heard within the company and for their promotion and development of skills;
> - The provision for shareholders of fair returns to remunerate

concern. As such, when the business judgment rule does not apply to insulate the directors' decisions from judicial review, the board will violate its fiduciary duty of shareholder wealth maximization if it considers any interests other than those of the shareholders. In turn, this confirms that the duty to maximize shareholder wealth is the principal obligation of directors, albeit one as to which judicial scrutiny is sometimes barred by the business judgment rule."); *id.* (concluding that, even where Delaware courts provided an opening for stakeholder theory, they quickly narrowed it in favor of shareholder primacy).

70. *See* Keay, *supra* note 66, at 255–56 (explaining stakeholder theory and listing the diverse parties that have an interest in a corporation, stockholders being one of these parties).

71. *See id.* at 257–58.

72. *See id.*

73. *See id.* at 257.

74. *Id.* at 260.

past investment and encourage future investment in the company;

- The provision for key business associates including suppliers of goods and services of secure relationships and ongoing co-operation where such connections offer advantages to both parties;
- The provision for the community of programmes to monitor and minimise the environmental impact of the company's operations and advance responsible conduct towards the company's neighbours.[75]

These prescriptions are at once specific in language yet vague in prescription, to the point of being incapable of implementation.[76] The only way for a board to successfully carry out Dean's menu is to either be micromanaged by some superior power (which does not exist in corporate law) or to have the latitude to alter, ignore, and add to the directives at their core, which would result in the board having the same duties as they would have under the shareholder primacy norm. Professor Keay reaches a similar conclusion, stating that

> [t]he point has been made that stakeholder theory has failed to provide any normative foundations for its justification. In particular, it fails to provide a normative base on which to ascertain who can be a stakeholder and what weight ought to be given to each stakeholder. Consequently, there is no basis for a manager, in running the corporation, to prefer stakeholderism to other moral approaches.[77]

Though stakeholder theory is primarily a policy goal for progressive scholars and activists in the U.S., it is a core principle of corporate law in a number of foreign jurisdictions.[78] In Germany, employees (without having

75. *Id.* at 261–62 (citing JANICE DEAN, DIRECTING PUBLIC COMPANIES: COMPANY LAW AND THE STAKEHOLDER SOCIETY 138 (2001)).

76. *See id.* (explaining that a fair return for shareholders, without further quantification, is a directive without context. Would a fair return be a set number of basis points above long-term U.S. Treasury yields? If so, how would the returns be adjusted for early stage, unprofitable high growth corporations as compared to an established, profitable, low-growth corporation?).

77. *Id.* at 270.

78. *See* Fabian Brandt & Konstantinos Georgiou, *Shareholders vs Stakeholders Capitalism*, COMP. CORP. GOVERNANCE AND FIN. REG. (2016), http://scholarship.law.upenn.edu/fisch_2016/10 (discussing, as case studies, methods used by the U.S. and Germany to mediate the tensions between shareholder interests and stakeholder interests); *see also* PAUL KRÜGER ANDERSEN & EVELYNE J.B. SØRENSEN, THE PRINCIPLE OF SHAREHOLDER PRIMACY IN COMPANY LAW FROM A NORDIC AND EUROPEAN REGULATORY PERSPECTIVE, THE EUROPEAN FINANCIAL MARKET IN TRANSITION (Hanne Birkmose et al. eds., Kluwer Law International, 2011) (analyzing trends in the U.S. and Europe that have promoted increased shareholder influence in corporate decision-making).

to be shareholders of the company) are given a say in matters of corporate governance and are also represented on the boards of directors.[79] Similarly, employees in Japanese companies have broad board representation and stakeholder rights, though this is through immutable custom rather than statute.[80] A full review of the role of stakeholder theory in jurisdictions outside of the U.S. is beyond the scope of this Article, but as a general principle it can be said that stakeholder theory has more of a legal foundation outside the U.S., while shareholder primacy norms prevail to the exclusion of stakeholder theory in the U.S.

III. THE EMERGENCE OF THE CORPORATE SOCIAL RESPONSIBILITY DOCTRINE

As a general concept, CSR can be defined as a set of principles whereby corporations consider the environmental and social impacts inherent in their business activities.[81] The European Union, a leader in CSR implementation, has defined CSR as

> 'the responsibility of enterprises for their impacts on society.' Respect for applicable legislation, and for collective agreements between social partners, is a prerequisite for meeting that responsibility. To fully meet their corporate social responsibility, enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of:
>
> - maximising the creation of shared value for their owners/shareholders and for their other stakeholders and society at large; [and]
> - identifying, preventing and mitigating their possible adverse impacts.[82]

As one would expect for any guideline issued by a bureaucratic committee, the European Union's definition of CSR is exceedingly vague and is phrased more in the manner of an aspirational concept rather than a substantive policy that can be implemented with some level of certainty.

---

79. Mark J. Loewenstein, *What Can We Learn From Foreign Systems? Stakeholder Protection in Germany and Japan*, 76 TUL. L. REV. 1673, 1675–77 (2002).

80. *Id.* at 1686 (noting that as a matter of custom, directors of Japanese corporations tend to be employees or former employees of that corporation).

81. *See* Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011–14 for Corporate Social Responsibility, at 6 COM (2011) 681 final (Oct. 25, 2011), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0681 (elaborating on the European Commission's definition of CSR).

82. *Id.*

A. European Union CSR Guidelines

While not helping to clarify what CSR is, the European Union has stated that its CSR strategy is based on five guidelines and principles consisting of the U.N. Global Compact ("UNGC"), the U.N. Guiding Principles on Business and Human Rights ("UNGP"), ISO 26000 Guidance Standard on Social Responsibility ("ISO 26000"), the International Labour Organization Tripartite Declaration of Principles concerning Multinational Enterprises on Social Policy ("ILO Declaration"), and the OECD Guidelines for Multinational Enterprises ("OECD Guidelines").[83] Because European Union CSR policy strongly influences both CSR advisors and U.S. companies and regulators, a brief overview of the guidelines and principles is presented below.

i. UNGC

The UNGC is a voluntary corporate citizenship initiative of the U.N., intended to promote globalization through leadership, policy dialogue, learning, partnership projects, and outreach activities.[84] The primary parties to the UNGC are governments, companies, labor, civil society organizations, and the U.N.[85] While the operational mechanisms and intended goals of the UNGC are fairly opaque, they have been generally described as "establish[ing] the business case for doing the right thing. By setting examples within its own sphere of influence, it hopes to generate positive impulses that in turn can contribute towards governance and public responses that contribute to a more beneficial relationship between business and society."[86] To accomplish these ends, the UNGC has ten principles: two principles relating to human rights, four principles on labor, three principles on the environment, and one principle on corruption.[87]

83. *Corporate Social Responsibility*, EUR. COMMISSION, http://ec.europa.eu/growth/industry/corporate-social-responsibility_en (last visited Feb. 9, 2020).

84. Georg Kell, *The Global Compact: Origins, Operations, Progress, Challenges*, 11 J. CORP. CITIZENSHIP 35, 35 (2003) (recognizing Mr. Kell as one of the primary architects of the UNGC).

85. *Id.* at 37.

86. *Id.* at 41.

87. *See The Ten Principles of the UN Global Compact*, UNITED NATIONS GLOB. COMPACT, https://www.unglobalcompact.org/what-is-gc/mission/principles (last visited Feb. 9, 2020) (stating that the two human rights principles are businesses should "support and respect the protection of internationally proclaimed human rights" and "make sure that they are not complicit in human rights abuses;" the four labor principles are businesses should uphold "the freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced and compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation;" the three environmental principles are

ii. UNGP

The UNGP are a set of thirty-one principles spread over three categories: the state duty to respect human rights, the corporate responsibility to respect human rights, and victim access to remedies.[88] Among the thirty-one principles are requirements that "[s]tates must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises . . . taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication"; "[b]usiness enterprises should respect human rights . . . they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved"; and "[a]s part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy."[89]

While the UNGP was unanimously endorsed by the U.N. Human Rights Council and nominally applied to all businesses, without regard to size, location, or structure, they explicitly state that "[n]othing in these Guiding Principles should be read as creating new international law obligations . . . ."[90] Of particular interest for purposes of this article is the admonition in the opening to the UNGP: "[t]hese Guiding Principles should be implemented in a non-discriminatory manner . . . ."[91]

The UNGP have been criticized by left-leaning groups for not giving governments compliance and enforcement powers over corporations and instead relying upon businesses to police their own conduct, while others have defended the UNGP as a workable compromise that creates a regulatory framework where public and private governance work together.[92]

---

businesses should "support a precautionary approach to environmental challenges; undertake initiatives to promote greater environmental responsibility; and encourage the development and diffusion of environmentally friendly technologies;" and the anti-corruption principle is businesses should "work against corruption in all its forms, including extortion and bribery").

88. *See generally* United Nations Human Rights Office of the High Comm'r, *Guiding Principles on Business and Human Rights,* HR/PUB/11/4 (2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (providing the language of the thirty-one Guiding Principles on Business and Human Rights, accompanied by commentary).

89. *Id.* at 3, 13, 27.

90. *Id.* at 1.

91. *Id.*

92. *See, e.g.*, Chris Albin-Lackey, *Without Rules: A Failed Approach to Corporate Accountability*, HUMAN RIGHTS WATCH, at 1 (2013), https://www.hrw.org/sites/

iii. ISO 26000

ISO 26000 is a benchmark for CSR developed by the nongovernmental organization International Organization for Standardization ("IOS"). IOS has a long history of using member input to achieve a consensus on the establishment of relevant standards in technology, food safety, healthcare, and manufacturing, as well as other areas.[93] IOS standards are not only used by members, but also are often incorporated into laws and treaties.[94] The U.N. granted ISO general consultative status with the U.N. Economic and Social Council, which allows ISO to participate in U.N. activities, including the right to speak before the U.N. and its constituent bodies. [95]

> IOS describes ISO 26000 as being intended to assist organizations in contributing to sustainable development. It is intended to encourage them to go beyond legal compliance, recognizing that compliance with law is a fundamental duty of any organization and an essential part of their social responsibility. It is intended to promote common understanding in the field of social responsibility, and to complement other instruments and initiatives for social responsibility, not to replace them.[96]

ISO 26000 provides guidance on organizational governance, human rights,

---

default/files/related_material/business.pdf ("Much of the problem lies with companies themselves-even though that think of themselves as ethical. Too many still deal with human rights problems on the fly, without forethought and often in a de factor regulatory vacuum that they lobby vigorously to maintain . . . the lion's share of the responsibility to prevent and address company-driven human rights abuses lies with governments."). *But see,* John Ruggie, *Progress in Corporate Accountability*, INSTIT. FOR HUMAN RIGHTS AND BUS. (Feb. 4, 2013), https://www.ihrb.org/focus-areas/benchmarking/commentary-progress-corporate-accountability_(rebutting Albin-Lackey's criticism, noting that adopting Albin-Lackey's position of international government having unilateral control over business activity would violate national sovereignty and inhibit competition, among other things). John Ruggie developed the UNGP when he was the U.N. Secretary-General's Special Representative for Business and Human Rights.

93. *All About ISO*, INT'L ORG. FOR STANDARDIZATION, https://www.iso.org/about-us.html (last visited Feb. 9, 2020) ("ISO has published 22542 International Standards and related documents, covering almost every industry, from technology, to food safety, to agriculture and healthcare. ISO International Standards impact everyone, everywhere.").

94. JAMES ROBERTS, HOW CORPORATE SOCIAL RESPONSIBILITY (ISO 26000) MANDATES UNDERMINE FREE MARKETS 1, 5 (May 3, 2010), https://www.heritage.org/markets-and-finance/report/how-corporate-social-responsibility-iso-26000-mandates-undermine-free.

95. *Civil Society Participation: International Organization for Standardization,* UNITED NATIONS DEP'T OF ECON. AND SOC. AFFAIRS, http://esango.un.org/civilsociety/consultativeStatusSummary.do?profileCode=468 (last visited Feb. 9, 2020) (indicating that ISO has had general consultative status with the U.N. Economic and Social Council since 1947).

96. *ISO 26000: 2010, Guidance on Social Responsibility*, INT'L ORG. FOR STANDARDIZATION, https://www.iso.org/standard/42546.html (last visited Feb. 9, 2020).

labor practices, the environment, fair operating practices, consumer issues, and community involvement, and development.[97]

Some commentators have warned that while ISO 26000 is a voluntary standard and, unlike other IOS standards, there is no certification possible under ISO 26000, it is nonetheless a push by globalist groups such as Amnesty International, Greenpeace, Oxfam, ActionAid, and Social Watch to force mandatory adoption of the UNGC by implementing CSR through voluntary adoption of IOS standards.[98] Indeed, in 2004, then-U.N. Secretary General Kofi Annan stated

> [l]et me also commend ISO for broadening the scope of its work in the area of social and environmental performance. In this way, too, you are making an important contribution towards a more sustainable world. I welcome, in particular, ISO's recent decision to develop a standard on social responsibility — *an initiative which dovetails well with the universal principles of the U.N. Global Compact on human rights, labour conditions, the environment and anti-corruption*.[99]

iv. ILO Declaration

According to the International Labour Organization, a U.N. agency consisting of employers, employees and governments, the ILO provides "guidelines to [multinational enterprises], governments, and employers' and workers' organizations in such areas as employment, training, conditions of work and life, and industrial relations. Its provisions are reinforced by certain international labour Conventions and Recommendations . . . ."[100] Specific policy guidelines are provided on improving employment opportunities, expanding social security, eliminating forced labor, abolishing child labor,

---

97. INT'L ORG. FOR STANDARDIZATION, DISCOVERING ISO 260000 1, 12–13, https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100258.pdf (last visited Feb. 9, 2020) (outlining the core subjects and issues addressed by ISO).

98. ROBERTS, *supra* note 94, at 5–7 (acknowledging that in many cases CSR can be "discrete, transparent and voluntary, [and] have the potential to make a positive contribution to employees, employers, consumers and investors," Roberts cautions that ISO 26000 is a politically charged mutation of CSR that "seems to recite anew a laundry list of grievances and daunting societal problems facing impoverished, developing countries before establishing vague, all-encompassing, and impossible-to-meet responsibilities to be imposed on each multinational firm, [which is] expected to foot the substantial bills for rectifying the seeming endless list of problems outlined in each ISO 26000 chapter.").

99. Katie Bird, *ISO Standards 'Crucial' to Sustainable Development, Says UN Secretary-General*, INT'L ORG. FOR STANDARDIZATION (Sept. 15, 2004) (emphasis added), https://www.iso.org/news/2004/09/Ref930.html.

100. *ILO Declarations*, INT'L LABOR ORG., https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS_428589/lang--en/index.htm (last visited Feb. 9, 2020).

promoting equal opportunity and treatment, ensuring employment stability and security, and expanding rights to worker organization and collective bargaining. As with other principles and guidelines, the ILO Declaration is not a binding obligation on its own.[101]

v. OECD Guidelines

The OECD Guidelines are a code of conduct for multinational enterprises, establishing non-binding standards of business ethics.[102] Developed by the Organisation for Economic Cooperation and Development, a forum of thirty-six countries that strategizes on economic, social and environmental measures and an observer at the U.N., the OECD Guidelines

> . . . provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards . . . [and] . . . express the shared values of the governments of countries from which a large share of international direct investment originates and which are home to many of the largest multinational enterprises. The Guidelines aim to promote positive contributions by enterprises to economic, environmental and social progress worldwide.[103]

The OECD Guidelines contain general principles on sustainable development, human rights, and compliance with applicable laws and regulations, and more specific guidance on providing useful disclosure on all aspects of the enterprise's activities, respecting and promoting human rights, treating workers fairly (including taking into account the effect of corporate decisions on workers and the community), being good environmental stewards, combatting corruption and other unethical activities, acting in the best interests of consumers, developing technology with a focus on promoting local interests, promptly and fully paying taxes as due, and promoting competition in the market.[104]

B. United States CSR Guidelines

In support of fostering CSR adoption by American corporations, the U.S. government, after consulting with the private sector and other stakeholders,

101. *See generally* Jernej Letnar Cernic, *Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 6 MISKOLC J. INT'L L. 24 (2009) (discussing the non-binding nature of the ILO Declaration).

102. OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 3 (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf.

103. *Id.*

104. *Id.* at 27–56.

published a document in late 2016 known as the National Action Plan.[105] Like the European Union, the U.S. supports the UNGP and the OECD Guidelines.[106] The National Action Plan is comprised of five elements.

The first National Action Plan element, labeled "Leading by Example," speaks to U.S. support for various international initiatives that the U.S. has and will continue to support, such as the Inter-American Convention against Corruption and the OECD's anti-bribery monitoring program.[107] Many of the components of the first element (and the other four elements as well) are vague or simply restate existing U.S. obligations.[108]

The second element, labeled "Collaborating with Stakeholders," describes the U.S. government's efforts to facilitate dialogue and cooperation among businesses and other stakeholders, such as employees and other stakeholders.[109] Examples given of such collaboration are the Fair Labor Association, the Voluntary Principles on Security and Human Rights, and the Extractive Industries Transparency Initiative.[110]

The third element, "Facilitating RBC by Companies," outlines the government's production and dissemination of relevant information to encourage businesses to comply with the CSR programs such as the UNGP and OECD Guidelines.[111] In large part, the information produced under this element is intended to allow U.S. corporations to examine how international business partners are complying with various CSR guidelines, such as

---

105. U.S. Dep't of State, RESPONSIBLE BUSINESS CONDUCT FIRST NATIONAL ACTION PLAN FOR THE UNITED STATES OF AMERICA (2016) [hereinafter NATIONAL ACTION PLAN], https://www.state.gov/documents/organization/265918.pdf.

106. U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., U.S. GOVERNMENT APPROACH ON BUSINESS AND HUMAN RIGHTS 3–5 (2013) [hereinafter 2013 STATE DEPARTMENT REPORT]; *see also* NATIONAL ACTION PLAN, *supra* note 105, at 5.

107. NATIONAL ACTION PLAN, *supra* note 105, at 7–12.

108. *See, e.g.*, Int'l Corp. Accountability Roundtable, *Assessment of the United States National Action Plan (NAP) on Responsible Business Conduct* 2 (2017), https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/58da9da11b10e3e2a234983c/1490722210495/US+NAP+assessment+FINAL.pdf [hereinafter ICAR Critique] (discussing how the absence of significant new, material obligations in the National Action Plan has been noted by a number of international organizations); *id.* ("One negative aspect of the U.S. NAP is that many of the government action points are overly vague, making it difficult to discern the concrete steps the NAP is committing specific government agencies or ministries to take. This difficulty hampers the ability for stakeholders, including internal government actors, to hold responsible government entities accountable for their commitments. Moreover, the NAP is strongly lacking in commitments to new regulatory measures.").

109. NATIONAL ACTION PLAN, *supra* note 105, at 13–16.

110. *Id.* at 13.

111. *See id.* at 17 (stating that the government produces various reports on subjects such as human rights, labor rights, commercial conditions, investment conditions, and company information).

eliminating child labor and complying with anti-bribery standards.[112]

The fourth element, "Recognizing Positive Performance," is a pledge to reward companies that achieve CSR objectives.[113]

The fifth element, "Providing Access to Remedy," reiterates the UNGP requirement of establishing a process by which victims of human rights abuses can petition for redress.[114] The National Action Plan states that the U.S. will continue to support the grievance procedures in the OECD Guidelines and the World Bank's Stolen Asset Recovery Initiative.[115]

Overall, while the National Action Plan sets out a wide range of CSR related goals, it mostly speaks of existing programs with very little in the way of new laws or regulations that would compel CSR activity by U.S. corporations.

C. CSR Compliance by Corporations

CSR compliance is a mix of voluntary adoption of CSR programs by corporations and mandatory reporting on individual corporation performance of specified CSR guidelines. The European Union recently implemented such mandatory reporting obligations on certain publicly traded companies, with the reports being a required element of each company's annual report to shareholders.[116] While the mandatory reporting scheme goes further than any prior regulatory scheme, it is rife with loopholes and has no penalties for non-compliance.[117] Some member-states of the European Union have adopted laws implementing CSR through socially responsible investing initiatives.[118] Belgium, for example, prohibits

112. *Id.* at 8–9, 17–21.

113. *Id.* at 22.

114. *See id.* at 23 (discussing the remedies that victims of human rights abuses can seek).

115. *Id.*

116. Directive 2014/95/EU, of the European Parliament and of the Council of 22 October 2014 on Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups (L 330) 6, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095 (stating that this directive requires public companies that have more than 500 employees to provide information on environmental, social and workers' concerns as well as reports on measures relating to human rights and corruption).

117. Jerome Chapalier, *EU to Force Large Companies to Report on Environmental and Social Impacts*, THE GUARDIAN (Feb. 28, 2014), https://www.theguardian.com/sustainable-business/eu-reform-listed-companies-report-environmental-social-impact.

118. REINHARD STEURER, THE ROLE OF GOVERNMENTS IN CORPORATE SOCIAL RESPONSIBILITY: CHARACTERISING PUBLIC POLICIES ON CSR IN EUROPE 13 (2010), https://www.wiso.boku.ac.at/fileadmin/data/H03000/H73000/H73200/InFER_Discussion_Papers/InFER_DP_10_2_The_Role_of_Governments_in_Coporate_Social_Responsibility_Characterising_Public_Policies_on_CSR_in__Europe.pdf.

investments in companies involved in the production of certain weapons including cluster munitions.[119]

In the U.S., certain CSR principles have been incorporated into a handful of federal[120] and state[121] laws, but for the most part CSR compliance and reporting is entirely voluntary. Indeed, the International Corporate Accountability Roundtable criticized the National Action Plan for being "heavily skewed towards voluntary measures, guidance, trainings, outreach, funding, and dialogue, and is severely lacking in commitments to new regulatory measures . . . ."[122]

i. Trends in CSR Reporting by Corporations

In 2017, KPMG International Cooperative conducted a survey on CSR reporting by the world's largest companies and found that approximately 75 percent of the companies included in the study issue CSR reports of some nature.[123] For companies in the survey that were domiciled in the U.S., the rate of reporting was 81 percent.[124] These data are overall figures based on a general definition of CSR for four subject areas: climate change, U.N. Sustainable Development Goals, human rights, and carbon emissions.[125]

119. *Id.*

120. *See* Securities and Exchange Act of 1934, 15 U.S.C. § 78a (2018) (requiring disclosure of risks related to climate change in filings by companies); 19 U.S.C. § 3901 (2018) (noting that perhaps the best-known law that reflects CSR principles is regulation on "conflict diamonds"); 31 C.F.R. § 537.311 (2016) *repealed by* Exec. Order 13742, 3 C.F.R. § 13742 (Oct. 7, 2016) (discussing that in 1997 the federal government enacted a reporting requirement on investments in, and sanctions on, Burma); Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 1504 (2010) (repealed 2017) (requiring public companies report on payments made to foreign governments in an attempt to curb corruption related to oil, gas and mining activities); Commission Guidance Regarding Disclosure Related to Climate Change, Exchange Act Release No. 33-9106, 34-61469, FR-82, (Feb. 8, 2010).

121. *See, e.g.*, CAL. CIV. CODE §1714.43 (West 2019) (requiring large retailers and manufacturers doing business in the state to disclose how they act to eliminate slavery and human trafficking in their supply chains).

122. ICAR Critique, *supra* note 108, at 8, 13 ("The new action points in the NAP are almost entirely voluntary. Of the new actions only one clearly involves regulation, and it is arguably not a commitment to new action . . . . Apart from this one action, the new commitments in the NAP are heavily focused on providing guidance, tools, trainings, and funding; convening and entering into dialogue with other stakeholders; and continuing to implement existing laws and policies . . . . While these new commitments are welcome, without pairing these efforts with legal demands and mandatory measures on companies, they are insufficient to drive real change.").

123. KPMG INTERNATIONAL COOPERATIVE, *The Road Ahead: The KPMG Survey of Corporate Responsibility Reporting 2017* 4 (2017), https://assets.kpmg/content/dam/kpmg/be/pdf/2017/kpmg-survey-of-corporate-responsibility-reporting-2017.pdf.

124. *Id.* at 22.

125. *Id.* at 2.

Looking solely at companies comprising the Standard & Poor's 500 Index, the Governance and Accountability Institute found that 85 percent of the companies in the index reported on corporate responsibility and sustainability in 2017.[126]

The lack of uniformity in CSR standards, however, renders CSR reporting data *sui generis* in many cases. The *Harvard Business Review* examined this problem and noted that the criteria making up CSR ranking systems have extreme variability not only in what criteria are included, but also how each is weighted.[127] Furthermore, the question of whether criteria have been satisfied is often difficult to answer and the underlying data are often unreliable.[128] In other words, under two different CSR ranking systems the same company could have diametrically opposed results due to the underlying ranking methodology variability. Because of this, it is difficult to accurately assess the impact of CSR programs in a manner that would lead one to be able to determine that one corporation's CSR program is more effective than another corporation's program.[129] Unless and until a uniform system of terms, measurements, and criteria are adopted, CSR ratings will generally have very little practical use.

A uniform system of terms, measurements, and criteria for CSR ratings might look similar to Generally Accepted Accounting Principles ("GAAP") and International Financial Reporting Standards ("IFRS"). By way of comparison, GAAP and IFRS have made the preparation and analysis of financial statements reliable and uniform, facilitating the preparation of accurate financial statements and allowing a wide range of constituencies to examine those statements to understand the financial condition of the reporting corporation.[130] ISO 26000 may be the starting point for a CSR

126. *Flash Report: 85% of S&P 500 Index Companies Publish Sustainability Reports in 2017*, GOVERNANCE AND ACCOUNTABILITY INST., https://www.ga-institute.com/press-releases/article/flash-report-85-of-sp-500-indexR-companies-publish-sustainability-reports-in-2017.html (last visited Feb. 9, 2020).

127. Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, 84 HARV. BUS. REV. 78, 81 (2006).

128. *Id.*

129. *See* N.M. NASRULLAH & M.M. RAHIM, CSR IN PRIVATE ENTERPRISES IN DEVELOPING COUNTRIES EVIDENCES FROM THE READY-MADE GARMENTS INDUSTRY IN BANGLADESH 11 (2014) ("In defining CSR, there is no overall agreement or consensus. There is a lack of an all embracing definition. Moreover, there is no universal definition of CSR. As a result, there remains an uncertainty about what CSR exactly is; how it can be defined accurately or conclusively. The reason may be rooted in its interchangeable and overlapping character with other terminologies . . . .").

130. *See* Daniel Tschopp & Michael Nastanski, *The Harmonization and Convergence of Corporate Social Responsibility Reporting Standards*, 125 J. BUS. ETHICS 147, 147 (2014) (suggesting that the Global Reporting Initiative be the basis for a standardized

analog to GAAP or IFRS, but because it is merely guidance, and has not been uniformly adopted, it is nothing more than a starting point.

ii. How Corporations Implement CSR Programs

On a macro level, it may be difficult to compare CSR rankings among various corporations, but it is possible to conduct useful analysis on corporate CSR compliance when one set of criteria is applied to a sufficient sample size. To this end, third party service providers create CSR compliance methodologies and then apply those methodologies to a wide range of corporations.[131] The reports that are produced from these studies are then used by investors, stakeholders, and governments to measure CSR performance. To illustrate the workings of these third-party CSR reports, this Article will briefly review two of the largest third-party service providers for CSR evaluation:[132] MSCI ESG Research, LLC[133] ("MSCI") and ISS-Ethix[134] ("ISS-Ethix").

MSCI has designed its rankings systems for use by investors who use CSR ratings, in whole or part, to screen potential investments as well as investments already in their portfolios.[135] MSCI ranks a corporation on a scale of AAA to CCC, with AAA being the highest rating and CCC being

CSR reporting mechanism).

131. *What Is a CSR Assessment?*, ECOVADIS, https://www.ecovadis.com/us/csr-assessment/ (last visited Feb. 9, 2020).

132. *See generally ESG Reports and Ratings: What They Are, Why They Matter?*, DAVIS POLK & WARDWELL (July 12, 2017), https://www.davispolk.com/files/2017-07-12_esg_reports_ratings_what_they_are_why_they_matter_0.pdf.

133. MSCI, *ESG Integration*, http://www.msci.com/esg-integration, (last visited Feb. 9, 2020) (noting that MSCI ESG Research LLC ("MSCI") is a subsidiary of MSCI, Inc., a provider of financial market index and portfolio tools).

134. *See* ISS, *Ethix Clients to Receive Integrated Environmental, Social, and Governance (ESG) Solutions*, ISS GOVERNANCE (Sept. 15, 2015), https://www.issgovernance.com/ethix-sri-advisors-acquired-by-institutional-shareholder-services-in-responsible-investment-business-expansion/ (discussing Institutional Shareholder Services, Inc. ("ISS"), acquisition of Scandinavian Ethix SRI Advisors AB in 2015 and subsequent renaming to ISS-Ethix); *What Sets ISS Apart*, ISS GOVERNANCE, https://www.issgovernance.com/about/about-iss/ (stating that ISS is the largest domestic and global proxy advisory, specializing in providing institutional investors with advice on corporate governance and shareholder voting matters); *see also* James R. Copland et al., *The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry*, ROCK CENTER FOR CORPORATE GOVERNANCE AT STANFORD UNIVERSITY CLOSER LOOK SERIES: RESEARCH PAPER NO. 18-27 (2018), https://ssrn.com/abstract=3188174.

135. *ESG Ratings Methodology: Executive Summary*, MSCI (Feb. 2017) (noting how raw data are collected, reviewed under specific CSR criteria, and ultimately rated on a defined scale) (obtained by the author anonymously from MSCI in researching this article) (on file with author).

the lowest.[136] Ratings are not absolute; rather, they are determined relative to the performance of corporations that are deemed to be industry peer corporations.[137] Each corporation is ranked on thirty-seven key CSR issues[138] that roll up into one of three categories: Environmental, Social, or Governance.[139] Here, it should be noted that MSCI does not include a "human rights" category, yet, as will be demonstrated later in this Article, activists who misuse CSR standards often base their discriminatory goals on the claim that illusory human rights norms are being violated.[140] Using publicly available data, media reports, and specialized datasets, MSCI first assigns a raw score for each CSR issue for a given corporation, and then each issue is assigned a weight, and a weighted average score is determined. The weighted average scored is then normalized within each industry and using a three-year average for all members of a particular industry, a corporation's rank (AAA to CCC) is calculated to show investors how the corporation compares to its peers in each of the thirty-seven categories. Throughout the process, subject corporations are invited to provide feedback on the facts contained in each report.

ISS-Ethix also uses a proprietary CSR ranking methodology. For purposes of this Article, the focus will be on the type of ranking related to what ISS-Ethix calls "Norms-Based Research."[141] Norms-Based Research reflects the principles in the UNGC and covers over 15,000 publicly traded corporations.[142] Through Norms-Based Research, ISS-Ethix investigates allegations that a corporation has violated UNGC principles and uses two inter-related ranking systems.[143] The first system consists of a "traffic light" spectrum, where red represents a verified failure to abide by the applicable

136. MSCI, *ESG Ratings*, https://www.msci.com/esg-ratings (last visited Feb. 9, 2020).

137. *See* ERIC MOEN, MSCI ESG RATINGS 3 (2018), https://www.msci.com/documents/1296102/1636401/MSCI+ESG+Rating+Brochure-V3.pdf/f2b4a27a-58f5-42c7-880b-cf8201039eaa.

138. Included in the thirty-seven key CSR issues are carbon emissions, toxic waste emissions, land use, labor management, product safety, business ethics, and corruption.

139. Within the Environmental category are climate change, natural resources, pollution and waste and environmental opportunities. Within the Social category are human capital, product liability, stakeholder opposition, and social opportunities. Within the governance category are corporate governance and corporate behavior.

140. *See infra* pp. 340–41; *see* discussion *infra* Section V.B.ii.

141. ISS-ETHIX, AN INTRODUCTION TO NORM-BASED RESEARCH (June 2017), https://www.issgovernance.com/file/products/ISS-Ethix-Norm-Based-Research-Methodology-Process.pdf?elqTrackId=380c3f4392324ff7a06f5d173491355c&elq=69d0f1c2d6fa403298d5aaecb7982606&elqaid=669&elqat=1&elqCampaignId=.

142. *Id.*

143. *Id.*

norm and green represents no current failure to abide by the applicable norm.[144] The second system is a score between one and ten, corresponding to the traffic light spectrum between red and green.[145] A numerical score of ten represents the highest level of a failure to abide by a norm while a score of one represents no allegations that the norm has been violated.[146] Thus, if a company is given a ranking of amber/5, it ranks in the middle of the failure to abide by a norm spectrum and is said to be "under observation."[147] A company given a ranking of green/1 is not alleged to have violated a norm, while a company with a red/10 ranking has a verified failure to abide by an established norm.[148]

ISS-Ethix begins its evaluation by monitoring over 4,000 publicly available sources of what it deems "controversial corporate news" for potential violations of the UNGC or the OECD Guidelines within either the Human/Labor Rights, Labor Standards, Environment, or Anti-Corruption categories.[149] Once a potential violation has been detected, ISS-Ethix determines the nature of the violation (whether it is severe, systematic, or systemic) and the level of complicity for the subject company.[150] From there, ISS-Ethix confirms that the alleged violation is of a recent date and then determines whether there has been reliable information provided to support the allegation of a violation.[151]

By way of example, one of the norms ISS-Ethix ranks companies on is "failure to respect the right to self-determination," which ISS-Ethix says is rooted in UNGC principles and OECD Guidelines IV.[152] To determine whether this norm has been violated by a company, ISS-Ethix looks into whether the company "benefit[s] from the suppression of a people's rights, when this people is under colonial or comparable rule (such as indigenous groups, a population under occupation).[153] This category applies *when a company is complicit in the dispossession of these peoples.*"[154] Similarly, the norm of "forced displacement" will be deemed to have been violated if a there is "forced displacement of communities to *make way for a large scale*

144. *Id.* at 1–2.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 3.
150. *Id.* at 7.
151. *Id.* at 7–8.
152. *Id.* at 16.
153. *Id.*
154. *Id.* (emphasis added).

project the company is involved in."[155] It is crucial to note here that for these two human rights norms, the company itself has to be complicit in the purported violation of human rights.[156] If a third party, including a government, is the party allegedly violating human rights, a company operating in the midst of the locale would not be complicit without some form of tangible action between the government and the company, such as would be the case if a company lobbied a government to displace indigenous people to allow the company to build a dam on the land traditionally occupied by such people.[157] This point becomes particularly relevant in the section of this Article titled "CSR Programs that Advance Discriminatory and Unlawful Initiatives: A Case Study."[158]

D. Can CSR Co-exist with the Shareholder Primacy Norm?

On its face, CSR, as the embodiment of stakeholder theory, would seem to be incompatible with the shareholder primacy norm, especially under the radical expression of the norm. This result is mandated only if one rigidly views CSR as requiring the board of directors of a Traditional Corporation to subordinate shareholder interests to the social responsibility agenda. In fact, though, it is possible, at least theoretically, for CSR to exist as a secondary consideration of the board, one that is considered only to the extent it does not interfere with the board's obligation to maximize shareholder value.

In jurisdictions outside of the U.S. where the shareholder primacy norm is not the controlling theory, it is certainly possible for CSR to thrive as a corporate policy that takes precedence over maximizing shareholder wealth, even at corporations with publicly traded securities. Scholars at the Institut Européen d'Administration des Affaires recently published a paper examining the possibility of how CSR could be implemented in a way that does not violate shareholder primacy norms.[159] One theory covered in that paper resulted in "the integration of social, ethical, and ecological aspects into business operations and decision-making, *provided it contributes to the financial bottom line*."[160] The Article examines CSR in the context of a

155. *Id.* (emphasis added).

156. *Id.* at 7.

157. *Id.*

158. *See infra* Section V.B.i.

159. *See* N. Craig Smith & David Rönnergard, *Shareholder Primacy, Corporate Social Responsibility, and the Role of Business Schools*, 134 J. BUS. ETHICS 463, 463 (2016) (advocating for the extension of fiduciary duties and changes in business school teaching).

160. *See id.* at 464 (citing M. Van Marrewijk, *Concepts and Definitions of CSR and Corporate Sustainability: Between Agency and Communion*, 44 J. BUS. ETHICS 95, 102

system where shareholder wealth maximization constrains the board of directors of a Traditional Corporation and notes that this expression of the shareholder primacy norm necessarily relegates CSR initiatives to a strategic role, where CSR must satisfy a "business case" that results in shareholder wealth appreciation, rather than the provision of benefits to non-shareholder constituencies.[161]

Other scholars have proposed theories under which a Traditional Corporation's board of directors can fulfill their duties to the corporation and shareholders while still advancing a CSR agenda that conflicts with the shareholder primacy norm. One of the leading scholars promoting this view is Professor Lynn Stout, who argues that not only is the traditional understanding of the shareholder primacy norm requiring the board to maximize shareholder value a fiction, but it is also harmful to corporations and shareholders.[162] Professor Stout deems the wealth maximization language in *Dodge v. Ford* and its progeny "mere dicta"[163] and tries to explain away decades of judicial opinions and scholarly works that build on this language with distinctions that are nothing more than a scholarly dance upon the head of a pin. For example, Professor Stout claims that the *Revlon* doctrine is an exception, rather than the rule, when it comes to shareholder wealth maximization and goes on to counter the established understanding of board conduct by asserting that a board of directors can essentially waste corporate assets under the protection of the business judgment rule in all cases other than one where a public company is being taken private:

> As long as [directors] do not take those assets for themselves, they can give them to charity; spend them on raises and health care for employees; refuse to pay dividends so as to build up a cash cushion that benefits creditors; and pursue low-profit projects that benefit the community, society, or the environment. They can do all these things even if the result is to decrease—not increase—shareholder value.[164]

Professor Stout, here, engages in what Chief Justice Strine described as dream world "wish-fulfilment" (with the dream being progressive stakeholder theory supplanting the shareholder primacy norm).[165]

Professor Thomas Clarke similarly has argued that concerns such as

(2003)) (emphasis added).

161. *Id*. at 465.

162. *See* STOUT, *supra* note 60, at 24–32, 48.

163. *Id.* at 26.

164. *Id.* at 31.

165. *The Dangers of Denial*, *supra* note 48*; see also Sublime Myths*, *supra* note 46 (disagreeing with the substance of Professor Stout's arguments and pointing out that she makes a fundamental error in describing shareholder primacy as law, and further defending the shareholder primacy ideology as well-based in law and tradition).

climate change have broadened the scope of the duties of the board of directors of a Traditional Corporation to the point that a "reevaluation of fiduciary duty is presently taking place and will prove to be profound."[166] To support this position, Professor Clarke argues that climate change is not just an environmental concern for certain groups, it can have a direct impact on the financial condition of a company if that company has not prepared to mitigate the risks inherent in climate change theory.[167] To that end, Professor Clarke argues, a board of directors that manages the corporation to minimize the corporation's contributions to climate change will help the corporation to minimize the costs it incurs to remediate those contributions and avoid regulatory penalties, all of which work to increase shareholder wealth.[168]

Ultimately, however, the position that board actions that ignore shareholder wealth maximization in favor of the promotion of third-party stakeholder interests are a proper corporate goal is a fringe, aspirational position, rather than a reflection of what the law and weight of scholarship articulate.[169]

The esteemed economist, Milton Friedman, provided the most succinct theory of the corporation and strongly implied that CSR has no place in a traditional corporation other than as a means to the end of wealth maximization: "In [a free economy] there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game . . . ."[170] Nonetheless, there is a perverse accuracy to the position

166. Thomas Clarke, *The Widening Scope of Directors' Duties: The Increasing Impact of Corporate Social and Environmental Responsibility*, 39 SEATTLE U. L. REV. 531, 570 (2016).

167. *Id.*

168. *Id.* at 549, 570 (emphasizing the financial and strategic importance of board action on environmental matters that include pollution prevention resulting in lower costs and sustainability, help to pre-empt competitors, and position the company for future growth).

169. Citizens United v. FEC, 558 U.S. 310, 365, 372 (2010) (finding that corporate funding of political messages is protected by the First Amendment); *see* Leo E. Strine & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 390 (2015) (noting how Citizens United has been inaccurately described as giving personhood rights to corporations and that if the case is read to provide corporations with rights of natural persons, it should also impose on them the corresponding social obligations of natural persons, which would support the stakeholder theory over the shareholder primacy norm). *But see* Bainbridge, *supra* note 31, at 40–41 (noting that Citizens United has not unmoored corporations from regulatory oversight as Strine argued and moreover, corporate law theory still favors shareholder primacy over CSR).

170. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (University of Chicago Press, 40th Anniversary ed. 2002).

espoused by Professor Stout. While there is no question that the shareholder primacy norm precludes the implementation of CSR other than as a strategy to increase shareholder wealth, as a practical matter courts tend to take a passive approach to board abdication of their duties, often relying on shareholders to provide redress through director elections and applying the business judgment rule so broadly as to rubber-stamp virtually all board action. While the fact that courts have been hesitant to hold directors accountable for their wrongful elevation of CSR principles above shareholder interests does not vest that practice with any legal foundation, it is also true that in many applications the business judgment rule serves as an uncodified judicial loophole allowing a board to divert corporate assets to third parties so long as the board action can be justified as being reasonable at some de minimis level.[171]

If courts have been reluctant, absent statutory guidance, to second guess boards to determine when CSR activity crosses into murky corporate law waters, one established method that courts have used to decide similar questions, and that could apply in the context of questionable CSR activity, is the doctrine of corporate waste.

The traditional definition of corporate waste is a transaction where "what the corporation has received is so inadequate in value that no person of ordinary, sound business judgment would deem it worth what the corporation has paid."[172] While claims of corporate waste have been made for a wide range of matters, the most typical subjects of the claims are excessive compensation, charitable donations, and political contributions.[173]

171. *See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 74 (Del. 2006) ("[W]here the business judgment [rule] presumptions are applicable, the board's decision will be upheld unless it cannot be attributed to any rational business purpose.") (internal quotation marks omitted)*; see also* Bernard S. Sharfman, *The Importance of the Business Judgment Rule*, 14 N.Y.U.J.L. & BUS. 27, 62 (2017) (explaining how scholars such as Professor Stout advance extremist theories that use the business judgment rule to protect directors who undermine the rights of shareholders in favor of non-shareholder constituencies); Lori McMillan, *The Business Judgment Rule as An Immunity Doctrine*, 4 WM. & MARY BUS. L. REV. 521, 535, 571 (2013) (arguing that because the business judgment rule is not codified, it has become amorphous as a legal standard and even puts the burden on plaintiffs, rather than directors as defendants, and positing that the proper implementation of the rule would require directors to first establish that they have met the preconditions to the rule before being allowed to claim it for immunity, essentially shifting the burden to directors, rather than aggrieved shareholders); Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 128 (2004) (contending that the business judgment rule is actually a doctrine that has allowed courts to abstain from reviewing director action, rather than review that action to determine whether it was made with the requisite process to establish that the board was acting for legitimate and rational business purposes).

172. Saxe v. Brady, 184 A.2d 602, 610 (Del. Ch. 1962).

173. Harwell Wells, *The Life (and Death?) of Corporate Waste*, 74 WASH. & LEE L.

The most logical analog to CSR initiatives of the three classic examples of corporate waste would be charitable donations, and it is here that a workable limitation on CSR activity can be discerned. In the typical case, a corporate charitable contribution will be found to not constitute corporate waste if it is "reasonable."[174] This is, on its own, a nearly useless definition due to the numerous possible definitions of "reasonable," but Delaware courts provided specific guidance when they tied the determination of "reasonable" to the amount of the contribution that the corporation could deduct under the federal tax code.[175] The import of this is to demonstrate that while charitable giving in general is motivated by altruism, for a corporation, charitable giving has to be tied to a tangible and quantifiable financial benefit that the corporation and its shareholders receive.[176] A similar standard should be assumed to exist with regard to CSR (as the shareholder primacy norm would require).

Furthermore, if a board of directors of a Traditional Corporation were to commit the company to a CSR program that effectively used company assets to advance the board's own desires to promote causes without shareholder ratification, a claim of conversion could be colorable. Under Delaware law, "the necessary elements for a conversion . . . are that a plaintiff had a property interest in the converted goods; that the plaintiff had a right to possession of the goods; and that the plaintiff sustained damages."[177] Conversion in Delaware has also been described as "any distinct act of dominion wrongfully exerted over the property of another, in denial of [the plaintiff's] right, or inconsistent with it."[178] While it may be unprecedented for a shareholder to claim that the board of directors of a Traditional Corporation has tortiously converted the corporation's assets for the director's own benefit by adopting a CSR program, it would not be without legal foundation. Delaware law restricts tortious conversion claims to situations where the property does not consist of cash and further limits claims that are associated with contract rights (requiring that the plaintiff's right to the property arose from an obligation not governed by that contract, as such a claim would be based on a theory of breach of contract, rather than

---

REV. 1239, 1249–50 (2017).

174. Theodora Holding Corp. v Henderson, 257 A.2d 398, 405 (Del. Ch. 1969).

175. Kahn v. Sullivan, 594 A.2d 48, 61 (Del. 1991).

176. *See Theodora Holding Corp.*, 257 A.2d at 405 (explaining that when looking at the reasonableness of a charitable donation by a corporation the IRS deduction limitation is a helpful guide).

177. Goodrich v. E.F. Hutton Grp., Inc., 542 A.2d 1200, 1203 (Del. Ch. 1988).

178. Drug, Inc. v. Hunt, 168 A. 87, 93 (Del. 1933).

conversion).[179] Obligations and duties of the board of directors of a Traditional Corporation are governed by statute and common law, except in the specific circumstances where a contract right is asserted,[180] so if the shareholders could demonstrate that the complained-of CSR program constituted an act of dominion by the board of directors that was inconsistent with the rights the shareholders had in corporate assets, a conversion claim would be viable.

What this means for CSR programs at Traditional Corporations is that where a CSR initiative can be shown to either have no material negative effect or is reasonably expected to have an overall benefit to the value of shareholder investments in the corporation, that company's directors are on firm legal footing in adopting the initiative. The decision, however, cannot be based on mere speculation or attenuated theories that depend on magical thinking or a horizon of such indeterminate duration as to make the results of the action impossible to determine.[181]

By way of example, the board of directors of an automobile manufacturer might review a plan to introduce a new type of vehicle that is claimed to have significant environmental benefits. There will be significant start-up costs for the new vehicle line, but based on deliberative market research and financial analysis, the board is informed that within a set and realistic timeframe the new vehicle division is expected to have sales that provide sufficient revenue to pay the start-up expenses and achieve a level of profitability that is at least as substantial as could have been achieved through other investments of corporate assets. In such a case, even though a component of the board's decision was for the benefit of non-shareholder constituencies, the board will not have violated their duties to the corporation and its shareholders.

---

179. Kuroda v. SPJS Holdings, L.L.C., 971 A.2d 872, 889–90 (Del. Ch. 2009) (dismissing conversion claim that was duplicative of breach of contract claim); *see also* Khushaim v. Tullow Inc., No. N15C-11-212-PRW, 2016 WL 3594752, at *21–23 (Del. Super. Ct. 2016).

180. For example, some corporations are bound by agreements with shareholders relating to when and how the shareholders can sell stock issued by the corporation. If the board of directors of the corporation were to violate the terms of a shareholders' agreement in a manner that deprived the shareholder of property rights, it would be a situation where both a conversion and a breach of contract claim might stand. *Kuroda*, 971 A.2d at 889–90 (highlighting that although the defendant was an LLC rather than a corporation, the legal principles on conversion and breach of contract claims against a business entity are equally applicable).

181. *See* Parnes v. Bally Entm't Corp., 722 A.2d 1243, 1246 (Del. 1999) ("The presumptive validity of a business judgment is rebutted in those rare cases where the decision under attack is 'so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.'").

Contrast the foregoing example with a decision by the board of directors of that same automobile manufacturer to refuse to do business with a country that is one of the company's prime markets but is under attack by environmental activists for contributing to environmental harms. The board has been pressured by activists to divest from and refuse to conduct business in the country with the theory that if put under enough economic pressure, the country will change its way. If the company does as the activists' demand, it will lose ten percent of global automobile sales and it will also incur higher costs to relocate manufacturing and research facilities from that country to one that is not being targeted by activists. The only business justification given to the board of directors for adopting the CSR initiative to blacklist the country is that such action might bolster the company's reputation among consumers who are environmental activists and, at some point in the future, if the campaign is successful, the country will reduce the harm it causes to the environment, which might provide benefits to a wide range of non-shareholder constituencies. These considerations are entirely speculative, as opposed to the sum-certain costs to the company of lower sales and relocation expenses. In this case, if the board nonetheless adopts the CSR initiative, it will have violated its duties to the corporation and its shareholders.[182]

IV. BENEFIT CORPORATIONS AND THE FUTURE OF CORPORATE SOCIAL RESPONSIBILITY PROGRAMS.

As adoption of CSR programs has expanded, states realized that there was a need for a corporate structure to fill the gap between non-profit corporations and Traditional Corporations. The co-founder of B Lab,[183] a leader in the Benefit Corporation movement, summarized the problem as:

> [c]urrently, individuals and groups seeking to establish organizations with a public mission can either organize themselves as not-for-profit corporations, or use a traditional for-profit corporate form. In the case of non-profits, there are numerous restrictions on the nature of their activities, and non-profits are thus extremely limited in their ability to attract capital to allow them to achieve their mission at scale. In the case of traditional for profit corporations, such businesses are generally required under the current statutory and case law to be conducted for the benefit of the shareholders to whom the directors owe a fiduciary duty to maximize shareholder value, thus limiting their ability to consider the

182. *See supra* notes 24–36 and accompanying text (deciding to take action that is not going to directly maximize shareholder value of in the corporation).

183. *See* discussion *supra* note 134 and accompanying text (discussing B Lab).

interests of their employees, communities, or the environment.[184]

A. Overview of Benefit Corporation Status.

The Benefit Corporation first came into existence in the U.S. in late 2010 when the State of Maryland[185] used a Model Benefit Corporation code produced in connection with the non-profit B Lab[186] to create a new, hybrid entity that at once could pursue social benefits, much like a non-profit corporation, while still working to provide profits to its shareholders.[187]

In certain basic ways, Benefit Corporations and traditional corporations (both for-profit and non-profit) share a common core in that they are all creatures of state corporation codes. To wit,

> [t]he benefit corporation laws of each state position the benefit corporation statutory regime within the context of the state's general corporations law, unlike the flexible purpose corporation (FPC), which has been adopted as a standalone entity with no necessary relationship to the general corporations law. This is advantageous for the benefit corporation because it allows each state's body of corporate governance law—most of which is useful to the operation of any business—to still apply to benefit corporations. Moreover, it allows the benefit corporation's body of corporate governance law to interact with and, to the extent that they are consistent, be updated by the cases and developments in other areas of the state's corporate governance law. While the benefit corporation statute is new, and therefore inheres some legal risk in the uncertainty of how courts will interpret the statute, there is, arguably, comparatively much less risk

---

184. Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures,* 62 EMORY L.J. 999, 1012 (2013) (quoting Jay Coen Gilbert, Remarks on White/Leach Benefit Corporation Bill upon Introduction to the Pennsylvania State Senate 1 (Feb. 7, 2011)).

185. *FAQ*, B LAB (Mar. 9, 2019, 2:15 PM), https://benefitcorp.net/faq.

186. *See generally* MODEL BENEFIT CORPORATION CODE (B LAB 2017) [hereinafter MODEL BENEFIT CORPORATION CODE] https://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation_4_16.pdf.

187. *See About B Lab*, FLYNNER DESIGN + BUILD, http://www.flynnerhomes.com/about-us/bcorp (last visited Aug. 18, 2019) ("[A] nonprofit organization dedicated to using the power of business to solve social and environmental problems. B Lab drives systemic change through three interrelated initiatives: 1) building a community of Certified B Corporations to make it easier for all of us to tell the difference between 'good companies' and just good marketing; 2) accelerating the growth of impact investing through use of B Lab's GIIRS Ratings and Analytics platform; and 3) promoting legislation creating a new corporate form – the benefit corporation – that meets higher standards of corporate purpose, accountability, and transparency."); *see also The Model Legislation*, BENEFITCORP, https://benefitcorp.net/attorneys/model-legislation (last visited Aug. 18, 2019) (explaining that a Benefit Corporation is formed under state law, totally unrelated to B Lab, though the model legislation that is the basis for most Benefit Corporation legislation was promulgated in connection with efforts by B Lab).

> than in an FPC because the benefit corporation statute still sits upon the bedrock of the remainder of the corporate governance laws.[188]

While a Benefit Corporation is also a for-profit corporation, it differs from a Traditional Corporation in that the shareholder primacy norm has been statutorily written out of its governance. Instead of focusing on maximizing shareholder value, the board of directors of a Benefit Corporation is required to consider the effects of its decisions on a range of constituencies that can include employees, suppliers, customers, communities, society as a whole, and the environment.[189]

The drafters of the Model Benefit Corporation Code saw the duty to maximize profits as a relic of Traditional Corporation corporate governance and acted to unshackle Benefit Corporations from solely pecuniary goals and explicitly rejected shareholder primacy caselaw such as *Dodge v. Ford Motor Co.* and *eBay v. Craigslist*.[190] The comment to Section 301(a)(1) of the Model Benefit Corporation Code states:

> [t]his section is at the heart of what it means to be a benefit corporation. By requiring the consideration of interests of constituencies other than the shareholders, the section rejects the holdings in *Dodge v. Ford* . . . and *eBay Domestic Holdings, Inc. v. Newmark* . . . that directors must maximize the financial value of a corporation.[191]

While a Traditional Corporation usually has few limitations on corporate purpose, a Benefit Corporation is, by its nature, required to fulfill prescribed corporate goals. A Benefit Corporation is limited to creating a general public benefit, typically defined as "[a] material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit corporation taking into account the impacts of the benefit corporation as reported against a third-party standard."[192] In addition to the general public benefit purpose, a Benefit Corporation can list additional specific purposes, and the Model Benefit Corporation Code lists the following as possible specific purposes:

> (1) providing low-income or underserved individuals or communities with beneficial products or services;
> (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;

---

188. Westaway & Sampselle, *supra* note 181, at 1033.

189. Model Benefit Corp. Code § 301(a)(1) (B Lab 2017).

190. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 684–85 (Mich. 1919) (requiring a corporation to distribute excess profits to shareholders); *see also* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33–34 (Del. Ch. 2010) (rejecting the notion that the corporation can put aiding communities over shareholder value).

191. Model Benefit Corp. Code § 301 cmt.

192. *Id.* § 102.

(3) protecting or restoring the environment;
(4) improving human health;
(5) promoting the arts, sciences, or advancement of knowledge;
(6) increasing the flow of capital to entities with a purpose to benefit society or the environment; and
(7) conferring any other particular benefit on society or the environment.[193]

To further distance the Benefit Corporation from the shareholder primacy norm, "[t]he Model [Benefit Corporation Code] explicitly states that '[t]he creation of a general public benefit and specific public benefit . . . is in the best interests of the benefit corporation.' *This serves to protect against the presumption that the financial interests of the corporation take precedence over the public benefit purposes*, which maximizes the benefit corporation's flexibility in corporate decision-making."[194]

Not only does a Benefit Corporation have to specify in its certificate of incorporation the benefits that it is obligated to perform, but it must also provide an annual report on its progress in performing those benefits[195] that includes an analysis of the Benefit Corporation's performance of its social benefit goals compared to a third-party standard for performance. The comments to the Model Benefit Corporation Code's definition of "third-party standard" describes the obligation as follows:

> The requirement in section 401 that a benefit corporation prepare an annual benefit report that assesses its performance in creating general public benefit against a third-party standard provides an important protection against the abuse of benefit corporation status. The performance of a regular business corporation is measured by the financial statements that the corporation prepares. But the performance of a benefit corporation in creating general or specific public benefit will not be readily apparent from those financial statements. The annual benefit report is intended to permit an evaluation of that performance so that the shareholders can judge how the directors have discharged their responsibility to manage the corporation and thus whether the directors should be retained in office or the shareholders should take other action to

193. *Id*.

194. William H. Clark & Larry Vranka, *The Need and Rationale for the Benefit Corporation: Why it is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public*, BENEFITCORP 17 (2013), https://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf (emphasis added).

195. MODEL BENEFIT CORP. CODE § 401 (requiring each Benefit Corporation to prepare and publicly publish an annual report consisting of a narrative describing the progress made in providing the stated benefit as well as a report that measures the Benefit Corporation's progress against a third-party standard).

> change the way the corporation is managed. The annual benefit report is also intended to reduce "greenwashing" (the phenomenon of businesses seeking to portray themselves as being more environmentally and socially responsible than they actually are) by giving consumers and the general public a means of judging whether a business is living up to its claimed status as a benefit corporation.[196]

This requirement, and the admonition to avoid "greenwashing" activity, is consistent with stakeholder theory and addresses concerns some have raised about CSR programs.[197] Additionally, a Benefit Corporation may have a "Benefit Director," a member of the board of directors responsible for preparing an opinion describing any failures of the board or officers to fulfill their obligations in providing the Benefit Corporation's stated benefits.[198]

In the event that a Benefit Corporation fails to properly pursue its stated benefit, the Model Benefit Corporation Code provides for a "benefit enforcement proceeding" as a remedy.[199] A "benefit enforcement proceeding" can be initiated by either the Benefit Corporation itself or by shareholders derivatively.[200] As a further protection, a Benefit Corporation cannot change its status as a Benefit Corporation without the affirmative vote of two-thirds of the Benefit Corporation's shareholders.[201] The penalty for a failure to fulfill the purpose of a Benefit Corporation includes, but is not limited to, a "benefit enforcement proceeding," which could conceivably include intervention by the state's attorney general to compel performance of the Benefit Corporation's stated beneficial purpose.[202]

Overall, Benefit Corporation governance procedures provide a guarantee that the entity will be guided by a commitment to public benefit over profit that is at least as robust as the rules that govern non-profits.

---

196. *Id.* § 102 cmt.

197. *See generally* Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TULANE L. REV. 983 (2010) (arguing that greenwashing is just rhetoric that is aimed at improving the company's image to the public, which could be helpful to corporations, without actually being a socially responsible company).

198. MODEL BENEFIT CORP. CODE § 302.

199. *See id.* § 102 (defining "benefit enforcement proceeding" as a result of either a failure of a benefit corporation to follow the benefit purpose defined it its articles, or a violation of the model rules).

200. *Id.* § 305(c).

201. *See id.* § 102 (defining "minimum status vote" to include a requirement that any major change to corporation, including a change in its status, requires a two-thirds vote from its shareholders).

202. *See* Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1020–23 (2013).

B. Why a Traditional Corporation That Seeks a Stakeholder Theory Based CSR Program Must Convert to Benefit Corporation Status.

Because Delaware is a state with a Benefit Corporation statute and a corporation can elect to be governed by either Traditional Corporation principles or Benefit Corporation principles and not both, a Traditional Corporation with a shareholder base that supports the stakeholder theory and has a desire to adopt a CSR program that is not limited by the strictures of shareholder wealth maximization has no choice but to convert to Benefit Corporation status. If the board of directors and shareholders of that Traditional Corporation choose to remain a Traditional Corporation, however, they cannot pursue a CSR program that conflicts with the shareholder primacy norm. This conclusion is supported by scholars who advocate for CSR, where they note that under the American corporate law system, as embodied by Delaware law with maximization of shareholder value as the model, CSR must have a strategic financial justification and must be supported by a business, rather than a moral, case.[203]

Assuming that a company's CSR program is not otherwise unlawful, requiring Traditional Corporations that reject the shareholder primacy norm in favor of a stakeholder-based CSR program to convert to a Benefit Corporation is also good corporate governance. Converting to a Benefit Corporation requires a supermajority vote of shareholders,[204] a higher statutory threshold than is required for a merger or other significant corporate transaction.[205] Only through a referendum of this nature, where shareholders are directly asked to allow the board of directors to abandon the shareholder primacy norm and its focus on maximizing shareholder value in favor of third party interests such that the company will no longer have profit as the primary objective, can a stakeholder-based CSR program be countenanced under traditional theories of corporate law.[206] Abandonment of the shareholder primacy norm is a disenfranchisement of the shareholders' exclusive rights to the assets of the corporation (subject to any encumbrances or security interests held by third parties) and should be viewed as a change in the rights of shareholders no less fundamental than that occasioned by a merger or sale of all or substantially all of the corporation's assets. Adoption of a stakeholder-based CSR program is the functional equivalent of conversion to Benefit Corporation status.[207]

203. *See, e.g.*, Smith & Rönnegard, *supra* note 157, at 6.

204. DEL. CODE ANN. tit. 8, § 363 (2015).

205. *See id.* §§ 251, 271 (requiring only a simple majority vote of shareholders to approve a merger or the sale of all or substantially all corporate assets).

206. *See, e.g.*, Smith & Rönnegard, *supra* note 157, at 6.

207. *See id.*

V. THE POTENTIAL FOR CONFLICT BETWEEN STATE AND FEDERAL LAWS AND CORPORATE SOCIAL RESPONSIBILITY PROGRAMS

In many cases, the objectives and implementation of CSR programs result in social benefits without violations of law (either laws relating to corporate governance or other laws that may be applicable). A CSR program that furthers the environmental goals set out in the UNGC by committing a Traditional Corporation to using renewable energy if such use does not materially increase expenses or otherwise materially and adversely affect the financial condition of the company is an example of this. Reducing the use of fossil fuels is generally in line with local, federal, and international guidelines and other than an obscure law that might be contorted to apply, there are no notable laws that prohibit the replacement of fossil fuels with renewable energy by Traditional Corporations.[208]

There are, however, cases where CSR objectives can conflict with laws that govern the activities of a Traditional Corporation. The obvious example of this under Traditional Corporation corporate governance law is that of a CSR program that materially harms shareholder value in order to provide benefits to non-shareholder stakeholders, where the board would likely be in breach of its state corporation law duties.[209] Then there are harder cases, such as when a Traditional Corporation makes business decisions to mollify political activists and those business decisions have an unknown or immaterial impact on the value of the corporation. In that scenario, there likely is no redress for shareholders under state corporation laws.[210] Lost in the rush to adopt CSR programs, though, are the many other ways that CSR programs, especially those rooted in international protocols, can unintentionally violate U.S. federal and local laws, particularly those aimed

208. *See, e.g.*, S.B. 100 (Cal. 2018) (requiring all sources of electricity sold in the state of California to be sourced 100% from renewable resources); *see also* H.B. 263, 28th Leg. (Haw. 2015) (enacting legislation similar to California's legislation in the state of Hawaii).

209. *See* discussion *infra* Section V.B.i.

210. *See, e.g.*, Austen Hufford et al., *Dick's Sporting Goods Stops Selling Assault-Style Weapons, Raises Age for Gun Buyers*, WALL ST. J. (Feb. 28, 2018), https://www.wsj.com/articles/dicks-raises-age-for-gun-buyers-will-stop-selling-assault-weapons-1519824569 (describing how the sporting goods retailer Dick's Sporting Goods Inc. succumbed to political pressure following a school shooting and ended sales of the most commonly owned sporting rifles and also raised the minimum age for firearms purchases to twenty-one years of age). Intentionally eliminating sources of profitable sales is facially antithetical for a Traditional Corporation, but unless the change has a material and adverse effect on profits over a sustained period it is likely not a breach of duty for the board of directors to make politically motivated decisions such as the board of Dick's made.

at combatting discrimination.[211]

Imagine a CSR program that requires companies to refuse to do business with any country or state that allows same-sex cohabitation. The originators of the CSR program in this hypothetical are countries with strong religious institutions and they seek to impose economic burdens that are intended to force a change in the policies of those countries that provide equal rights to homosexuals. Further assume that a CSR advisor with a religious affiliation adopts the aforementioned CSR program and advises its clients to avoid doing business with the identified countries and companies that do business in those countries. If an American real estate leasing company that has pledged to support CSR initiatives were to follow this CSR program and refused to lease dwelling units to same-sex couples, would it be in violation of federal and state anti-discrimination laws[212] or could it claim that because it was simply following CSR guidelines, its actions cannot be seen as a form of discrimination?

International guidelines, such as U.N. principles relied upon by European CSR firms, do not insulate American companies from liability for acts that violate domestic law unless those guidelines are contained in a treaty that has been ratified by the Senate in accord with Article II of the Constitution or approved by Congress and the President in a customary manner.[213] Further, unless the agreement has been ratified by Congress, a state cannot enter into binding international agreements.[214] While some have argued that

211. *See* discussion *infra* Section V.A.

212. *See, e.g.*, Smith v. Avanti, 249 F. Supp. 3d 1194, 1202–03 (D. Colo. 2017) (holding that the property owners violated the Fair Housing Act, 42 U.S.C. §§ 3601–19, by discriminating based on sexual orientation); *see also* Unruh Civil Rights Act, CAL. CIV. CODE § 51(b) (West 2019) (citing a California law that prohibits housing discrimination on the basis of sexual orientation); N.Y. EXEC. Law § 296 (McKinney 2019) (citing New York's human rights law that prohibit housing discrimination on the basis of sexual orientation).

213. U.S. CONST. art. II, § 2; *see* Oona A. Hathaway, *Treaties End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1321, 1327 (2008) (explaining the difference between a self-executing treaty, which requires no further action by Congress to be effective as the supreme law of the land, and non-self-executing treaties, which only become the supreme law of the land if Congress enacts implementing legislation); *id.* at 1317 (discussing how, in addition to the process enumerated in Article II of the Constitution, "congressional-executive agreements," which are the result of majority votes by each house of Congress and execution by the President, are also considered binding international agreements and are treated as the supreme law of the land pursuant to U.S. CONST. art. VI, cl. 2); *id.* at 1286 (clarifying that, while this may be an accurate statement of how congressional-executive agreements have been treated, because it is an extra-constitutional custom it can only be acknowledged as a practice rather than given the full status of Article II treaty ratification).

214. *See* U.S. CONST. art. I, § 10, cl. 3; *see also* Duncan B. Hollis, *Unpacking the*

individual states have some level of autonomy with regard to complying with international law,[215] even under these theories state action that either frustrates federal foreign policy or conflicts with federal law would necessarily fail due to the Constitution's foreign affairs[216] and supremacy clauses.[217] Thus, in the event of a conflict between foreign or international standards and laws, on the one hand, and federal or state laws, on the other hand, the federal and state laws will prevail absent a specific international agreement on the subject that has been properly enacted and executed under the Constitution.

A. CSR Programs and General Anti-Discrimination Laws.

There are hundreds of anti-discrimination laws in the U.S. at the federal and state levels. At the federal level, the earliest significant anti-discrimination law was the Fourteenth Amendment's Equal Protection Clause,[218] which was supplemented by the Civil Rights Act of 1964[219] and its progeny, including the Age Discrimination in Employment Act of 1967,

---

Compact Clause, 88 TEX. L. REV. 741, 761 (2010) (characterizing Article I, § 10, clause 3 of the U.S. Constitution as a provision that gives Congress a veto power of state agreements with foreign nations, rather than one that makes such agreements *void ab initio*).

215. *See, e.g.*, Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C.L. REV. 457, 475–76 (2004) (arguing that individual states play an important role in the development of customary international law and even play a role in executing treaty obligations).

216. *See id.* at 466–67 ("The United States Supreme Court has often endorsed a nationalist conception that assumes the exclusion of states from any activities relating to foreign affairs."); *id.* at 467 ("*Zschernig*, therefore, announced openly what the Court had only suggested in its previous holdings: not only are Congress and the President authorized to override state activities that interfere with foreign affairs, but the states are excluded from any such activities even in the absence of congressional or executive action."); *see also* Am. Ins. Assoc. v. Garamendi, 539 U.S. 396, 429 (2003) (invalidating a state law that intruded upon the President's power to conduct foreign affairs).

217. *See* Jordan J. Paust, *Medellín, Avena, the Supremacy of Treaties, and Relevant Executive Authority*, 31 SUFFOLK TRANSNAT'L L. REV. 301, 318–19 (2008) (analyzing Supreme Court caselaw and concluding that states have no authority to enact laws that conflict with treaties, and state action must be subordinated to the supreme law of the land, including duly ratified treaties).

218. U.S. CONST. amend. XIV, § 1; *see also* John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 FORDHAM L. REV. 423, 440 (2002) (tracking the history of federal anti-discrimination laws starting with the Equal Protection Clause).

219. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. *See generally* Paulette Brown, *The Civil Rights Act of 1964*, 92 WASH. U.L. REV. 527 (2014) (exploring the history and legacy of the Civil Rights Act).

[220] the Equal Employment Act of 1972,[221] the Pregnancy Discrimination Act of 1978,[222] the Americans with Disabilities Act of 1990[223] and the Civil Rights Act of 1991,[224] among others. These federal anti-discrimination laws prohibit differential treatment in a wide range of circumstances, including voting, the application of law and opportunities for and conditions of employment on the basis of, inter alia, age, race, color, religion, national origin, and sex.[225]

At the state level, all fifty states have enacted some form of anti-discrimination laws, though some states generally defer to federal anti-discrimination laws[226] while others aggressively regulate in this field.[227] The National Council of State Legislatures has reported that on the specific concern of public accommodation discrimination, forty-five states have laws prohibiting the practice[228] and all states have laws that prohibit employment discrimination.[229]

In the case of the hypothetical scenario of a boycott aimed at same-sex cohabitation referenced in the introduction to this section,[230] any company

---

220. 29 U.S.C. §§ 621–34 (2018).

221. 42 U.S.C. §§ 2000e–2000e-17 (2018).

222. 42 U.S.C. § 2000e(k) (2018).

223. 42 U.S.C. §§ 12101–03 (2018); *see also* Americans with Disabilities Amendments Act (ADA Amendments Act) of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

224. 42 U.S.C. §§ 1981–96b.

225. *See* 42 U.S.C. § 2000. The panoply of protections afforded by federal anti-discrimination laws is outside the scope of this article.

226. *See, e.g.*, ALA. CODE §§ 25-1-20 to 25-1-40 (2019) (displaying general deference to federal anti-discrimination laws, despite state law prohibiting employment-related age discrimination); Robinson v. Alabama Cent. Credit Union, 964 So. 2d 1225 (Ala. 2007) (adopting federal age discrimination jurisprudence to decide the state age discrimination claim, despite state having an independent law on the subject matter and acknowledging the state's reliance on federal anti-discrimination laws).

227. *See, e.g.*, Fair Employment and Housing Act, CAL. GOV'T CODE §§ 12900–96 (West 2019) (prohibiting discrimination in employment and housing); *see also* Family Rights Act, CAL. GOV'T CODE § 12945.2 (2018) (prohibiting discrimination against parents seeking to take leave); Unruh Civil Rights Act, CAL. CIV. CODE § 51 (2016) (requiring business establishments to provide equal accommodations); The Ralph Civil Rights Act, CAL. CIV. CODE § 51.7 (2019) (prohibiting hate violence or the threat of hate violence); Disabled Persons Act, CAL. CIV. CODE § 54–55.32 (2017) (prohibiting discrimination against disabled persons).

228. *State Public Accommodations Laws*, NAT'L CONF. ST. LEGISLATURES (Apr. 8, 2019), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx.

229. *Discrimination — Employment Laws*, NAT'L CONF. ST. LEGISLATURES (July 27, 2015) http://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx.

230. *See supra* pp. 352–53.

that complied with the calls for such a boycott would be in violation of federal law and any applicable state law on the subject. Using the example of a large, publicly traded real estate leasing company operating in the U.S., if an international CSR organization created a "blacklist" of companies that leased dwelling units to same-sex couples and foreign companies and countries refused to deal with all companies included in that blacklist, the targeted company would not be excused from complying with anti-discrimination laws. This would be the case even if refusing to comply with the CSR guideline resulted in material and adverse financial consequences as CSR compliant companies, investment funds and consumers ceased doing business with the targeted company. There are simply no financial hardship exceptions to domestic anti-discrimination laws that would apply in this scenario.[231]

B. CSR Programs and Anti-Discrimination Laws Specifically Applicable to Boycott Movements.

Of particular interest for the purposes of this article are the anti-boycott provisions of the federal Export Administration Act[232] and certain anti-discrimination laws enacted by twenty-seven states in the past several years (collectively, the "Anti-Boycott Laws").[233] These laws were enacted to

---

231. *See, e.g.*, 29 C.F.R. § 1630.15(d) (2018) (stating that, under the Americans with Disabilities Act, if an employer would suffer "undue hardship" in implementing an accommodation for an employee the employer may be excused from compliance); *id.* § 1630.2(p) (stating that an undue hardship requires a showing of a significant difficulty or expense for the employer, and not allowing a party to engage in discrimination if it is financially beneficial to the party); *id.* (implying that the undue hardship exception is directly related to the types of accommodation an employer may make and establishing a balancing test for that decision). There are some examples of hardship exemptions from anti-discrimination laws, but these are generally balancing tests to determine whether making an accommodation for a particular individual would impose a significant burden on an employer, landlord, or other party and are not black line tests used to allow discrimination if the discriminatory act improves the financial condition of the party discriminating. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 402 (2002) ("Not every court has used the same language, but their results are functionally similar. In our opinion, that practical view of the statute, applied consistently with ordinary summary judgment principles, *see* Fed. R. Civ. P. 56, avoids Barnett's burden of proof dilemma, while reconciling the two statutory phrases ('reasonable accommodation' and 'undue hardship').").

232. Export Administration Act of 1979, 50 U.S.C. §§ 4601–23 (2018), *repealed in part by* John S. McCain National Defense Authorization Act for Fiscal Year 2019, 115 P.L. 232, 132 Stat. 1636 § 1766(a).

233. Hannah Allam, *U.S. Denies Entry To Leader of Movement to Boycott Israel*, NAT'L PUB. RADIO (Apr. 11, 2019), https://www.npr.org/2019/04/11/712189791/u-s-denies-entry-to-leader-of-movement-to-boycott-israel; *see also* Marc A. Greendorfer, *Boycotting the Boycotters: Turnabout is Fair Play Under the Commerce Clause and the Unconstitutional Conditions Doctrine*, 40 CAMPBELL L. REV. 29, 30–31 n.1 (2018)

combat the discriminatory boycott campaign against Israel first launched by the Arab League and recently assumed by the Boycott, Divestment and Sanctions ("BDS") movement[234] (collectively, the "Foreign Boycott Campaign").[235] The Anti-Boycott Laws impose penalties ranging from imprisonment and significant fines for violations of the federal Anti-Boycott Law[236] to the loss of eligibility to enter into contracts with states and divestment of state investments in boycott participants for state Anti-Boycott Laws.[237]

In addition to being promoted by groups affiliated with the BDS movement, elements of the Foreign Boycott Campaign have recently been adopted by CSR advisors and companies that employ CSR programs.[238] As a result, the Foreign Boycott Campaign represents the intersection of several strains of discrimination with CSR.

Since 2010, the U.S. Department of State has utilized a working definition of anti-Semitism[239] that was recently incorporated into the U.S. Department of Education's definition of discrimination[240] for purposes of Title VI of the Civil Rights Act of 1964, as amended (the "Federal Definition of anti-Semitism").[241] The Federal Definition of anti-Semitism provides a number of examples of such discrimination, including "denying the Jewish people their right to self-determination, e.g., by claiming that the existence of the

---

[hereinafter *Greendorfer*, CAMPBELL] (stating a list of state laws).

234. *See infra* note 236.

235. *See* Marc A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, is Still Illegal*, 22 ROGER WILLIAMS U.L. REV. 1, 5–40 (2017) [hereinafter *Greendorfer*, ROGER WILLIAMS].

236. *Office of Antiboycott Compliance*, BUREAU OF INDUS. & SEC., https://www.bis.doc.gov/index.php/enforcement/oac#penalties (last visited Feb. 8, 2020).

237. *See Greendorfer*, CAMPBELL, *supra* note 229, at 37 (providing a summary of the provisions of the state Anti-Boycott Laws).

238. Samantha Marcus, *Why Jewish Group Says N.J. Should Dump This Pension Investment*, NJ.COM (Oct. 5, 2017) https://www.nj.com/politics/index.ssf/2017/10/pension_investment_violates_anti-israeli_boycott_l.html; *see* Benjamin Weinthal, *New Jersey Fails to Enforce its Anti-BDS Law with Danish Bank*, JERUSALEM POST (Sept. 19, 2017), https://www.jpost.com/BDS-THREAT/New-Jersey-fails-to-enforce-anti-BDS-law-with-Danish-bank-505480 (describing the influence of CSR advisors on Danske Bank's boycott of certain companies in Israel).

239. *Defining Anti-Semitism*, U.S. DEP'T. OF ST. (May 26, 2016), https://www.state.gov/s/rga/resources/267538.htm.

240. Letter from Kenneth L. Marcus, Assistant Secretary for Civil Rights, to Susan B. Tuchman, Zionist Organization of America (Aug. 27, 2018), [hereinafter OCR Letter], https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/5bae6de471c10b08c080420a/1538158057692/US+Department+of+Education+and+Working+Definition%5B1%5D+%281%29.pdf.

241. 42 U.S.C. §§ 2000d–2000d-7 (2018).

State of Israel is a racist endeavor", "applying double standards by requiring of [Israel] a behavior not expected or demanded of by any other democratic nation" and "holding Jews collectively responsible for actions of the State of Israel."[242]

The Foreign Boycott Campaign is predicated on the claim that Israel is nothing more than a colonial and racist initiative undertaken by Jews and explicitly states that the State of Israel is a racist, illegitimate entity that should not exist.[243] In making the calls to boycott Israel, the Foreign Boycott Campaign holds academics, entertainers, and businesses in Israel — and academics, entertainers, and businesses abroad that support Israel — responsible for the actions of Israel and in selecting objects for the boycott campaign, applies a unique standard not applied to any other country.[244]

The Foreign Boycott Campaign satisfies a number of prongs of the test set out in the Federal Definition of anti-Semitism and should thus be considered to be a form of national origin and race discrimination in accord with the federal government's longstanding policy.[245]

i. CSR Programs That Advance Discriminatory and Unlawful Initiatives: Two Case Studies.

A recurring theme in CSR ideology is the notion that, in addition to the benefits to society, the environment and other non-shareholder constituencies, CSR programs are accretive to the profitability and financial condition for Traditional Corporations.[246] Because the shareholder primacy

---

242. *See* OCR Letter, *supra* note 236, at 3.

243. *See* Grassroots Palestinian Anti-Apartheid Wall Campaign, *Towards a Global Movement: A Framework for Today's Anti-Apartheid Activism*, BDS MOVEMENT viii (June 2007) [hereinafter BDS Manifesto], https://bdsmovement.net/files/bds%20report%20small.pdf (stating that the BDS Movement's campaign against Israel is a "struggle against colonialism, racism, and expulsion."); *id.* at 16 ("From their inception, Zionist thinkers and ideologues propagated the need to cleanse the indigenous [Arab] population of Palestine if their dream of a Jewish state was to become a reality.").

244. *Id.* at 52–53 (calling for a wide range of boycotts against Israel and its supporters). *But see* OFFICE OF INT'L RELIGIOUS FREEDOM, *Defining Anti-Semitism*, https://www.state.gov/defining-anti-semitism/ (last visited Feb. 8, 2020) (noting that "criticism of Israel similar to that leveled against any other country cannot be regarded as anti-Semitic.").

245. *See* OCR Letter, *supra* note 236, at 2 (stating explicitly that anti-Semitism is a form of national origin and race discrimination).

246. Porter & Kramer, *supra* note 127, at 2 ("If, instead, corporations were to analyze their prospects for social responsibility using the same frameworks that guide their core business choices, they would discover that CSR can be much more than a cost, a constraint or a charitable deed — it can be a source of opportunity, innovation and competitive advantage."); *see also* Michael L. Barnett & Robert M. Salomon*, Does it Pay to be Really Good? Addressing the Shape of the Relationship Between Social and Financial Performance*, 33 STRATEGIC MGMT. J. 1304, 1304–05 (2012) (examining the

norm is the guiding principle for Traditional Corporations in the U.S., the financial case for CSR is the only one that can be used to defend the implementation of any CSR program in this jurisdiction.

Some have argued that a well-designed and implemented CSR program can mitigate regulatory risks and costs for a Traditional Corporation.[247] McKinsey & Company has studied this issue and concluded that CSR programs not only can positively impact regulatory settlements, price premiums, sales, the risk of boycotts, and employee retention, but they also "can create value in many other ways that support growth, improve returns on capital, reduce risk, or improve management quality."[248]

But what if a particular CSR initiative, one that purports to promote laudable goals such as human rights advocacy and that is allowed, or even encouraged, by foreign governments and non-governmental organizations, demonstrably creates material financial costs to a Traditional Corporation with little to no financial benefits?[249]

The popularly called BDS movement is a timely case study on this point. The BDS movement is a recent mutation of the longstanding Arab League's effort to harm the State of Israel through economic, academic and cultural

---

financial impact of CSR programs and finding that while relatively modest CSR programs do not generally provide material financial benefits, aggressive CSR programs can provide significant financial benefits); Adriana Galant & Simon Cadez, *Corporate Social Responsibility and Financial Performance Relationship: A Review of Measurement Approaches*, 30 ECON. RES.-EKONOMSKA ISTRAŽIVANJA 676, 680–88 (2017) (discussing various ways of measuring the financial impact of CSR programs on participating companies). *But see* Gérard Hirigoyen & Thierry Poulain-Rehm, *Relationships Between Corporate Social Responsibility and Financial Performance: What is the Causality?*, 4 J. BUS. & MGMT. 18, 38 (2014) (arguing that an analysis of the data show that CSR has a demonstrated negative financial impact on companies); *id.* ("This study seems to confirm the Managerial Opportunism Hypothesis identified by Preston and O'Bannon (1997) which postulates that corporate social responsibility has a negative influence on financial performance.").

247. *See* Charles J. Fombrun et al., *Opportunity Platforms and Safety Nets: Corporate Citizenship and Reputational Risk*, 105 BUS. & SOC'Y REV. 85, 98 (2000).

248. Sheila Bonini et al., *Valuing Social Responsibility Programs*, MCKINSEY QUARTERLY (July 2009), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/valuing-social-responsibility-programs.

249. *See* Alexander B. Traum, *Applied Anti-Semitism: The BDS Movement and the Abuse of Corporation Social Responsibility*, 34 TOURO L. REV. 1025, 1051–52 (2018) ("The movement's boycotts of Israeli academics and artists target those citizens of Israel who are most amendable to challenging Israel's current policies vis-a-vis the Palestinians. By censuring and boycotting such individuals, the BDS movement alienates potential allies. Israeli hospitals and medical technology companies serve those suffering from illness beyond Israel's borders, including, of course, Palestinians. The BDS movement's targeting of these individuals and institutions further reveals the disingenuousness of the movement's claim to support peace and prosperity for the Palestinians.").

attacks on Israel and those who are affiliated with Israel.[250] The BDS movement identifies businesses, entertainers, academics, and others that are based in or work with Israel as part of a campaign to compel governments, companies, educational institutions and religious and social groups to either boycott or otherwise terminate relationships with the Israeli and Israel-affiliated parties. Though the stated goal of the BDS movement is to promote what the Federal Definition of anti-Semitism considers national origin and racial discrimination,[251] and it has numerous ties to terrorist organizations that share the goal of destroying Israel,[252] the BDS movement and its supporters allege that they are a human rights organization devoted to protesting purported Israeli human rights violations.[253] Using this claim as

---

250. *See* MARTIN A. WEISS, CONG. RESEARCH SERV., RL33961 ARAB LEAGUE BOYCOTT OF ISRAEL (2013), https://fas.org/sgp/crs/mideast/RL33961.pdf; MARTIN A. WEISS ET AL., CONG. RESEARCH SERV., R44281 ISRAEL AND THE BOYCOTT, DIVESTMENTS, AND SANCTIONS (BDS) MOVEMENT (2017), https://fas.org/sgp/crs/mideast/R44281.pdf. *See generally Greendorfer*, CAMPBELL, *supra* note 229. The author of this paper has published two other law review articles that relate to the legality of the BDS movement in the U.S.: Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, 2016 CARDOZO L. REV. de.novo 112 (2016); Marc A. Greendorfer, *Boycotting the Boycotters: Turnabout is Fair Play Under the Commerce Clause and the Unconstitutional Conditions Doctrine*, 40 CAMPBELL L. REV. 29 (2018). On behalf of Zachor Legal Institute, the author has also advised governments, companies, individuals and others on legal issues arising out of BDS activity and has also been instrumental in helping states to enact anti-discrimination statutes and defending those state laws in federal courts.

251. *See Greendorfer*, CAMPBELL, *supra* note 229, at 29–40.

252. Bret Stephens, Opinion, *The Anti-Israel Money Trail,* WALL ST. J. (Apr. 25, 2016, 6:44 PM), https://www.wsj.com/articles/the-anti-israel-money-trail-1461624250?ns=prod/accounts-wsj; *see also* STATE OF ISRAEL MINISTRY OF STRATEGIC AFF. & DIPL., *Terrorists in Suits: The Ties Between NGOs Promoting BDS and Terrorist Organizations*, https://4il.org.il/wp-content/uploads/2019/02/MSA-Terrorists-In-Suits-English-1.pdf (last visited Feb. 8, 2020); *Israel Imperiled: Threats to the Jewish State: Joint Hearing Before H. Foreign Affairs Comm., Subcomm. on Terrorism, Nonproliferation, and Trade and the Subcomm. on the Middle East and North Africa*, 114th Cong., 2d Sess. (2016) (statement of Jonathan Schanzer, Vice President of Research Foundation for Defense of Democracies), http://docs.house.gov/meetings/FA/FA18/20160419/104817/HHRG-114-FA18-Wstate-SchanzerJ-20160419.pdf (outlining the ties between supporters of the BDS movement and supporters of designated foreign terror organizations); *Israel, the Palestinians and the United Nations: Challenges for the New Administration: Hearing Before H. Foreign Affairs Comm., Subcomm. on the Middle East and North Africa and Africa, Global Health,Global Human Rights, and International Organizations*, 115th Cong., 1st Sess. (2017) (statement of Jonathan Schanzer, Senior Vice President for Research, Foundation for Defense of Democracies), http://docs.house.gov/meetings/FA/FA13/20170202/105508/HHRG-115-FA13-Wstate-SchanzerJ-20170202.pdf (stating that the Palestine Liberation Organization's treasury is likely the key source of BDS movement funding and that the Palestine Liberation Organization coordinates BDS activity worldwide).

253. *See* al-Shabaka, *The "S" in BDS: Lessons of the Elbit Systems Campaign*, BDS (Aug. 24, 2016), https://bdsmovement.net/news/%E2%80%9Cs%E2%80%9D-bds-

cover, BDS activists have promoted their cause as one that properly belongs within the CSR world and have had success in encouraging governments, NGOs, CSR advisors and CSR advisory clients to boycott and/or divest from Israeli businesses and institutions.[254]

a) Case Study Number One: Danske Bank.

One example of this campaign has been directed at Elbit Systems Ltd. ("Elbit"), an international defense electronics company headquartered in Israel with securities traded on various international exchanges, including in the U.S. on the Nasdaq Stock Market exchange ("Nasdaq").[255] Elbit has been targeted by a number of international BDS affiliates who characterize Elbit's activities as being in violation of human rights norms.[256] These groups have successfully coerced some institutional and sovereign investors to divest from Elbit's securities.[257] As a result of BDS affiliates pressuring them, CSR

lessons-elbit-systems-campaign ("For years, Palestinians and their supporters – global figures such as Desmond Tutu, Adolfo Peres Esquivel, Naomi Klein, and Noam Chomsky – have called for an immediate and comprehensive military embargo against Israel to hold it accountable for its violations of Palestinian human rights. Tens of thousands of people have signed petitions and activists have demonstrated against companies tied to the Israeli military. For the last decade, activists have run a campaign against Elbit Systems, one of Israel's largest military companies. The effort ranges from governmental lobbying to blockading Elbit subsidiaries in such countries as Australia, the United Kingdom (UK), and Brazil. A dozen financial institutions, including almost all major Scandinavian pension funds, are no longer investing in Elbit Systems."); Alexander B. Traum, *Applied Anti-Semitism: The BDS Movement and the Abuse of Corporation Social Responsibility,* 34 TOURO L. REV. 1025, 1030 (2018) ("The BDS movement's purported goals are often presented in cryptic terms, with such ambiguity serving to obscure the movement's underlying aim of destroying the State of Israel (as opposed to positively seeking Palestinian statehood alongside a State of Israel, such pursuit the so-called 'two state solutions')."); *see also* Benjamin Joffe-Walt, *Swedish Pension Giant Divests from Elbit*, JERUSALEM POST (Mar. 31, 2010), https://www.jpost.com/printarticle.aspx?id=172146 (quoting BDS Movement co-founder Omar Baghouti on the decision by Swedish pension funds to comply with BDS demands to divest from Elbit, "This is the beginning of when the BDS movement begins to bite . . . [t]he BDS movement is turning Israel into the world's pariah state, as South Africa was during apartheid."); *Elbit Systems*, BDS LIST, http://bdslist.org/security-and-weapons/elbit-systems/ (last visited Feb. 8, 2020).

254. *See* Joffe-Walt, *supra* note 249. *See generally* NGO MONITOR, DENMARK CORPORATE SOCIAL RESPONSIBILITY (CSR) REPORT (2015), https://ngo-monitor.org/data/images/File/Denmark.pdf (discussing how NGOs and CSRs are supporting BDS in Denmark).

255. BDS LIST, *supra* note 249 (explaining Elbit Systems' history and business).

256. *See id.* (explaining how the BDS campaign against Elbit Systems has led different companies to divest from Elbit Systems due to the company's human rights violations).

257. *See* Benjamin Weinthal, *New Jersey Fails to Enforce Anti-BDS Law with Danish Bank*, JERUSALEM POST (Sept. 19, 2017, 4:00 AM), https://www.jpost.com/BDS-

advisors such as ISS-Ethix and their clients, such as Danske Bank, include Elbit on their restricted investment lists and state pension funds in European countries[258] have included Elbit on their divestment lists as well.[259] One must ask what it is about Elbit that could cause such institutionalized disapprobation?

In filings made with the U.S. Securities and Exchange Commission ("SEC"), where the U.S. government imposes significant monetary and criminal penalties for misstatements or omissions,[260] Elbit has described its operations as

> [A]n international high technology company engaged in a wide range of programs throughout the world. We develop and supply a broad portfolio of airborne, land and naval systems and products for defense, homeland security and commercial applications. Our systems and products are installed on new platforms, and we also perform comprehensive platform modernization programs. In addition, we provide a range of support services.
>
> Our major activities include:
>
> - military aircraft and helicopter systems;

THREAT/New-Jersey-fails-to-enforce-anti-BDS-law-with-Danish-bank-505480 (stating that Danske Bank excluded Elbit Systems' customer's investments, even though the bank admits it was not "legally required to divest from any Israeli company").

258. *See* Adri Nieuwhof, *Scandinavian Financial Institutions Drop Elbit Due to BDS Pressure*, ELECTRONIC INTIFADA (Feb. 19, 2010), https://electronicintifada.net/content/scandinavian-financial-institutions-drop-elbit-due-bds-pressure/8685 ("In early September, Norway's Minister of Finance Kristin Halvorsen announced that the Norwegian State Pension Fund had sold its shares in Elbit, worth $5.4 million . . . . Following the decision by the Norwegian State Pension Fund, Kommunal Landspensjonkasse (KLP), one of the largest life insurance companies in Norway, also divested from Elbit. The move by heavyweights Halvorsen and KLP to divest led Danwatch, the Danish financial watchdog, to add last month Elbit to its blacklist of 35 companies that are disqualified from investments due to ethical considerations . . . . The largest bank in Denmark and a leading player in the Scandinavian financial markets, Danske Bank followed suit a week later."); *see also Impact of the Boycott, Divestment and Sanctions Movement, Hearing Before H. Comm. On Oversight and Gov't. Reform, Subcomm. on Nat'l. Security*, 114th Cong., 1st Sess. (July 28, 2015) (statement of Mark Dubowitz, Executive Director, Foundation for Defense of Democracies, documenting the spread of BDS activity targeting Elbit).

259. A restricted investment list is a generic term for a list of securities that may not be invested in by institutional or sovereign investment funds. *See, e.g.*, DANSKE BANK INVESTMENT RESTRICTIONS (2019) [hereinafter RESTRICTION LIST], https://danskebank.com/-/media/danske-bank-com/file-cloud/2019/3/danske-bank---investment-restrictions-2019.pdf.

260. *See, e.g.*, 17 C.F.R. § 240.10b-5 (2019) (providing both a government and private right of action for any material misstatement or omission in connection with the purchase or sale of a security). *See generally* Steve Thel, *Taking Section 10(b) Seriously: Criminal Enforcement of SEC Rules*, 2014 COLUM. BUS. L. REV. 1 (2014) (reviewing the criminal penalties that may be imposed for violations of this rule).

> - commercial aviation systems and aerostructures;
> - unmanned aircraft systems and unmanned surface vessels;
> - electro-optic and countermeasures systems;
> - land vehicle systems;
> - command, control, communications, computer and intelligence (C4I) systems;
> - electronic warfare and signal intelligence systems; and
> - commercial cyber security products and other commercial activities.
>
> Many of these major activities have a number of common and related elements. Therefore, certain of our subsidiaries, divisions or other operating units often jointly conduct marketing, research and development, manufacturing, performance of programs, sales and after sales support among these major activities.[261]

If this description sounds like it could be applicable to any other international high-technology defense company like Lockheed Martin Corporation or Rockwell Collins, Inc., it is because they are so similar in what they do as to be named competitors by the Nasdaq.[262] So why have some countries, CSR advisors, and CSR clients focused on placing Elbit on their restricted investments lists while ignoring other companies in the same field? The evidence points to one key difference: it is the only Israeli company.[263]

Some CSR guidelines do, in fact, put high-technology defense companies on a restricted investments list, but there is a crucial, substantive difference in those cases. Those CSR programs identify specific activities, such as the production of nuclear weapons or cluster munitions, as outside of societal norms, even for defense companies.[264] Robeco Institutional Asset

---

261. ELBIT SYSTEMS LTD., *Annual Report* 13 (Form 20-F) (Mar. 20, 2018), https://www.sec.gov/ix?doc=/Archives/edgar/data/1027664/000162828018003366/eslt 1231201720-fdoc.htm.

262. *Elbit Systems Ltd. Competitors*, NASDAQ, https://www.nasdaq.com/symbol/eslt/ competitors (last visited Feb. 8, 2020); *see* ELBIT SYSTEMS LTD., *supra* note 257, at 26 (listing as its competitors Boeing, Lockheed Martin, Northrop Grumman, Raytheon, General Dynamics, BAE Systems, Rockwell Collins, L-3 Communications, Thales, Airbus, Leonardo, Saab, Harris, Textron, FLIR Systems, Orbital ATK, AeroVironment, Rhode and Schwartz, Rheinmetall, Kongsberg, Safran, CMC, CAE, Aselsan, Bharat Electronics, Cubic and Verint).

263. *Compare About Lockheed Martin*, LOCKHEED MARTIN, https://www.lockheed martin.com/en-us/who-we-are.html (last visited Feb. 8, 2020) (headquartered in Bethesda, Maryland U.S.A.), *and Contact Us*, COLLINS AEROSPACE, https://www.rock wellcollins.com/Contact-Us.aspx (last visited Feb. 8, 2020) (headquartered in West Palm Beach, Florida U.S.A.), *with Contact Us*, ELBIT SYSTEMS, http://elbitsyst ems.com/contact-us/ (last visited Feb. 8, 2020) (headquartered in Haifa, Israel).

264. *See* WHITNEY RAUSCHENBACH, GLOBAL CLUSTER MUNITIONS LEGISLATION AND IMPLICATIONS FOR INVESTORS 1 (2011), https://www.msci.com/documents/10199/

Management, an international asset management company, is one such company with a transparent procedure for adding companies to its restricted investments list. Under Robeco's "Exclusion Policy," companies that are involved in the production of "controversial weapons," which include nuclear weapons, cluster munitions, anti-personal mines, chemical and biological, and depleted uranium weapons, will not be invested in.[265] In furtherance of that policy, Robeco lists eleven companies in its Exclusion Policy.[266] Four companies are listed due to their involvement with the production of nuclear weapons, three companies are listed due to their involvement with the production of cluster munitions, another three companies are listed due to their involvement with the production of depleted uranium weapons, and one company is listed due to its involvement with the production of anti-personnel mines.[267]

Danske Bank, on the other hand, seems to have had a policy that can charitably be deemed arbitrary, and possibly be called discriminatory, when it comes to its defense company restricted investments list. In a document dated January 2, 2017, based on the recommendations provided by ISS-Ethix, Danske published its list of companies ("Danske Exclusion List") that it will not invest in due to alleged conflicts between Danske's "Responsibility" policy (a CSR program that Danske acknowledges is based on the U.N. Principles for Responsible Investments) and the activities of the listed companies.[268] Twenty-seven companies, including Elbit, are on this list.[269] Elbit is included on the list due to its purported involvement "in supplying electronic equipment in conflict with human rights norms."[270] When Danske first added Elbit to the Danske Exclusion List in 2010, it acknowledged that the decision was political and was made because Elbit worked on Israel's security wall.[271] This is a rationale for inclusion on the

---

ef83b474-22c0-4fa4-947b-f287adcf0175 (describing how CSR advisor MSCI evaluates companies for possible inclusion on restricted investment lists based on their ties to the manufacture of cluster munitions); *see also* Aime Williams, *Mutual Funds Have Exposure to Controversial Weapons*, FIN. TIMES (Mar. 27, 2017), https://www.ft.com/content/fcb7e956-0f18-11e7-a88c-50ba212dce4d (noting that as a result of screening for "controversial weapons" done by CSR firms such as MSCI, the world's largest sovereign pension fund will not invest in Boeing or Honeywell, due to those companies' involvement in the production of nuclear weapons).

265. ROBECO, EXCLUSION POLICY ROBECO (2019), https://www.robeco.com/docm/docu-exclusion-policy-and-list.pdf.

266. *Id.* at Annex 2.

267. *Id.*

268. *See* RESTRICTION LIST, *supra* note 255.

269. *Id.*

270. *Id.*

271. *See* Nicolai Raastrup, *Danske Bank Cuts Out Controversial Israeli Companies*,

excluded companies list that is *sui generis* and is nothing more than a thin smokescreen for what is likely compliance with the BDS movement's boycott list.[272] At the end of 2015, at least 65 countries (including Israel) had secured border walls, many of them erected in response to terrorism threats.[273]

Elbit is an electronics company that produces systems that can be used by states to, among other things, defend their borders electronically.[274] According to its latest annual report filed with the SEC, Elbit is active in only two product lines that can be described as electronic border surveillance equipment: command, control, communications, computer and intelligence ("CI") systems, and electro-optic systems.[275] The particular Elbit product that has been the focus of attention for CSR purposes is known as "TORCH,"[276] a system that Elbit provides to other countries, including the

---

BERLINGSKE (Jan. 25, 2010), https://www.business.dk/finans/danske-bank-frasorterer-omstridte-israelske-selskaber (translated by author from Dutch to English by Google translate) (the head of Danske's CSR program stated "[b]ut our [CSR] policy goes further than that and incorporates standards prepared by the U.N. and also analyzes the political context. In the U.N., the EU and in the Nordic region there is an attitude that the settlements are illegal and an obstacle to a peace solution. On this basis, we can see that there are violations of our SRI policy.").

272. *See infra* notes 272–74 and accompanying text.

273. Simon Tomlinson, *World of Walls: How 65 Countries Have Erected Fences on Their Borders – Four Times as Many as When the Berlin Wall Was Toppled – as Governments Try to Hold Back the Tide of Migrants*, DAILY MAIL, https://www.dailymail.co.uk/news/article-3205724/How-65-countries-erected-security-walls-borders.html (last updated Aug. 22, 2015).

274. Numerous other defense companies operate in the "electronic equipment market segment," and specifically the "C4I" segment that appears to be the basis for Danske's boycott of Elbit. Thales Group, a publicly traded French defense company that Elbit lists as a competitor. *See, e.g.*, Thales Group, *2017 Registration Document* 126 (2017), https://www.thalesgroup.com/sites/default/files/database/document/2018-07/2017_registration_document%20EN.pdf (acknowledging that Thales operates in the C4I market and listing Elbit as a competitor in C4I); *see also* BDS LIST, *supra* note 251, at 26 (listing Leonardo S.p.A., a publicly traded Italian defense company, as a competitor of Elbit in C4I); RESTRICTION LIST, *supra* note 255 (refraining from including Thales Group or Leonardo from Danske's Exclusion List).

275. BDS LIST, *supra* note 251, at 18 (describing C4I systems as "integrated and coastal border C4I surveillance systems, broadband communication systems, cyber intelligence solutions, border control systems, 'safe city' [integrated communications, monitoring and intelligence systems within a defined political subdivision] systems, emergency and first responder communications systems and homeland security and emergency response training and simulation systems."); *id.* at 17 (defining electro-optic systems as "surveillance systems, 'safe city' projects, facility perimeter security products, electronic fences, fiber optic intrusion detection systems and transportation protection systems."). Because of the overlap between the components of C4I systems and electro-optic systems, this article will use the term C4I to include electro-optic systems.

276. NORWEGIAN COUNCIL OF ETHICS, RECOMMENDATION TO THE NORWEGIAN

U.S., for border security.[277]

No other company was included in Danske's Exclusion List on the basis that it supplies electronic equipment used in border defense (which Danske inexplicably puts in the same category as nuclear weapons, anti-personnel mines, and cluster munitions).[278] Indeed, the Norwegian Council on Ethics explicitly stated that it had made its recommendation to boycott Elbit upon its consideration of opinions from U.N. related entities that singled out an Israeli company's work on Israel's border wall for scrutiny while ignoring other non-Israeli companies that had also worked on the border wall.[279] Under the Federal Definition of anti-Semitism, the way Elbit has been held to a standard not applied to similar companies from other jurisdictions is a clear case of discrimination.[280]

Why did Danske create an exclusion category that is comprised of a single company that happens to be Israeli for producing a product that is widely available and only problematic when used in Israel? The answer can be found at various BDS websites which call for boycotts of Elbit.[281] While Danske denies participating in BDS, its boycott of Elbit can only be

---

MINISTRY OF FINANCE 9 (May 15, 2009), https://www.regjeringen.no/contentassets/f507de70bf0b4235bf760746452cf192/elbit_engelsk.pdf (recommending divestment from Elbit for work on Israel's security wall while acknowledging that many other companies were involved in the project, including the American company Caterpillar, which supplied heavy equipment used in construction of the wall).

277. *See* Jill Aitoro, Elbit Systems of America, *CBP in Talks for Expanded Surveillance Along US-Mexico Border*, DEFENSENEWS.COM (Oct. 11, 2017), https://www.defensenews.com/digital-show-dailies/ausa/2017/10/11/elbit-systems-of-america-cbp-in-talks-for-expanded-surveillance-along-us-mexico-border/ ("Elbit Systems of America, the U.S. subsidiary of Elbit Systems headquartered in Israel, won the contract from U.S. Customers and Border Protection in 2014 to install a technology-based system – a combination of towers, sensors, radars, cameras, and communications linked into the company's TORCH command and control center for 24/7 surveillance capability."); *see also Homeland Security*, ELBIT SYSS. OF AM., http://www.elbitsystems-us.com/homeland-security (last visited Feb. 8, 2020) (describing the TORCH project as a C4I system built from the ground up that meets real world needs for border security).

278. *See* RESTRICTION LIST, *supra* note 255 (listing, in order of frequency used, ten companies for production of cluster weapons, eight companies for production of nuclear weapons, four for natural resource violations, two for supplying military equipment used in conflicts in violations of human rights norms, and one each for violations of environmental and labor norms); *id.* (including as one of the ten companies included for producing cluster weapons Aryt Industries Ltd., an Israeli defense company).

279. NORWEGIAN COUNCIL OF ETHICS, *supra* note 272, at 9 (recommending divestment from Elbit for work on Israel's security wall while acknowledging that many other companies were involved in the project, including the American company Caterpillar, which supplied heavy equipment used in construction of the wall).

280. *See Defining Anti-Semitism*, *supra* note 235 (defining anti-Semitism as a perception of Jewish people that is expressed as hatred).

281. *See, e.g.*, al-Shabaka, *supra* note 249; BDS LIST, *supra* note 251.

explained by compliance with the Foreign Boycott Campaign. This conclusion is further supported by pro-BDS organizations who released public statements applauding Danske's adherence to calls to boycott of Elbit as well as testimony before the U.S. Congress.[282]

This conclusion is further supported by the fact that there are only twenty-seven companies on Danske's Exclusion List, and somehow companies in the tiny country of Israel represent 7.5% of the list. Compared to China, which has two companies on the excluded companies list and Russia, which has only one company on the list, it defies any rational explanation that Israel can have two companies on this list. The only explanation is that Danske has complied with the BDS movement's Foreign Boycott Campaign against Elbit.[283]

b) Case Study Number Two: Airbnb.

On November 19, 2018, Airbnb, Inc. ("Airbnb"), a Delaware corporation, released a statement announcing its decision to remove all of its approximately 200 listings from "Israeli settlements" in the West Bank region of territories controlled by Israel.[284] Airbnb stated that the territories in question "are the core of the dispute between Israelis and Palestinians" but also openly acknowledged that they are "not the experts when it comes to the historical disputes" in the territories claimed by Israel and the Palestinians and further acknowledged "conflicting views" on the dispute.[285] Nevertheless, after consulting with "various experts," Airbnb adopted a policy to remove Jewish-owned properties in these territories from its listing platform while leaving properties owned by Palestinian Arabs available.[286]

Airbnb stated in its justification for its decision that "as a global

---

282. *See* Nieuwhof, *supra* note 254.

283. Following the intervention of the author of this article in the State of Colorado's enforcement of its anti-boycott law, as described in the following subsection, Danske restructured its Exclusion List and removed Elbit. *See* DANSKE BANK INVESTMENT RESTRICTIONS (2018), https://danskebank.com/-/media/danske-bank-com/file-cloud/2018/3/investment-restrictions.pdf. Danske made no public comments regarding the removal of Elbit and still maintains on its website its 2017 Exclusion List. *See* DANSKE BANK INVESTMENT RESTRICTIONS (2017), https://danskebank.com/-/media/danske-bank-com/file-cloud/2017/2/excluded-companies.pdf. However, the most recent list includes "controversial weapons" as a category as well as thermal coal and tar sands, and most of the defense companies on the 2017 list are still listed on the most recent list. A logical reading of the two lists leads the reader to assume that the more recent list supersedes and replaces the older list, but Danske has not responded to requests for comment.

284. *See* Press Release, AIRBNB, *Listings in Disputed Regions* (Nov. 19, 2018) [hereinafter Airbnb Disputed Regions], https://press.airbnb.com/listings-in-disputed-regions/ (giving Airbnb's statement on Listings in Disputed Regions, published).

285. *See id.*

286. *See id.*

platform . . . we must consider the impact we have and act responsibly."[287] In furtherance of that policy, Airbnb outlined five points which make up a "framework for how [Airbnb] should treat listings in occupied territories." Two of the most salient points were:

> 1) Evaluate whether the existence of listings is contributing to existing human suffering.
> 2) Determine whether the existence of listings in the occupied territory has a direct connection to the larger dispute in the region.[288]

There is ample evidence that Airbnb's policy decision regarding Israeli settlements was the result of a multi-faceted campaign carried out over the past three years[289] by a BDS movement group known as "StolenHomes."[290]

In 2016, members of this BDS affiliate began a concerted effort to influence Airbnb by exerting pressure on one of the company's key investors and other platforms.[291] The group staged protests outside the San Francisco office of Fidelity Investments, an Airbnb investor,[292] as well as at its Chicago office.[293] Concurrently, another BDS affiliate known as "Uplift"[294] targeted the international subsidiary service of Airbnb in its Dublin, Ireland office.[295] In conjunction with the protests, BDS activists launched a strong online and written media campaign aimed at raising public awareness of their assault on Airbnb.[296]

Further proof of BDS coordination on the Airbnb campaign is demonstrated by a letter sent directly by Saeb Erekat, the secretary general

---

287. *See id.*

288. *See id.*

289. *See StolenHomes.Org Domain Information*, WHOIS (last updated Aug. 11, 2018), https://www.whois.com/whois/stolenhomes.org.

290. *See* Sonya E. Meyerson-Knox, *Breaking: Airbnb Commits to Removing Rentals in Illegal Israeli Settlements in the West Bank*, JEWISH VOICE FOR PEACE (Nov. 19, 2018), https://jewishvoiceforpeace.org/airbnb-victory/ (acknowledging the efforts of StolenHomes as a factor affecting Airbnb's decision).

291. *See id*.

292. *See Fidelity Tell Airbnb: Stop Profiting From Stolen Homes*, CODEPINK, https://www.codepink.org/protest_airbnb_in_san_francisco (last visited Feb. 8, 2020).

293. *See* Greg Hinz, *Airbnb Fight Opens on New Front: West Bank*, CHI. TIMES (June 2, 2016), https://www.chicagobusiness.com/article/20160602/BLOGS02/160609941/airbnb-protests-planned-for-chicago-over-rentals-in-israeli-occupied-areas.

294. *See* UPLIFT, https://uplift.ie/ (last visited Feb. 8, 2020).

295. *See* Ciaran D'Arcy, *Protest at Airbnb Europe HQ in Dublin over West Bank Rentals*, IRISHTIMES (June 3, 2016), https://www.irishtimes.com/business/retail-and-services/protest-at-airbnb-europe-hq-in-dublin-over-west-bank-rentals-1.2671641.

296. *See Stolen Homes by Illegal Settlers*, SUMOFUS, http://airbnb.sumofus.org/ (last visited Feb. 8, 2020); *see also* Steven Erlanger, *West Bank Settlers' Listings on Airbnb Draw Palestinian Anger*, N.Y. TIMES (Feb. 7, 2016), https://www.nytimes.com/2016/02/08/world/middleeast/airbnb-west-bank-israel-settlements.html.

of the Palestine Liberation Organization's Executive Committee (a member of the committee that founded and manages the BDS movement),[297] to Airbnb's CEO, Brian Chesky, imploring him to direct Airbnb to terminate all business with Jewish property owners in the West Bank in early 2016.[298]

Just one day after the press release announcing Airbnb's boycott of Jewish property owners was published, a joint report by Human Rights Watch and the Israeli organization Kerem Navot on the issue was also published.[299] The report, which slammed Airbnb for permitting rentals in the West Bank, was likely intended to lend credence to Airbnb's claim that its decision had been taken in accordance with international law and in the pursuance of human rights.

Airbnb demonstrates double standards by continuing to permit listings in areas which have long been the subject of territorial dispute or internationally-recognized occupation such as Chinese-occupied Tibet,[300] Turkish-occupied Northern Cyprus,[301] or Moroccan-occupied Western Sahara.[302] Airbnb continues to allow listings in all of these locations and offers no explanation as to why listings in the West Bank are any more directly linked to the "larger dispute" than listings in these locations.

---

297. *See Greendorfer*, CAMPBELL, *supra* note 229, at 48.

298. *See* Adam Chandler, *The Bright, Cozy Airbnb Listings in West Bank Settlements*, THE ATLANTIC (Jan. 20, 2016), https://www.theatlantic.com/international/archive/2016/01/airbnb-israel-west-bank-settlements/424836/?utm_source=SFTwitter.

299. *Bed and Breakfast on Stolen Land*, HUMAN RIGHTS WATCH (Nov. 20, 2019), https://www.hrw.org/report/2018/11/20/bed-and-breakfast-stolen-land/tourist-rental-listings-west-bank-settlements.

300. *Tibetan-style villa, Located in the Barkhor Street Jokhang Temple Edge, Quiet, Suitable for Family Travel or Friends Go Hand in Hand*, AIRBNB, https://www.airbnb.com/rooms/13446030?location=Tibet%2C%20China&adults=1&guests=1&s=uRhdMdi8 (last visited Aug. 19, 2019) (describing the apartment location as being in Tibet); *see* COUNCIL ON FOREIGN RELATIONS, *The Question of Tibet* (last updated Dec. 5, 2008), https://www.cfr.org/backgrounder/question-tibet (noting that the United States has contradictory policies toward the China-Tibet conflict because the United States officially recognizes Tibet as a part of China but funded Tibetan independence efforts during the Cold War).

301. *Relaxing Location with Sea Views*, AIRBNB, https://www.airbnb.ca/rooms/5179967?locAIRBNB tion=Louroujina&s=a91hWubk&guests=1&adults=1 (last visited Feb. 8, 2020) (describing the apartment location as being in Kirenia, Cyprus); *see Cyprus Country Profile,* BBC NEWS (Nov. 12, 2018), https://www.bbc.com/news/world-europe-17217956 (stating that the island is divided between a Turkish Cypriot and a Greek Cypriot governments).

302. *Cool Appart in Laayoune City*, AIRBNB, https://www.airbnb.ca/rooms/29310138?location=Western%20Sahara&adults=0&children=0&infants=0&guests=0&s=R7KBuPRU (last visited Feb. 8, 2020) (describing the apartment location as being in Laayoune, Western Sahara); *see Western Sahara Profile*, BBC NEWS (May 14, 2018), https://www.bbc.com/news/world-africa-14115273 (referring to a territorial dispute between Morocco and Sahara's indigenous people).

In the "Further Information" section of its website published after the original statement, Airbnb cited its current prohibition of listings in Crimea as evidence that no discriminatory policy vis-à-vis Israel exists.[303] However, the crucial difference between Israeli settlements and Crimea lies within the statement itself and should be emphasized: Airbnb is forbidden by U.S. regulations from operating in Crimea.[304] The boycott of Israeli developments in the West Bank, by contrast, was a policy decision which Airbnb was not obliged to implement in compliance with U.S. regulations and is, in fact, in conflict with longstanding U.S. policies against participation in foreign boycotts of Israel.[305] The discriminatory nature of the decision against Israel is accentuated by Airbnb's own statement which says: "U.S. law permits companies like Airbnb to engage in business in these territories" and "[i]n the past, we made clear that we would operate in this area *as allowed by law*."[306]

Further, Airbnb stated that it evaluated "whether the existence of listings is contributing to existing human suffering" and as such, determined the Israeli settlements needed to be removed.[307] However, Airbnb continues to allow hosting in a number of areas where human rights violations are rife such as Tibet, where human rights violations by Chinese forces have been repeatedly condemned by international bodies in a string of resolutions and declarations issued by, inter alia, the European Parliament, the U.S. Congress and the Australian Parliament.[308] Moreover, China's numerous human rights violations have been documented and condemned by U.N. human rights experts.[309]

---

303. *See* Airbnb Disputed Regions, *supra* note 280 ("There are conflicting views regarding whether companies should be doing business in the occupied territories that are the subject of historical disputes between Israelis and Palestinians . . . . The global framework will be applied in an ongoing manner. Airbnb has *previously removed listings in Crimea as a result of international sanctions* and they are currently not available on the Airbnb platform.") (emphasis added).

304. *Id.*; *Ukraine-/Russia-Related Sanctions*, U.S. DEP'T TREASURY, https://www.treasury.gov/resource-center/sanctions/Programs/pages/ukraine.aspx (last visited Feb. 8, 2020); U.S. DEP'T TREASURY OFFICE FOREIGN ASSETS CONTROL, UKRAINE/RUSSIA-RELATED SANCTIONS PROGRAM 5, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine.pdf (last updated June 16, 2018).

305. *See* discussion *supra* Section V.B.

306. *See* Airbnb Disputed Regions, *supra* note 280 (emphasis added).

307. Nora Barrows-Friedman, *Airbnb Drops Israel Settlements from Listings*, ELECTRONIC INTIFADA (Nov. 19, 2018), https://electronicintifada.net/blogs/nora-barrows-friedman/airbnb-drops-israeli-settlements-listings.

308. *See generally* INT'L RESOLUTIONS & RECOGNITION ON TIBET (1959–2004), https://tibet.net/wp-content/uploads/2014/10/International-rsolutions-on-Tibet.pdf.

309. *See, e.g.*, *UN Human Rights Experts to China: Disclose the Fate and Whereabouts of Kirti Monks*, INT'L CAMPAIGN FOR TIBET (June 9, 2011),

Not only is Airbnb's policy demonstrative of a double standard, it fails to demonstrate neutrality in the conflict by allowing Palestinian Arab-owned rentals in the West Bank to remain on its listing, despite acknowledging that the area lies "at the core of the dispute between Israelis and Palestinians."[310] By failing to do so, it has chosen to discriminate against Israelis and favor Palestinians. Therefore, Airbnb's boycott is discriminatory. Airbnb's policy on "listings in disputed territories" is an Israel-specific policy, strictly concerning Israel and Jewish landowners.

In the supplementary section of its statement, Airbnb also attempts to refute claims of discrimination by highlighting the fact that it continues to allow listings in East Jerusalem and in the Golan Heights, areas which are considered occupied territories by the international community.[311] However, the varying degree of implementation of the policy does not detract from the fact that a specific area and a specific demographic in Israel is being voluntarily boycotted.

Since Israeli settlements are populated exclusively by Jews, the decision to remove properties in these areas from Airbnb's listing service blatantly discriminates against Jews in violation of Airbnb's own terms prohibiting users from assisting or enabling others to "discriminate against or harass anyone on the basis of race, national origin, religion . . . ."[312] Airbnb's own policy regarding settlements has rendered it the chief culprit of violating its own fundamental principles.

As a result of Airbnb's discriminatory actions against Jewish property owners, lawsuits were filed against Airbnb,[313] American politicians demanded that Airbnb end its discriminatory policy,[314] and several states with laws regulating BDS activity threatened to take action against

---

https://www.savetibet.org/un-human-rights-experts-to-china-disclose-the-fate-and-whereabouts-of-kirti-monks/; INT'L RESOLS. & RECOGNITION ON TIBET, *supra* note 304.

310. Airbnb Disputed Regions, *supra* note 280.

311. *Id.*

312. *Terms of Service*, AIRBNB, https://www.airbnb.com/terms#sec14 (last updated Jan. 21, 2019); *see also Airbnb's Nondiscrimination Policy: Our Commitment to Inclusion and Respect*, AIRBNB, https://www.airbnb.ca/help/article/1405/airbnb-s-nondiscrimination-policy--our-commitment-to-inclusion-and-respect (last visited Feb. 8, 2020).

313. *See, e.g.*, Jonathan Stempel, *Jewish Americans Sue Airbnb Over West Bank Listing Ban*, REUTERS (Nov. 28, 2018), https://www.reuters.com/article/us-airbnb-lawsuit-israel/jewish-americans-sue-airbnb-over-west-bank-listing-ban-idUSKCN1NX2V1.

314. Adam Kredo, *Trump Admin, Congress Slam Airbnb Boycott of Israel as "Anti-Semitic"*, WASH. FREE BEACON (Nov. 28, 2018, 12:20 PM), https://freebeacon.com/national-security/trump-admin-congress-slam-airbnb-boycott-israel-anti-semitic/print/.

Airbnb.[315] In April 2019, the litigation against Airbnb was terminated pursuant to a settlement agreement that provided, inter alia, for the termination of the discriminatory policy against Jewish property owners.[316]

ii. Case Study Conclusions

While Danske's and Airbnb's actions against Israeli businesses present a concise case study of the intersection of CSR and discriminatory campaigns, many other companies have complied with the Foreign Boycott Campaign to harm Israel and Israeli businesses without a direct connection to a CSR program. As prominent recent examples of companies basing business decisions on political pressure from the Foreign Boycott Campaign rather than CSR-related financial considerations, Orange S.A., the French telecommunications company, echoing the allegations against Israel made by the BDS movement, undertook a campaign against its Israeli affiliate that ultimately led to a termination of the business relationship[317] and CRH plc, an international building materials company, complied with calls from the BDS movement to end its participation in the Israeli market.[318]

The Foreign Boycott Campaign also abuses and misuses standards, such as those promulgated by ISS-Ethix, that clearly state a company cannot be found to be violating a human rights norm if a government is the party allegedly violating a norm and the company is simply a third party tangentially related to the purported violation.[319] If it is the case that a company like Elbit is guilty of violating human rights norms simply because it provided materials and expertise used by Israel in the construction of a wall near refugee populations, it would also have to be the case that companies in Lebanon, Syria, Jordan, Egypt, and other nearby countries should also be deemed similarly guilty for the work they do to support government border security projects, yet no campaign to boycott such companies is known to exist. This fact highlights the obvious conclusion

315. *See, e.g.*, Reid Wilson, *Florida Governor Threatens Airbnb over West Bank Settlements*, THE HILL (Jan. 16, 2019, 11:31 AM), https://thehill.com/homenews/state-watch/425628-florida-governor-threatens-airbnb-over-west-bank-settlements.

316. *See* Julia Jacobs, *Airbnb Reverses Policy Banning Listings in Israeli Settlements in West Bank*, N.Y. TIMES (Apr. 9, 2019), https://www.nytimes.com/2019/04/09/world/middleeast/airbnb-israel-west-bank.html.

317. Ali Abunimah, *Campaigners Hail "Inspiring" BDS Victory as Orange Quits Israel*, ELECTRONIC INTIFADA (Jan. 11, 2016), https://electronicintifada.net/blogs/ali-abunimah/campaigners-hail-inspiring-bds-victory-orange-quits-israel.

318. John Mulligan, *CRH Sells Controversial Stake in Israel's Only Cement firm Mashav*, IRISH INDEPENDENT (Jan. 8, 2016, 7:53 AM), https://www.independent.ie/business/crh-sells-controversial-stake-in-israels-only-cement-firm-mashav-34345981.html.

319. *See* ISS-ETHIX, *supra* note 140, at 1 (discussing ISS-Ethix norms standards).

that the Foreign Boycott Campaign is nothing more than a discriminatory campaign with a thin veneer of faux human rights activism.

The Danske and Airbnb case studies demonstrate the problems of discriminatory acts being propagated by CSR campaigns, but Danske and Airbnb are simply two easily outlined instances of the problem, and Elbit and Jewish property owners in the West Bank are simply two obvious examples of Israeli businesses that are being harmed by CSR programs. CSR programs generally are susceptible to abuse that transforms an otherwise admirable attempt to provide for a balance between profit and societal needs into an unlawful and destructive co-option of the corporate franchise. This is particularly dangerous when the discriminatory campaign hiding behind a CSR program becomes systemic and institutionalized in government, non-governmental organization and third-party advisor guidelines that base CSR principles on purely political platforms.

C. Discriminatory Campaigns Adopted by International Organizations Do Not Sanitize Unlawful Domestic Discrimination.

At the heart of many CSR campaigns, particularly those adopted by foreign companies, is some form of international imprimatur. In his role as the founder of a non-profit legal institute that combats discrimination, the author of this article has filed governmental complaints against companies that participate in discriminatory boycotts.[320] The typical scenario in which such complaints have been filed involves a state with a law that requires state pension funds to divest from companies that boycott Israel.[321] State laws of this nature have a form of due process in which companies that have been identified for divestment are first informed of the determination and then given an opportunity to dispute the determination.[322] Only after the appeal process has been completed with a finding that the company has engaged in the prohibited activity will the divestment occur.[323]

A recent interaction between a state regulator and Danske (an interaction in which the author of this article requested that a state agency enforce the divestment provisions of the state's anti-discrimination law) is illustrative of

320. Letter from Zachor Legal Institute to California Public Employees' Retirement System (May 17, 2018) (on file with author); Letter from Zachor Legal Institute to SEC (Nov. 28, 2018), https://www.sec.gov/comments/s7-18-18/s71818-4699792-176614.pdf.

321. *See supra* Section V.B.i.

322. *See, e.g.*, FLA. STAT. § 215.4725(3)(a) (2018) (outlining the required steps the state fund must take to engage with a company identified as engaging in prohibited boycott activity and providing such company with a 90 day window to demonstrate that it is not engaging in the prohibited activity).

323. *See id*.

how discriminatory campaigns can infect CSR with the support of CSR adherents. In late 2017, the State of Colorado Public Employee Retirement Association ("PERA") notified Danske that it was in violation of Colorado's anti-boycott law (the "CO BDS Law")[324] and would be subject to divestment. Through its counsel, Danske acknowledged that under the Danske Exclusion Policy it boycotts two Israeli companies (Elbit and Aryt Industries Ltd.), but claimed that the exclusion was not a boycott as that term is defined in the CO BDS Law.[325] To argue this, Danske parsed the text of the CO BDS Law to opine that a prohibited boycott has to have a politically motivated intent to inflict harm on Israel.[326] Danske stated that its boycott of Elbit was not politically motivated to inflict harm on Israel but was, instead, part of its CSR program and pointed to the fact that it was simply complying with its own "Responsible Investing"[327] policies, which in turn were developed on the basis of the UNGC and U.N. Guiding Principles on Business and Human Rights with the advice and counsel of MSCI and ISS-Ethix,[328] and thus had no political motivation to harm Israel.[329]

Responding to that argument, the author of this article reminded PERA that compliance with international CSR guidelines does not absolve a company of liability for violating valid laws of the U.S. and individual states:

> The [CO BDS Law] does not contain exemptions for boycotts that have been undertaken as part of a company's voluntary compliance with the guidance of an international political organization. As an initial matter, the international organization that has issued the standards Danske

---

324. COL. REV. STAT. §§ 24-54.8-201 to 24-54.8-204 (2018).

325. *See* JTA, *New Jersey Divests from Danish Bank to Comply with State Anti-BDS Law*, TIMES OF ISRAEL (Jan. 14, 2018, 11:23 PM), https://www.timesofisrael.com/new-jersey-divests-from-danish-bank-to-comply-with-state-anti-bds-law/ (discussing how Danske Bank denies that its exclusion policy, which prevents it from doing business with Israeli companies Aryt Industries and Elbit System, constitutes a boycott).

326. *See* COL. REV. STAT. § 24-54.8-201 (looking to the definition of economic prohibitions against Israel, which means "engaging in actions that are politically motivated and are intended to penalize, inflict economic harm . . . .").

327. *Sustainable Investment Policy*, DANSKE BANK, https://www.danskeinvest.dk/w/show_download.hent_fra_arkiv?p_vId=didken_responsible_investment_policy_dima.pdf (last visited Feb. 8, 2020).

328. Letter from Charles E. Borden, Allen & Overy LLP, to Jennifer Schreck, Senior Staff Attorney, PERA (Oct. 10, 2017) (on file with author)[hereinafter Borden Letter].

329. *See* Benjamin Weinthal, *Colorado Sanctions Danish Bank for BDS Activity Against Israel Companies*, FOUNDATION FOR DEFENSE OF DEMOCRACIES (Sept. 26, 2017), https://www.fdd.org/analysis/2017/09/26/colorado-sanctions-danish-bank-for-bds-activity-against-israel-companies/ (stating that Danske's head of responsible investments said "Danske Bank does not boycott Israel or Israeli companies as such, and we do not take part in this so-called BDS campaign targeting Israel."). Danske used the UNGP to explain its actions when the UNGP states that its principles should not be applied in a discriminatory manner. *See supra* notes 87–91 and accompanying text.

> complies with [the U.N.] is notoriously anti-Israel. Danske chooses to comply with the standards promulgated by this biased entity. There is certainly no binding authority under which Danske is forced to comply with the UN standards in the manner it has and no law otherwise obligates Danske to boycott the two Israeli companies. In fact, the international standards are a political message that Danske has volitionally adopted and complied with.[330]

Particularly problematic is when CSR guidelines are based on U.N. actions or determinations. U.N. biases, especially against Israel, are well documented.[331] In 2017, all 100 U.S. Senators called for the U.N. to eliminate its bias against Israel.[332] The fact that any topic was able to get bipartisan, unanimous support of the Senate is strong evidence of the pervasiveness of U.N. bias. Further, Secretary of State Mike Pompeo and U.S. Permanent Representative to the U.N. Nikki Haley, in announcing the withdrawal of the U.S. from the U.N. Human Rights Council, highlighted the organization's lengthy and deep bias against Israel and stated:

> [T]he council's continued and well-documented bias against Israel is unconscionable. Since its creation, the council has adopted more resolutions condemning Israel than against the rest of the world combined . . . . Last year, the United States made it clear that we would not accept the continued existence of agenda item seven, which singles out Israel in a way that no other country is singled out. Earlier this year, as it has in previous years, the Human Rights Council passed five resolutions against Israel – more than the number passed against North Korea, Iran, and Syria combined. This disproportionate focus and unending hostility towards Israel is clear proof that the council is motivated by political bias, not by human rights.[333]

What this documented bias against Israel by the U.N. and its affiliated agencies demonstrates is the risk of international guidelines being weaponized and deployed as CSR programs. Foes of Israel have pushed the Foreign Boycott Campaign not only at the local level, but by infiltrating U.N. agencies that publish standards used as a benchmark to set CSR policies, these groups have been able to create a de facto international boycott

---

330. Borden Letter, *supra* note 324.

331. *See infra* notes 322–323 and accompanying text; *see also* S.C. Res. 2334, ¶¶ 1–9 (Dec. 23, 2016) (showing the U.N.'s bias against Israel by condemning Israel).

332. *See* Letter from the U.S. Senate to António Guterres, Secretary-General of the United Nations (Apr. 27, 2017), https://www.rubio.senate.gov/public/_cache/files/f6c7c142-8655-4c34-907b-ffe91b033f34/83A98BDD8379F7A35D6207DCB0D74B38.4-27-2017-rubio-coons-ltr-to-unsg-re-israel.pdf.

333. Mike Pompeo, Sec'y of State, & Nikki Haley, U.S. Permanent Representative to the United Nations, Remarks on the U.N. Human Rights Council (June 19, 2018) (transcript available at https://www.state.gov/secretary/remarks/2018/06/283341.htm).

campaign directed at Israel. Put another way, CSR is being used, in part, to sanitize discrimination.

As noted in the previous section of this article, the U.S. Department of State further defines anti-Semitism as, inter alia, "[d]enying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor," "[a]pplying double standards by requiring of it a behavior not expected of or demanded of any other democratic nation" and "[h]olding Jews collectively responsible for actions of the State of Israel."[334] The U.S. Department of Education's Office for Civil Rights has adopted the Department of State's definition of anti-Semitism and is applying it in a civil rights complaint against Rutgers University.[335]

By their own admission, Danske, and other companies and European bodies issuing CSR guidelines, brand Israel as a racist endeavor,[336] hold Israeli companies to a double standard and hold Jews, including Jewish-controlled companies, collectively responsible for the acts of the State of Israel. As such, these entities discriminate on the basis of national origin and race.[337]

To be certain, Danske is hardly the only company that has incorporated discriminatory CSR guidelines into its own activities, but it is a very telling example of how CSR is used as a trojan horse to carry BDS into Traditional Corporations. Danske's advisors, ISS-Ethix and MSCI, each having thousands of clients relying on them for CSR guidance, presumably advise all of their CSR customers in a manner consistent with how it advised Danske on investing in Israeli companies, so the scope of unlawful

334. Defining Anti-Semitism, *supra* note 235.

335. OCR Letter, *supra* note 238, at 3.

336. *See* NGO MONITOR, *supra* note 250, at 2 ("Ultimately Danske Bank and Ethix rely on distorted legal narratives that falsely accuse Israel of human rights violations and erroneously argue that conducting business with Israel amounts to furthering these alleged violations. As part of this anti-Israeli narrative, they promote the claim that it is illegal and unethical to conduct business with Jews over the 1949 armistice lines. Courts in France, Canada, and the UK have explicitly found that there is no international law prohibiting business operations over the 1949 armistice lines. A court in France and the advertising board in the Netherlands also found that it was defamatory to claim a company selling goods or operating over armistice lines was acting "illegally" or in violation of international law.").

337. *See* OCR Letter, *supra* note 238, at 2 ("However, as OCR has repeatedly indicated previously, discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics — which may include discrimination against Jewish or Muslim students — is discrimination on the basis of national origin or race in violation of Title VI. In determining whether students face discrimination on the basis of actual or perceived Jewish ancestry, we rely where appropriate upon widely established definitions of anti-Semitism.").

discrimination in companies with CSR policies is likely significant.

Moreover, a Traditional Corporation that incorporates BDS principles in its CSR policies is also acting in violation of the Shareholder Primacy Norm. While CSR advocates argue that CSR programs ultimately lead to increased shareholder value, these claims are vague and speculative. In fact, Professor Stephen Bainbridge examined the question of how the adoption of BDS affects investment performance and concluded that it is "nearly certain to result in poorer performance" of investment plans.[338] To this point, Israel has been named "Startup Nation" in response to its prolific entrepreneurial nature[339] and in a research paper distributed in 2018 by Jeffries LLC, Israel's technology sector was described as one of the top ten most technologically advanced countries in the world.[340] Only the U.S. and China have more companies listed on Nasdaq.[341] Adopting an investing program that prohibits investments in one of the world's leading investment markets[342] is clearly at

---

338. Stephen Bainbridge, *Did Harvard Divest From Israel?*, PROFESSORBAINBRIDGE.COM (Aug. 15, 2010), https://www.professorbainbridge.com/professorbainbridgecom/2010/08/did-harvard-divest-from-israel.html; *see also* Stephen Bainbridge, *Those Divesting Presbyterians*, PROFESSORBAINBRIDGE.COM (July 21, 2004), http://www.professorbainbridge.com/professorbainbridgecom/2004/07/those-divesting-presbyterians.html.

339. *See generally* DAN SENOR & SAUL SINGER, START-UP NATION: THE STORY OF ISRAEL'S ECONOMIC MIRACLE (2011).

340. THE ISRAELI TECHNOLOGY IMPERATIVE: INVESTING AT THE CROSSROADS OF INNOVATION, BLUESTAR INDEXES (June 2018), https://www.fa-mag.com/userfiles/stories/whitepapers/2018/The-Israeli-Technology-Imperative-June_2018-sm.pdf; *see also Israel's Technology Sector Continues to Grow*, THE ECONOMIST (Feb. 9, 2018), http://www.eiu.com/industry/article/1796420563/israels-technology-sector-continues-to-grow/2018-02-09 ("Israel is riding on a global surge in high-tech investment. In the U.S., venture-capital firms deployed US$84bn in more than 8,000 companies in 2017, the highest number since the dot.com era around 2000 . . . ."); Sam Shead, *The 25 Coolest Tech Companies in Israel*, BUS. INSIDER (May 25, 2017, 3:30 AM), https://www.businessinsider.com/coolest-tech-startups-in-israel-2017-5 ("Israel continues to produce an impressive number of highly successful tech companies for a country with a population of just 9 million people. The Middle Eastern country is sometimes referred to as 'Startup Nation' thanks to the sheer number of entrepreneurs building businesses there, particularly in cities like Tel Aviv. Multinational tech companies like Google, Apple, Facebook, and Microsoft all have research centres in Israel . . . .").

341. Rory Cellan-Jones, *Next Silicon Valleys: What Makes Israel a Start-Up Nation*, BBC NEWS (Feb. 10, 2014), https://www.bbc.com/news/technology-26071818.

342. Coco Liu, *Why Israel is the Next Promised Land for Chinese Investors*, SOUTH CHINA MORNING POST (Nov. 26, 2017, 9:45 AM), https://www.scmp.com/week-asia/business/article/2121498/why-israel-new-promised-land-chinese-investors ("China's total investment in Israel almost tripled last year to US$16 billion (HK$125 million), largely driven by a surge in funding in Israel's hi-tech industry . . . ."); *see also* Steven Scheer, *U.S. Intel Plans $5 Billion Investment in Israeli Plant*, REUTERS (Feb. 21, 2018), https://www.reuters.com/article/us-intel-israel-expansion/u-s-intel-plans-5-billion-investment-in-israeli-plant-minister-idUSKCN1G51ET; PWC ISRAEL HI-TECH

odds with the fiduciary duties of any Traditional Corporation's board of directors, yet this is exactly what happens when a board signs on to a CSR program with BDS elements. In addition, in a jurisdiction that has enacted legislation that prohibits the state from entering into contracts with, or investing in, companies that boycott Israel, the financial cost of adopting any form of BDS program can be significant.[343]

Under accepted shareholder primacy theories, whether radical or traditional, directors ultimately have a duty to enhance the value of the company. Adhering to a CSR policy that includes BDS elements turns the corporation from one that is primarily focused on enhancing shareholder returns to one that is acting for a political or social constituency, something that is not permissible for a non-benefit corporation. The boycotting of Israeli companies can only provide "social justice" returns (that is, appeasement of a radical base), something at odds with traditional notions of Shareholder Primacy.

VI. CONCLUSION

CSR programs can be both legal and beneficial, but they are not immune from the application of federal and state laws. As CSR has become an important element considered by the boards of Traditional Corporations it has also caught the attention of groups that see the opportunities to embed

---

EXIT REPORT 2017 1 (2018), https://www.pwc.com/il/en/assets/pdf-files/exit-report-en-2017.pdf (noting that 2017 merger and acquisition deal value for Israeli companies was up 110% over 2016, with a total value of $23.8 billion, and concluding " . . . one should not overlook the fact that more global corporations now choose Israel as the place where they can buy the right technologies to help them shape their own future.").

343. BDS activists have targeted a number of large, publicly traded corporations with demands that they terminate business relationships with Israel. *See Global BDS Week of Action Against HP November 25 - December 3*, BDS MOVEMENT, https://bdsmovement.net/boycott-hp/week-of-action (last visited Feb. 8, 2020). As an example, the Hewlett Packard Enterprise Company has been a frequent focus for BDS activists. Hewlett Packard Enterprise Company also has a number of contracts with states, including the State of California. *See LPA Contract Detail*, CA.ORG, https://caleprocure.ca.gov/PSRelay/ZZ_PO.ZZ_CTR_SUP_CMP.GBL?Page=ZZ_CTR_SUP_PG&Action=U&SETID=STATE&CNTRCT_ID=3-16-70-3223A (last visited Feb. 8, 2020). The State of California prohibits state agencies from entering into contracts with entities boycotting Israel and if Hewlett Packard Enterprise Company were to participate in BDS boycotts of Israel, they would be disqualified from entering into contracts with the State of California (as well as other states with anti-BDS laws). *See* CAL. PUB. CONT. CODE § 2010 (West 2017). As the State of California has an economy that would be the fifth largest in the world if it were an independent country, a company like Hewlett Packard Enterprise Company would be excluded from participating in a trillion dollar economy if it became a BDS participant. *See* Lisa Marie Segarra, *California's Economy Is Now Bigger Than All of the U.K.*, FORTUNE (May 5, 2018), https://fortune.com/2018/05/05/california-fifth-biggest-economy-passes-united-kingdom/.

their own agendas into the boardroom. The most relevant current example is that of CSR being used by BDS activists to co-opt the corporate franchise into becoming yet another tool to further the discriminatory BDS movement. When CSR is implemented in such a manner it becomes an unlawful form of national origin and race discrimination. Furthermore, abuse of CSR in this way leaves the boards of Traditional Corporations in violation of state corporate law principles on shareholder primacy and the obligation of corporate boards to maximize the value of the company. In addition to shareholder liability, companies that adopt discriminatory CSR programs should be exposed to liability under anti-discrimination laws and should also be subject to shareholder lawsuits based on breach of fiduciary duty under relevant state laws.

To the extent a Traditional Corporation adopts a CSR program that benefits non-shareholder parties and is not facially discriminatory, to avoid shareholder lawsuits for breach of fiduciary duty the company should convert to a Benefit Corporation status, which would subject the matter to a vote of all shareholders and require the company to be transparent as to its decision to focus on social and political matters, rather than profit.

*   *   *

HENRY SCHEIN V. ARCHER & WHITE: A LESSON IN THE IMPORTANCE OF CAREFULLY DRAFTING AN ARBITRATION CLAUSE

CHARLES B. ROSENBERG*

I. INTRODUCTION

When a company negotiates a contract, it often focuses on the commercial aspects of the agreement, paying little attention to the agreement's dispute resolution clause. Indeed, often added at the last minute, as the parties toast the conclusion of their negotiations, it has become common practice for companies to use model dispute resolution clauses[1] or even cut and paste from other agreements.[2] In fact, a

* Charles B. Rosenberg is Counsel at King & Spalding LLP in Washington, D.C. He is a specialist in public international law and international arbitration, focusing on both investment treaty arbitration and international commercial arbitration. Mr. Rosenberg graduated first in his class, *summa cum laude*, and *Order of the Coif* from the American University Washington College of Law.

1. *See, e.g.*, *Standard ICC Arbitration Clauses*, INT'L CHAMBER OF COM. (Jan. 3, 2017), https://cdn.iccwbo.org/content/uploads/sites/3/2016/11/Standard-ICC-Arbitrat

commentator on the Oil, Gas, Energy, Mining, Infrastructure Dispute Management (OGEMID) discussion forum recently observed that while "[p]arties commonly use the AAA's recommended arbitration clause from its drafting guidelines . . . [m]any if not most parties don't know the details of the institution's rules."[3]

This is only natural as companies enter into contracts with the expectation of a positive commercial relationship. Companies are in the business of doing business, not resolving conflicts. But disputes can and do arise.

While model dispute resolution clauses — or "template" clauses — copied and pasted from other agreements may be adequate, a company may be able to strengthen its position in a dispute resolution proceeding by tailoring the contract's dispute resolution clause to the unique circumstances of the transaction and the company.[4] Indeed, if a dispute

---

ion-Clause-in-ENGLISH.pdf ("All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."); *Standard Clauses*, LCIA, http://www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx (last visited Feb. 8, 2020) ("Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be [one/three]. The seat, or legal place, of arbitration shall be [City and/or Country]. The language to be used in the arbitral proceedings shall be [ ]. The governing law of the contract shall be the substantive law of [ ]."); *Clauses*, AM. ARBITRATION ASS'N, https://www.adr.org/Clauses (last visited Feb. 8, 2020) ("Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.").

2. *See* LEW, MISTELIS, & KROLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶ 8-2 (2003) ("In practice too little attention is given to the drafting of the arbitration agreement. The arbitration clause is frequently included late in contract negotiations, sometimes as a boilerplate clause or as an afterthought, without debate or consideration of the specific needs of the case."); *see also* ILEANA M. SMEUREANU, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION 14 (2011) (noting that contract drafters are reluctant to "talk about the funeral while negotiating the terms of marriage").

3. *See generally* Ken Adams, *My Version of the AAA Standard Arbitration Clause*, ADAMS ON CONTRACT DRAFTING (Aug. 30, 2009), https://www.adamsdrafting.com/my-version-of-the-aaa-standard-arbitration-clause/ (last visited Feb. 8, 2020) (showing an example of how one may use the AAA Standard Arbitration Clause for their company).

4. Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation" (Symposium Keynote Presentation)*, 7 DEPAUL BUS. & COM. L.J. 3, 383, 400–01 (2009).

arises, a carefully drafted dispute resolution clause can save major headache, time, and expense later by, for example, avoiding litigation in domestic courts to determine the scope of the agreement to arbitrate.[5]

The U.S. Supreme Court recently rendered its decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*,[6] a dispute regarding whether a judge or an arbitrator will arbitrate a dispute based on an ambiguous arbitration clause.[7] The dispute was originally filed in U.S. courts in 2012.[8] More than seven years later, the dispute *still* has not been resolved.[9] *Henry Schein* is an important reminder that a carefully drafted arbitration clause has real-world consequences.

This article discusses *Henry Schein* and uses this dispute as a springboard to explain the importance of carefully drafting an arbitration clause that takes into consideration the transaction and the parties' needs for an economical and efficient dispute resolution process.

II. *HENRY SCHEIN V. ARCHER & WHITE*: A DISPUTE OVER AN AMBIGUOUS ARBITRATION CLAUSE

Henry Schein involves a disagreement over whether a dispute falls within the scope of an ambiguously worded arbitration clause in a contract. In August 2012, Archer & White Sales, Inc. ("Archer"), a low price distributor, seller, and servicer for dental equipment manufacturers, sued Henry Schein, Inc. ("Henry Schein"), the largest distributor and manufacturer of dental equipment in the United States, and certain subsidiaries of Danaher Corporation ("Danaher") (together, "Defendants") in the U.S. District Court for the Eastern District of Texas, alleging that they violated federal and state antitrust laws by conspiring to fix prices and refusing to compete with each other.[10] Specifically, Archer maintained that its competitor Henry Schein conspired with Danaher to terminate or reduce

---

5. *Drafting Dispute Resolution Clauses: A Practical Guide*, AM. ARBITRATION ASS'N, https://www.adr.org/sites/default/files/document_repository/Drafting%20Dispute%20Resolution%20Clauses%20A%20Practical%20Guide.pdf (last visited Feb. 8, 2020) (noting the benefits of a well-written dispute resolution clause that clearly defines the "process prior to a dispute, after which agreement becomes more problematic").

6. 139 S. Ct. 524 (2019).

7. *Id.* at 527.

8. *See* Archer & White Sales, Inc. v. Henry Schein, Inc., No. 2:12-CV-572-JRG-RSP, 2013 WL 12155243, at *1 (E.D. Tex. May 28, 2013).

9. *See Henry Schein Inc.*, 139 S. Ct. at 532 (remanding the case for further adjudication on the merits).

10. *See Archer & White Sales, Inc.*, 2013 WL 12155243, at *1.

Archer's distribution territory because Archer was selling dental equipment at discounted prices.[11] Archer sought tens of millions of dollars in damages *and injunctive relief*.[12] Defendants moved to compel arbitration based on the arbitration clause in the distribution contract between Archer and Danaher, which provided:

> Disputes. This Agreement shall be governed by the laws of the State of North Carolina. *Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief* and disputes related to . . . intellectual property . . .), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina.[13]

More than a year later, in May 2013, a magistrate judge ruled in favor of Defendants, granted the motion to compel arbitration, and held that the gateway question of the arbitrability of the claims belonged to an arbitrator.[14] The magistrate judge found that the incorporation of the AAA Rules in the arbitration clause evinced an intent to have an arbitrator decide questions of arbitrability and that there was a reasonable construction of the arbitration clause that would provide for arbitration of the dispute.[15]

In December 2016, another three and a half years later, the U.S. District Court for the Eastern District of Texas vacated the magistrate judge's order, ruled in favor of Archer, and held that a court could decide the question of arbitrability.[16] The district court found that the dispute was not arbitrable because the plain language of the arbitration clause expressly excluded suits that involved requests for injunctive relief,[17] reasoning that the court would "not re-write the terms of the Parties' agreement to accommodate a party . . . that could have negotiated for more precise

---

11. *See id.*

12. *See* Archer & White Sales, Inc. v. Henry Schein, Inc., 878 F.3d 488, 491 (5th Cir. 2017) (emphasis added).

13. *Id.* (emphasis added).

14. *See Archer & White Sales, Inc.*, 2013 WL 12155243, at *1, *3.

15. *See id.* at *1 ("The incorporation of the rules of the AAA provides the answer to this problem, as those rules very clearly state that the question of the arbitrability of a dispute is referred to the arbitrator under the AAA rules.").

16. *See* Archer & White Sales, Inc. v. Henry Schein, Inc., No. 2:12-CV-572-JRG, 2016 WL 7157421, at *6, *9 (E.D. Tex. Dec. 7, 2016).

17. *See id.* at *5 ("[T]he phrase 'except actions seeking injunctive relief' [in the arbitration clause] is clear on its face – any action seeking injunctive relief is excluded from mandatory arbitration. Plaintiff's action seeks injunctive relief. Applying the plain meaning of the clause, Plaintiff's action is excluded from mandatory arbitration.").

language."[18] The court scheduled a trial on the merits for more than a year later in February 2018.[19] But that trial never happened, as Defendants appealed to the U.S. Court of the Appeals for the Fifth Circuit.

In December 2017, another year later, the Fifth Circuit ruled that the parties had not "clearly and unmistakably" intended to delegate the question of arbitrability to an arbitrator, reasoning that "the interaction between the AAA Rules and the carve-out is at best ambiguous."[20] The court concluded that the carve-out in the arbitration clause excluded the claim from arbitration and, consequently, a court could decide the question of arbitrability.[21]

Defendants then appealed to the U.S. Supreme Court, which granted the petition for a writ of certiorari.[22] Prior to the oral argument, a prominent U.S. Supreme Court commentator opined that the "long delays and high expenses" incurred by the parties may be a decisive factor in the Court's determination:

> [T]he one key fact that might be enough to keep [Defendants] in the game is the protracted delay of the judicial proceedings here. [Archer] filed this complaint in 2012. *The litigation over arbitrability has consumed seven years and doubtless expended several hundred thousand dollars in legal fees (if not more).* I will be surprised next week if the justices [sic]who commonly have joined the majority in broad readings of the FAA are not troubled by the prospects of imposing such *long delays and high expenses* on parties that had bargained for a swift and presumably less expensive resolution in arbitration.[23]

18. *See id.* at *5–6 (noting that "[s]uch an intentional drafting effort as opposed to dropping in standard language is worthy of the Court's notice.").

19. *See id.* at *9.

20. *See* Archer & White Sales, Inc. v. Henry Schein, Inc., 878 F.3d 488, 494–95 (5th Cir. 2017) ("On one reading, the Rules apply to '[a]ny dispute arising under or related to [the] Agreement.' On another, the provision expressly exempts certain disputes and the Rules apply only to the remaining disputes.").

21. *See id.* at 497 ("The arbitration clause creates a carve-out for 'actions seeking injunctive relief.' . . . We see no plausible argument that the arbitration clause applies here to an 'action seeking injunctive relief.' The mere fact that the arbitration clause allows Archer to avoid arbitration by adding a claim for injunctive relief does not change the clause's plain meaning.").

22. Petition for Writ of Certiorari, Henry Schein, Inc. v. Archer & White Sales, Inc., 138 S. Ct. 2678 (No. 17-1272); *Henry Schein Inc. v. Archer and White Sales Inc.*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/henry-schein-inc-v-archer-and-white-sales-inc/ (last visited Feb. 8, 2020).

23. Ronald Mann, *Argument Preview: Justices to Mull Who Decides Whether to Arbitrate — the Judge or the Arbitrator*, SCOTUSBLOG (Oct. 22, 2018, 10:25 AM), http://www.scotusblog.com/2018/10/argument-preview-justices-to-mull-who-decides-whether-to-arbitrate-the-judge-or-the-arbitrator/ (emphasis added).

On January 8, 2019, the Court rendered a unanimous decision in favor of the Defendants.[24] The Court vacated the Fifth Circuit's decision, reasoning that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract."[25] While the Court "express[ed] no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator," the Court noted that "[t]he Court of Appeals did not decide that issue" and indicated that "[o]n remand the [circuit court] may address that issue in the first instance."[26]

Thus, after more than seven years and likely hundreds of thousands of dollars in lawyer fees litigating a preliminary issue before a magistrate judge, a district court, a circuit court, and the U.S. Supreme Court, the dispute still has not been resolved or even argued on the merits.[27] A clear and non-ambiguous arbitration clause could have prevented this situation.

III. DRAFTING AN ARBITRATION CLAUSE: PRACTICE POINTERS

An arbitration clause provides contract drafters with the opportunity to streamline the resolution of a potential future dispute, to ensure that it will be resolved by appropriate decision-makers, and to maximize the chances that the ultimate award will be enforceable. However, inattentive drafting can lead to disputes similar to *Henry Schein* or disputes over arbitration clauses that are unenforceable, procedural requirements that are impossible to satisfy, and provisions that endanger the enforceability of the award.[28]

In general, an arbitration clause should be simple, economic, and clear. As Professor Rusty Park has explained:

> The cardinal rule of drafting an international arbitration agreement is to avoid ambiguity and equivocation. Uncertainty about whether, where and how the parties wished to arbitrate will delight only the party wishing to drag its feet, and will often render the clause unenforceable.[29]

This section provides practice pointers with respect to the following critical issues in drafting an arbitration clause: (i) the scope of arbitration;

---

24. *See* Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 531 (2019) (rejecting the "wholly groundless" exception and remanding the case for further proceedings).

25. *Id.* at 528, 531.

26. *Id.* at 531.

27. *See id.*

28. *See generally id.* (highlighting the consequences of poorly drafted arbitration clauses).

29. William W. Park, *Arbitration in Banking and Finance*, 17 ANN. REV. BANKING L. 213, 246 (1998).

(ii) the arbitral institution; (iii) the seat of the arbitration; (iv) the arbitrators; (v) confidentiality; and (vi) document production or discovery.[30]

The Scope of Arbitration

An arbitration clause confers a mandate upon an arbitral tribunal to adjudicate disputes that come within the ambit of the clause. It is important that an arbitral tribunal not exceed this mandate; otherwise, the ultimate arbitral award may be set aside or refused enforcement.[31] Further, as illustrated by *Henry Schein*, narrowly drafted arbitration clauses can lead to uncertainties regarding the scope of arbitration and challenges to an arbitral tribunal's jurisdiction, with consequent increased expense and time to resolve the dispute.[32] To avoid these risks, it is advisable to consider drafting arbitration clauses in broad, inclusionary terms.

- <u>Recommended</u>: "All disputes arising out of or in connection with this agreement shall be resolved by arbitration . . . ."
- <u>Not Recommended</u>: "In the event of a dispute in respect of the amount of any Indemnification Claim or in respect of whether such Claim is indemnifiable . . . ."

Arbitral Institutions

Disputes may be resolved by arbitration administered by an arbitral institution or ad hoc without the use of an institution.[33] The advantages of institutional arbitration — including well-established arbitral rules, trained staff to help administer proceedings and deal with recalcitrant parties, and review of the arbitral award by some institutions — normally outweigh the additional expense of the institution.[34]

---

30. This list is not exhaustive. Other important issues that should be addressed in the arbitration clause include the governing law, language of the arbitration, and number of arbitrators.

31. *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(c), June 7, 1959 (providing that recognition and enforcement may be refused "[i]f the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or if it contains decisions on matters beyond the scope of the submission to arbitration").

32. *See generally Henry Shein, Inc.,* 139 S. Ct. at 531 (remanding to the Court of Appeals to address whether an arbitrator or court should rule on the contract issue).

33. *See* RÉMY GERBAY, THE FUNCTIONS OF ARBITRAL INSTITUTIONS 5–6 (2016). *See generally* PAUL D. FRIEDLAND, ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS 37–43 (2d ed. 2007) (discussing the choice between administered and non-administered arbitration).

34. *See* JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL

In selecting institutional arbitration, it is advisable to not use newly formed arbitral institutions that lack proven track records. A party runs the risk that an inexperienced institution may appoint an unqualified arbitrator or experiment with untested arbitral procedures. Well-established arbitral institutions with a history of administering international arbitrations include the International Chamber of Commerce ("ICC"),[35] the London Court of Arbitration ("LCIA"),[36] and the International Centre for Dispute Resolution ("ICDR"),[37] the international arm of the American Arbitration Association ("AAA").[38]

In choosing among established arbitral institutions, it is important to consider the nature of the transaction, the identities of the parties, and the likely nature of future disputes. For example, to ensure that both parties perceive the arbitration as legitimate and respect the resulting arbitral award,[39] it is advisable to select an arbitral institution based in a third country where none of the parties reside or have a place of business.[40] Thus, parties that contract with Chinese state entities should think twice before agreeing to arbitration administered by the China International Economic and Trade Arbitration Commission ("CIETAC").[41]

Seat of the Arbitration

The seat — or legal place of arbitration — generally plays a central role in an arbitration. The seat, which will not necessarily be the place where the arbitration hearing is physically held, is the jurisdiction that may deal with issues relating to, among other things, the constitution of the tribunal,

---

ARBITRATION 211–13 (2012).

35. *See generally* INT'L CHAMBER OF COM., https://iccwbo.org (last visited Feb. 9, 2020).

36. *See generally* LONDON COURT OF INT'L ARBITRATION, http://www.lcia.org/ (last visited Feb. 9, 2020).

37. *See generally* INT'L CTR. FOR DISP. RESOL., https://www.icdr.org/ (last visited Feb. 9, 2020).

38. *See generally* AM. ARB. ASS'N, https://www.adr.org/ (last visited Feb. 9, 2020).

39. *See* Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson — van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, 29 ARB. INT'L 7, 19 (2013) (explaining that "[l]egitimacy of the proceedings in turn may translate into respect for the arbitral award, regardless of the outcome, as well as for the ultimate enforcement proceedings, if needed at all.").

40. *See* BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 164 (6th ed. 2015).

41. *See generally* CHINA INT'L ECON. & TRADE ARB. COMMISSION, http://www.cietac.org/?l=en (last visited Feb. 9, 2020).

challenges to arbitrators, interim measures of protection, and the finality of the award.[42] The seat of the arbitration is important because an arbitral award that does not comply with the law of the seat may be set aside or refused enforcement.[43]

It is advisable to select an arbitration seat that has a modern national arbitration law, support from local court judges, but also freedom from judicial interference, limited appeals on law or substance, and a proven track record of enforcing arbitration agreements and arbitral awards. Examples of well-established arbitral seats include London, Paris, Hong Kong, Geneva, Singapore, and New York.[44]

The Arbitrators

One of the principal advantages of arbitration over domestic litigation is that the parties have a role in selecting who decides the dispute;[45] the parties can choose the arbitrators that they believe are best suited to resolve the dispute rather than being stuck with a judge randomly assigned to the case.[46] Contract drafters can specify in an arbitration clause the type of experience, expertise, or other qualifications that they desire in the arbitrators.

However, it is strongly advisable to not name a specific individual in an arbitration clause. The parties risk finding out that the desired arbitrator may have a conflict, is not available, or is deceased. Nor is it advisable to

---

42. *See* WAINCYMER, *supra* note 34, at 159–60.

43. *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award, art. V(1)(d), June 7, 1959 (providing that recognition and enforcement may be refused if "the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.").

44. *See* QUEEN MARY UNIV. OF LONDON & WHITE & CASE LLP, 2018 INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION 2 (2018).

45. *See, e.g.*, *id.* at 7 (reporting that the "ability of parties to select arbitrators" is one of the most valuable characteristics of international arbitration).

46. *See* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1641 (2d ed. 2014) ("The parties' involvement in the selection of the tribunal contrasts markedly with the parties' non-involvement in selecting judges to hear their dispute in a national court. In virtually no legal system are the parties permitted to agree that a particular judge may hear and resolve their dispute; the assignment of the judge in a litigation is the task of the judicial administration – almost invariably conducted in a random or otherwise arbitrary fashion – and party-involvement in this process is not only nonexistent but often mandatorily forbidden. Indeed, in many jurisdictions, the suggestion that the parties might choose their judge would be regarded as implausible.").

create a laundry list of requirements that only a few select people may meet.

- Recommended: "Each arbitrator shall be fluent in English and be a lawyer in good standing admitted to the New York Bar for at least 10 years."
- Not Recommended: "Each arbitrator shall be fluent in Mandarin, hold a law degree from Université Panthéon-Assas (Paris II) in France, and have more than 20 years of experience in the chemical industry."

If the parties have designated a procedure for constituting the arbitral tribunal, it must be respected; if the tribunal is constituted in a manner contrary to the parties' agreement, the award may be set aside or refused enforcement.[47] Along these lines, contract drafters and parties in an arbitration should keep in mind that younger arbitrators may be able and willing to devote more time and attention to a case than more experienced, and often busier, practitioners.

Confidentiality

Another major advantage of arbitration over domestic litigation is that arbitration is a private proceeding in which "the parties may air their differences and grievances, and discuss their financial circumstances, their proprietary 'know-how', and so forth, without exposure to the gaze of the public and the reporting of the media."[48] An important issue related to privacy is confidentiality: the parties have an obligation to not disclose information concerning the arbitration to third parties.

The rules of some leading arbitral institutions do not restrict parties from disclosing to third parties the existence, nature, or other facts about an arbitration. For example, the ICDR Arbitration Rules impose a confidentiality obligation on the tribunal and the arbitral institution, but not on the parties.[49] The ICC Arbitration Rules go further and contemplate the

---

47. *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award, art. V(1)(d), June 7, 1959 (providing that recognition and enforcement may be refused if "[t]he composition of the arbitral authority . . . was not in accordance with the agreement of the parties . . . .").

48. *See* BLACKABY, *supra* note 40, at 134; *see also* BORN, *supra* note 46, at 2780 (explaining that some commentators describe arbitration as "not a spectator sport").

49. INT'L CTR. FOR DISP. RESOL., INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, Art. 37(1) (2014), https://www.icdr.org/about_icdr ("Confidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator or by the Administrator. Except as provided in Article 30, unless otherwise agreed by the parties or required by applicable law, the members of the arbitral tribunal and the Administrator shall keep confidential all matters relating to the arbitration or the award.").

possibility of confidentiality upon the request of a party:

> Upon the request of any party, the arbitral tribunal *may* make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.[50]

Contract drafters concerned with the confidentiality of the transaction, the business relationship, or a potential future dispute should consider including confidentiality provisions in their arbitration clauses to restrict the contracting parties from disclosing any confidential information to third parties.[51]

- Recommended: "The parties undertake to keep confidential the fact of the arbitration, all orders and awards, all materials submitted in the proceedings that were created for the purpose of the arbitration, and all other documents produced by another party in the proceedings that are not otherwise in the public domain, to save and, to the extent that disclosure may be required of a party by law, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a court or other judicial authority."

Document Production/Discovery

Document production in international arbitration is generally more expansive than discovery in civil law jurisdictions. Most international arbitration rules provide an arbitral tribunal with broad discretion regarding the taking of evidence, including document disclosure.[52] Further, the

---

50. *Compare* INT'L CHAMBER OF COMMERCE, ARBITRATION RULES, Art. 22(3) (2017) (emphasis added), *with* LONDON COURT INTERNATIONAL ARBITRATION, LCIA ARBITRATION RULES, Art. 30(1) (2014) ("The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority.").

51. *See* ILEANA M. SMEUREANU, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION 13 (2011) (observing that "[a]lthough it seems more practical to agree on confidentiality when entering into the arbitration agreement (or the contract containing the arbitration clause), it is not unusual that parties conclude such agreements after the proceedings commence").

52. *See, e.g.*, INT'L CHAMBER OF COMMERCE, ARBITRATION RULES, Art. 25(1) (2017) ("The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means."); LONDON COURT INTERNATIONAL ARBITRATION, LCIA ARBITRATION RULES, Art. 22(1)(v) (2017) ("The Arbitral Tribunal shall have the power, upon the application of any party or . . . upon its own initiative, but in either case only after giving the parties a reasonable opportunity

International Bar Association's Rules on the Taking of Evidence in International Arbitration ("IBA Rules"), which have gained "wide acceptance within the international arbitral community"[53] and are "frequently used in practice,"[54] provide specific rules for document production, including limited grounds for excluding documents from production.[55]

To minimize risk and enhance legal certainty, it is advisable for parties to specify in their arbitration clause what type of discovery, if any, they want. Depending on the circumstances, a party may want to exclude discovery, allow it, or find some middle ground. For example, a party that has sensitive documents that potentially may be privileged may opt to prohibit document production to avoid the risk that an arbitral tribunal may determine that the documents are not protected by privilege and order that they be produced.[56]

- <u>Recommended</u>: "The parties agree that they shall have no right to seek production of documents in the arbitration proceeding."
- <u>Recommended</u>: "The IBA Rules on the Taking of Evidence in International Commercial Arbitration shall apply together with [the designated arbitration rules]. Where there is an inconsistency, the IBA Rules shall prevail, but solely as regards the taking of evidence."

---

to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide . . . to order any party to produce to the Arbitral Tribunal and to other parties documents or copies of documents in their possession, custody or power which the Arbitral Tribunal decides to be relevant.").

53. *See* INT'L BAR ASS'N, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION 2 (2010).

54. *See* RETO MARGHITOLA, DOCUMENT PRODUCTION IN INTERNATIONAL ARBITRATION 33 (2015).

55. *See* INT'L BAR ASS'N, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION 7, 19 (2010).

56. *See id.* at 19 ("The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons . . . legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable."). Failure to comply with an arbitral tribunal's order to produce a document may cause the tribunal to make an "adverse inference" and presume that if the document had been produced, it would not have been in the party's favor. *See generally* Michael Polkinghorne & Charles B. Rosenberg, *The Adverse Inference in ICSID Practice*, 30 ICSID REVIEW – FOREIGN INVESTMENT L.J. 741 (2015) (describing that an adverse inference should not "shift a party's burden of proof but rather alleviates the standard (or quantum) of proof by allowing the party to discharge its burden of proof using indirect or circumstantial evidence rather than direct or primary evidence").

IV. CONCLUSION

An arbitration clause provides an opportunity to tailor the dispute resolution process in the manner desired by the contracting parties. A company may be able to strengthen its position in a dispute resolution proceeding by carefully tailoring the contract's dispute resolution clause to the unique circumstances of the transaction and the company. However, care should be taken in drafting an arbitration clause to ensure that it is simple, economic, and clear. Otherwise, parties risk a *Henry Schein* situation where significant time and expense may be unnecessarily wasted.

*   *   *

THE NOT-SO-FREE SPIRIT OF COACHELLA: COACHELLA'S OVERBEARING RADIUS CLAUSE AND THE SHERMAN ANTITRUST ACT

HOLLY SANTAPAGA*

I. INTRODUCTION

When enjoying a concert, it is easy to get caught up in the energy and excitement of seeing your favorite artist live. Behind the lights and sounds of a live performance lies a complex business that balances the interests of artists, promoters, and others working to bring artists to venues across the world. The live music industry has evolved from its simplistic roots, with business practices behind the music becoming equally advanced.[1]

Music festivals in particular are popular among both concert-goers and promoters.[2] Coachella Valley Music Festival ("Coachella") is one of the giants of the music festival industry, featuring over 170 performers and drawing crowds of up to 125,000 people per day.[3] Along with massive festivals such as Coachella, there are also smaller and less polarizing festivals with limited resources.[4]

In the live music industry, a typical radius clause stipulates that a performer cannot play any other shows within a certain geographic radius around the promoter's event for a fixed period of time.[5] In 2018, the business

---

* Senior Staff Member, American University Business Law Review, Volume 9; J.D. Candidate, 2020, American University Washington College of Law; B.S. Biology, and Nursing, Wagner College. I would like to thank the *American University Business Law Review* staff for their help and encouragement throughout the entire writing and publication process. I would also like to thank Professor Daniel Lenerz for shaping my writing at the start of my legal studies. Finally, I would like to thank my friends and family for their constant support.

1. *See, e.g.*, Robert W. Hayes, *Rock May Never Die, But It Sure Has Matured*, DEL. LAW. 20, 20–21 (2017) (discussing the music industry's corporatization and progression towards a monetary focus on live performances).

2. *See* Jeremy A. Gogel, *Antitrust Concerns with Respect to Music Festival Radius Clauses*, 38 LINCOLN L. REV. 87, 87 (2011) (stating that music festivals gained popularity following the 1969 Woodstock festival).

3. Second Am. Compl. ¶ 28, Soul'd Out Prods., LLC v. Anschutz Entm't Grp., Inc., No.3:18-cv-00598 (D. Or. Apr. 9, 2018) (explaining that Coachella is held at the Empire Polo Club in Indio, California and over 1000 miles from Portland, Oregon where Soul'd Out's festival is held); Bruce Fessier, *Coachella 2018, The Year Beyoncé Reigned, Was a Historic Moment for the Festival*, USA TODAY (last updated Apr. 23, 2018, 11:19 AM), https://www.usatoday.com/story/life/music/2018/04/23/coachella-2018-recap-beyonce-historic-success/541837002/ (discussing Coachella's success in 2018).

4. *See* Second Am. Compl., *supra* note 3, ¶¶ 5–7 (explaining that under Coachella's Radius Clause artists are prevented from performing at any small festival within the clause's geographic confines).

5. *See* Gogel, *supra* note 2, at 104 (stating that artists are required to sign radius clauses in exchange for the opportunity to perform at large music festivals, preventing them from freely touring around the festival's date).

practices behind large music festivals such as Coachella developed as part of the public consciousness.[6] Two lawsuits condemning the use of radius clauses attracted the public's attention.[7] Soul'd Out Productions ("Soul'd Out"), a small festival promoter, brought a lawsuit criticizing Coachella's use of an overbearing radius clause in its contracts with artists.[8] Prior to Soul'd Out's lawsuit against Coachella, Eagle Theater Entertainment ("Eagle") brought a lawsuit against SFX React-Operating ("React") with a similar claim.[9]

Coachella's Radius Clause restricts artists slated to perform at the event from performing at other music festivals surrounding Coachella before and after their performance.[10] React's radius clause similarly restricts artists from freely playing in the vicinity of the venue.[11] Both Soul'd Out and Eagle alleged that the overbearing radius clauses used by Coachella and React violated Section 1 of the Sherman Antitrust Act ("Sherman Act") that guards against monopolies or activities that restrict commerce.[12]

This Comment will focus on analyzing *Soul'd Out Productions, LLC v. Anschutz Entertainment Group, Inc.*,[13] and *SFX React-Operating LLC v. Eagle Theater Entertainment, LLC*.[14] Part II will discuss the Sherman

---

6. *See*, *e.g.*, Katie Bain, *How the Music Industry Uses a Pervasive Secret Weapon to Keep Bands from Freely Touring*, LA WEEKLY (Apr. 18, 2017, 6:23 AM), https://www.laweekly.com/music/how-music-festival-promoters-use-radius-clauses-to-keep-bands-from-freely-touring-8140333 (explaining that radius clauses have expanded in geographic scope over the past few years as the result of the increase in earning potential and business opportunities associated with music festivals).

7. *See, e.g.*, Dave Brooks, *Coachella's Radius Clause Details Exposed in Legal Fight With Oregon Festival*, BILLBOARD (June 20, 2018), https://www.billboard.com/articles/news/festivals/8462036/coachella-radius-clause-details-exposed-lawsuit-oregon-festival (detailing the allegations against Coachella's use of an overbearing Radius Clause); Ann-Derrick Gaillot, *Radius Clauses Are the Least Rock and Roll Thing in Music*, THE OUTLINE (Apr. 11, 2018, 9:44 AM), https://theoutline.com/post/4129/coachella-radius-clause-lawsuit?zd=1&zi=ed6jrpb2/ (discussing Eagle Theater Entertainment's lawsuit against SFX React-Operating regarding its radius clause).

8. *See* Second Am. Compl., *supra* note 3, ¶¶ 5–6; Brooks, *supra* note 7.

9. *Compare* SFX React-Operating LLC v. Eagle Theater Entm't, LLC, No. 16-13311, 2017 U.S. Dist. LEXIS 134820, at *8–10 (E.D. Mich. Aug. 23, 2017) (bringing breach of contract, unjust enrichment, and RICO claims), *with* Second Am. Compl., *supra* note 3, ¶ 1 (alleging violations of "antitrust, unfair competition, tortious interference, and unlawful restraint on trade").

10. *See* Second Am. Compl., *supra* note 3, ¶¶ 5–6.

11. *See SFX React-Operating LLC*, 2017 U.S. Dist. LEXIS 134820, at *6 n.1.

12. 15 U.S.C. § 1 (2018).

13. *See generally* Second Am. Compl., *supra* note 3 (detailing allegations of the lawsuit).

14. *See generally SFX React-Operating LLC*, 2017 U.S. Dist. LEXIS 134820, at *1 (alleging violations of breach of contract, breach of fiduciary duty, and unjust

Antitrust Act as it relates to radius clauses, and Part III will analyze Coachella's and React's radius clauses and suggest that Coachella's Radius Clause is a per se violation of Section 1, in disagreement with the district court's dismissal of Soul'd Out's antitrust claims. Part IV will go on to recommend a modified test for radius clauses in the live music industry and make an argument for increased use of the quick look analysis.

II. RADIUS CLAUSES AND THE SHERMAN ANTITRUST ACT

a. The Sherman Antitrust Act

The Sherman Antitrust Act is a federal statute that prevents formation of monopolies or activities that restrict commerce.[15] Section 1 of the Sherman Act states that a contract that restrains trade amongst states is illegal.[16] Section 1 only applies to activity between separate entities, which means that it does not apply to acts between parent companies and their "wholly owned subsidiaries" because of their "complete unity of interest."[17] To prove a violation of Section 1 of the Sherman Antitrust Act, one must typically show an agreement that affects interstate commerce and unreasonably restrains trade.[18] Restraints on trade that violate the Sherman Act fall into two categories: vertical or horizontal.[19] A horizontal restraint is an "agreement between competitors at the same level of the market structure."[20] Vertical restraints are agreements between individuals at different market levels.[21] Three elements that must be met to establish a violation of Section 1 include: (1) "a contract, combination or conspiracy," (2) "affecting interstate commerce" that (3) "imposes an unreasonable restraint on trade."[22] To analyze such violations, the courts typically use either the rule of reason test or per se violation analysis.[23]

---

enrichment).

15. 15 U.S.C. § 1.

16. *Id.*

17. *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771, 776 (1984).

18. *See, e.g.*, White & White, Inc. v. Am. Hosp. Supply Corp., 723 F.2d 495, 504 (6th Cir. 1983) (citations omitted) (discussing the requirements that constitute a violation Section 1 of the Sherman Antitrust Act).

19. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972) ("[A]n agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition . . . is usually termed a 'horizontal' restraint, in contradistinction to combinations of persons at different levels of the market structure . . . which are termed 'vertical' restraints.").

20. *Id.*

21. *Id.*

22. *White & White, Inc.*, 723 F.2d at 504.

23. *See* N. Pac. Ry. Co. v. United States*,* 356 U.S. 1, 4–5 (1958); *In re* Cardizem CD

i. The Rule of Reason

Section 1 inquiries can be decided under either the rule of reason test or as per se violations.[24] Most restraints are analyzed under the rule of reason, which "requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition."[25] In contrast, when a restraint on trade "always or almost always" restricts interstate competition, it is categorized as a per se violation of Section 1.[26]

In *Ohio v. American Express Co.*,[27] the Supreme Court applied the rule of reason analysis and held that American Express's antisteering provisions did not violate the Sherman Antitrust Act.[28] To combat merchants diverting business from American Express, the company included "antisteering" provisions in its contracts with merchants.[29] The Court applied the rule of reason test because both parties agreed that American Express's antisteering provision was a vertical restraint on trade, meaning that it was "imposed by agreement between firms at different levels of distribution."[30] Ultimately, the Supreme Court held that the plaintiffs did not prove that the antisteering provisions had anticompetitive effects.[31]

Similarly, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[32] the Supreme Court held that the rule of reason was an appropriate test to be applied.[33] Respondent claimed that petitioner ceasing sales in respondent's stores due to respondent's policy to "refus[e] to sell to retailers that discount

---

Antitrust Litig., 332 F.3d 896, 906–07 (6th Cir. 2003); *see also* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 769–70 (1999) (discussing the applicability of different tests in trade restraint claims).

24. *See In re Cardizem CD Antitrust Litig.*, 332 F.3d at 906; *see also N. Pac. Ry. Co.*, 356 U.S. at 4–5 (explaining that violations of the Sherman Act can be analyzed under the rule of reason).

25. *White & White, Inc.*, 723 F.2d at 505.

26. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979).

27. 138 S. Ct. 2274 (2018).

28. *See id.* at 2280, 2283–84 (highlighting that American Express included antisteering provisions in its contracts, which prevented merchants from "steering" customers away from paying with American Express to avoid its higher fees).

29. *See id.* at 2280.

30. *Id.* at 2284.

31. *See id.* at 2290, 2303 (explaining that the plaintiffs did not meet the burden of proof required to show that American Express's antisteering effects were competitive in nature because they "stem[med from] negative externalities in the credit-card market and promote Interbrand competition").

32. 551 U.S. 877 (2007).

33. *Id.* at 877.

[its] goods below suggested prices" constituted a violation of Section 1.[34] The Court reasoned the respondent's "rel[iance] on pricing effects absent a further showing of anticompetitive conduct" did not rise to the level of a per se violation.[35] Though the Court recognized "[t]he rule of reason as the accepted standard for testing whether a practice restrains trade in violation of [Section] 1," it clarified that the "rule of reason does not govern all restraints."[36]

In *Brantley v. NBC Universal, Inc.*,[37] the Ninth Circuit applied the rule of reason test in a class action lawsuit brought by consumers alleging that defendants, television programmers, exploited their full or partial ownership of broadcast and cable channels by requiring consumers to purchase "prepackaged tiers" of the bundled channels.[38] Both parties had agreed that the rule of reason analysis was appropriate.[39] However, despite its common application, the rule of reason test has been criticized as vague and costly, which can make it difficult for plaintiffs to prevail.[40]

ii. The Per Se Rule

Per se violations of Section 1 occur when a restraint on trade "facially appears to be one that would always or almost always tend to restrict competition and decrease output."[41] Consequently, the per se rule is applied to restraints that would "always or almost always tend to restrict competition or decrease output."[42] The per se rule is appropriate when courts can predict "with confidence that the restraint would be invalidated in . . . almost all instances under the rule of reason."[43]

Vertical restraints are generally found to be per se illegal under Section 1,

---

34. *Id.* at 883.

35. *See id.* at 895–96 (reasoning that the respondents did not address that the interests of manufacturers and consumers are similar with regard to profits margins).

36. *Id.* at 885–86.

37. 675 F.3d 1192 (9th Cir. 2012).

38. *See id.* at 1195–96 (explaining that plaintiffs' further allegations include that the bundling resulted in leaving consumers with only the option to purchase packages consisting of bundled channels from a sole programmer, thus impairing competition between program television distributors).

39. *Id.* at 1197.

40. *See, e.g.*, Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1461–65 (2009) (demonstrating that the rule of reason test is expensive, inaccurate, and time consuming).

41. *In re* Cardizem CD Antitrust Litig., 332 F.3d 896, 906 (6th Cir. 2003) (quoting Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979)).

42. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 876 (citing Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)).

43. *Id.* at 886–87.

unless there is some agreement on price between the market participants.[44] In addition to price-fixing, non-price horizontal restraints that allocate territories, reduce output, or divide up customers are also found to be per se illegal, along with "[h]orizontal group boycotts by competitors with shared market power."[45] Other restraints may be brought under the per se rule if they cause destructive anticompetitive effects and lack any procompetitive effects.[46] Though the per se rule does not require an elaborate inquiry into the relevant industry to find illegality, the term is not as fixed as it appears.[47] Before a restraint can be deemed per se illegal, "considerable inquiry into market conditions may be required."[48]

In *United States v. Topco Associates, Inc.*,[49] the Supreme Court found that Topco's market-dividing scheme, which granted its members licenses that allowed them to restrict competition in their territory, was a per se violation of Section 1.[50] Topco, a cooperative association of supermarket chains, was charged with conspiring with its members through an agreement to "sell Topco-controlled brands only within the marketing territory allocated to it, and [to] refrain from selling Topco-controlled brands outside such marketing territory."[51]

Tying arrangements have also been found to be per se violations of the Sherman Act.[52] A tying arrangement occurs when a party agrees to sell one product on a condition that the buyer also purchases a "tied" product or agrees not to buy the product from another seller.[53] When tied products

---

44. *See Bus. Elecs. Corp.*, 485 U.S. at 735–36 (explaining that a vertical restraint must include a price agreement to constitute a per se violation of Section 1 of the Sherman Act).

45. WILLIAM HOLMES & MELISSA MANGIARACINA, ANTITRUST LAW HANDBOOK § 2:9 (2011), Westlaw ANTITRHDBK (updated Nov. 2018).

46. *See id.* (citing Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006)) ("Other concerted activities may at least in theory be brought under the per se banner, if shown to have a particularly 'pernicious effect on competition' and to lack 'any redeeming virtue.'").

47. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779–80 (1999); Nat'l Soc'y of Prof'l Eng'rs v. United States*,* 435 U.S. 679, 692 (1978) ("[A]greements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are 'illegal *per se*.'").

48. *Id.* (quoting Nat'l Collegiate Athletic Assn. v. Bd. of Regents of Univ. of Okla.*,* 468 U.S. 85, 104 (1984)).

49. 405 U.S. 596 (1972).

50. *See id.* at 611–12.

51. *Id.* at 601, 610–11 (discussing Topco's ability to give its members the right to decide if "competition with other supermarket chains is more desirable than competition in the sale of Topco-brand products.").

52. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (stating that tying arrangements are "unlawful in and of themselves").

53. *Id.* at 5–6.

impede competition by limiting a buyer's choice, thus denying access to the market for no reason other than suppression, they are per se unlawful under Section 1 of the Sherman Act.[54] For a tying arrangement to be unreasonable, the seller must have significant dominance over the market.[55] In *Northern Pacific Railway Co. v. United States*,[56] the Supreme Court held that Northern Pacific Railway Co.'s "preferential routing clause" was a per se violation of the Sherman Act.[57] The preferential routing clause in question forced the lessees of the railway's land to use Northern Pacific to ship all items they manufactured.[58] As most products were shipped over state lines, this arrangement affected interstate commerce.[59]

In contrast, the Supreme Court in *Illinois Tool Works Inc. v. Independent Ink Inc.*[60] found no tying arrangement where defendants did not have market power in the tied products.[61] Petitioners manufactured printing systems that contained patented ink containers and printheads, along with unpatented corresponding ink.[62] Petitioners had an agreement with the manufacturers to only fill the petitioners' containers with their corresponding unpatented ink.[63] Respondents created an ink with the same chemical composition as the petitioners' ink and filed a suit alleging that petitioners were tying the unpatented ink with the patented products.[64] The Supreme Court held that patent ownership did not automatically give a patentee market power and that showing of market power is necessary to prove a tying arrangement.[65]

---

54. *See id.* at 3, 8 (holding that appellant railroad companies' land lease contracts containing "preferential routing" clauses, which required the "grantee or lessee to ship over its lines all commodities produced or manufactured on the land, provided that its rates (and in some instances its service) were equal to those of competing carriers" were per se violations of Section 1).

55. *See, e.g.*, *id.* at 6–7. *But see* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 35 (2006) (noting the decline in the Court's "strong disapproval of tying arrangements" and instead requiring a showing of market power to prove an illegal tying arrangement).

56. 356 U.S. 1 (1958).

57. *Id.* at 3, 8.

58. *See id.* at 3.

59. *See id.*

60. 547 U.S. 28 (2006).

61. *Id.* at 45–46 (stating that a patent holder does not automatically gain market power through said patent).

62. *See id.* at 31.

63. *See id.* at 32 (stating that petitioners' original infringement suit was dismissed, and respondents subsequently filed a suit claiming a violation of Section 1 of the Sherman Act through tying).

64. *Id.*

65. *See id.* at 45–46 (holding that respondents must produce relevant evidence of the petitioner's alleged market power).

b. Radius Clauses

Radius clauses in the live music industry restrict the artist's ability to work, similar to non-compete clauses in employment contracts.[66] Radius clauses have also been classified as a type of restrictive covenant.[67] A restrictive covenant is a private agreement between two parties that prevents a party from taking a specific action.[68]

i. Non-compete Clauses in Employment Contracts

Non-compete clauses in employment contracts generally restrict employees from working for another employer for a certain time period or in a set geographic location.[69] When geographic restrictions are present in non-compete clauses, courts analyze the scope of the area covered.[70] Courts consider the overall combination of factors to determine the validity of a non-compete clause.[71] Non-compete clauses that contain unlimited or broad restrictions on geographic areas are likely to be found unreasonable; however, courts are often reluctant to deem these clauses per se unenforceable for geographic reasons alone and prefer to apply a reasonableness test instead.[72] Courts analyze time restrictions similarly to geographic restrictions and rely on a fact-dependent reasonableness test.[73]

Enforcement of strict non-compete clauses in the employment context is

66. *See* Gogel, *supra* note 2, at 104 (explaining that both radius clauses and non-compete clauses in employment contracts are types of restrictive covenants that prevent employees from competing with an employer after their employment is terminated).

67. *See id.* at 88–89 (asserting that radius clauses used in commercial leasing are restrictive covenants because they prevent tenants from freely operating outside of a lease).

68. *See* Beth R. Minear & Eric R. Waller, *Common Law of Restrictive Covenants*, 28 ENERGY & MINERAL L. FOUND. § 15.02 (2007).

69. *See Restrictive Covenants in the Employment Context*, 285 CORP. COUNS. PRIMERS NL 1, SEPT. 2017, at 2 [hereinafter *Corporate Counsel*].

70. *See id.* at 11; *see also* Bennett v. Storz Broad. Co., 134 N.W.2d 892, 899 (Minn. 1965) (explaining that courts look at whether a restraint is required to protect the employer and whether it restrains the employee more than "reasonably necessary" to achieve that protection).

71. *See Corporate Counsel*, *supra* note 69, at 31 (citing Raimonde v. Van Vlerah, 325 N.E.2d 544, 547 (Ohio 1975)) (stating the factors considered in determining the validity of a non-compete clause, which include the employee's possession of trade secrets, whether the employee is a customer's only contact, and time and distance restrictions).

72. *See id.*; *see also* Dynamic Air, Inc. v. Bloch, 502 N.W.2d 796, 800 (Minn. Ct. App. 1993) (stating reluctance to deem a non-compete clause without an unlimited geographic restriction as per se unreasonable).

73. *See Corporate Counsel*, *supra* note 69, at 24 (asserting that a circumstance specific reasonableness test should be used to deal with time restrictions).

associated with "both lower wage growth and lower initial wages."[74] Additionally, it can lead to decreased mobility of workers throughout an industry, which can stifle economic growth.[75]

ii. Radius Clauses in the Live Music Industry

In the live music industry, performers often sign contracts containing a radius clause.[76] A typical radius clause stipulates that a performer cannot play at any other show within a certain radius of the promoter's event for a fixed period of time.[77] The live music industry's movement towards corporatization has flowed naturally from the increasing popularity of concerts.[78] Along with Coachella, other major music festivals, such as Lollapalooza and Bonnaroo, also utilize radius clauses.[79] Though the clauses differ in some respects, each festival requires the artist to accept them to have an opportunity to perform.[80]

Smaller acts and regional venues and workers bear most of the harm caused by overly restrictive radius clauses.[81] In 2010, Lollapalooza's radius clause that "restrict[ed] bands from playing 180 days before and 90 days after Lollapalooza within a 300-mile radius" became subject of an investigation by the Illinois Attorney General for "potential antitrust violations."[82] Lollapalooza held the exclusive power to grant exceptions; and popular

---

74. OFFICE OF ECONOMIC POLICY, U.S. DEP'T OF THE TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 19 (Mar. 2016), https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf.

75. *See id.* at 19–20 (explaining that potential effects of non-compete enforcement can have negative effects beyond the individual level).

76. *See* Gogel, *supra* note 2, at 104 (discussing the exclusivity agreements imposed on artists by promoters of major music festivals).

77. *See id.* ("Promoters of every major American music festival force the acts slated to perform at their events to sign an exclusivity, or radius, clause, which forbids these acts from performing anywhere near the festival several months before and after the event.").

78. *See* Hayes, *supra* note 1, at 20–21 (discussing how improvements in recording and listening quality inspired the current willingness to pay for a live music experience).

79. *See* Gogel, *supra* note 2, at 105.

80. *See id.* at 105–06 (discussing the ramifications of refusing to sign a radius clause, including preventing artists from performing for large audiences).

81. *See, e.g.*, Bain, *supra* note 6 ("[F]or smaller bands that depend on touring revenue, agreeing to a radius clause means being elbowed out of markets for long periods of time and grinding harder to make ends meet, in exchange for the slim hope that a daytime slot at a mega-festival might make them the next Arcade Fire or Daft Punk.").

82. Josh Wright, *Lollapalooza and Antitrust*, TRUTH ON THE MKT. (June 28, 2010), https://truthonthemarket.com/2010/06/28/lollapalooza-and-antitrust/.

artists were less likely to avoid the restrictions.[83] The investigation resulted in little else other than awareness that these clauses exist.[84]

iii. Coachella's Radius Clause: Soul'd Out Prod., LLC v. Anschutz Entm't Grp., Inc.

Coachella takes place each year in Indio, California, over two weekends in April.[85] The festival draws crowds of 125,000 people per day[86] with ticket prices starting at $429 in 2018.[87] Coachella's Radius Clause is a "part of its standard agreements with artists"; it explicitly forbids artists from "performing at any other festival or themed event within a distance that extends over 1300 miles" including "California, Nevada, Oregon, Washington[, and] Arizona from December 15, 2017, until May 7, 2018."[88]

Oregon-based Soul'd Out brought a lawsuit against Coachella for alleged anticompetitive behavior.[89] Soul'd Out's complaint states that Coachella's Radius Clause is a per se violation of Section 1 because it ties together "open-air music festivals," "hard-ticket concert performances," and "themed events."[90] Soul'd Out further claims that Coachella and its promoters have "substantial economic power" in the tied markets.[91] On March 14th, 2019, the district court dismissed Soul'd Out's antitrust claims.[92]

---

83. Joel Rose, *Lollapalooza Investigated by Illinois Attorney General*, NPR MUSIC (Aug. 4, 2010, 4:04 PM), https://www.npr.org/sections/therecord/2010/08/04/128982880/lollapalooza-undergoing-investigation-by-illinois-attorneygeneral.

84. *See, e.g.*, Karen Gwee, *Music Festivals and the Pursuit of Exclusivity,* CONSEQUENCE OF SOUND (Sept. 26, 2016, 12:00 AM), https://consequenceofsound.net/2016/09/music-festivals-and-the-pursuit-of-exclusivity/.

85. Josh Johnson & Lesley Messer, *What is Coachella? Everything to Know About the Music Festival*, ABC NEWS (Apr. 13, 2018, 6:56 AM), https://abcnews.go.com/GMA/Culture/coachella-music-festival/story?id=54404096.

86. George Varga, *Coachella 2018 Preview: Beyoncé, Eminem, The Weeknd, New Food Court, Drones and a New Emoji*, THE SAN DIEGO UNION-TRIB. (Apr. 12, 2018, 6:05 AM), http://www.sandiegouniontribune.com/entertainment/music/sd-et-music-coachella-20180412-story.html.

87. Megan Leonhardt, *What It Really Costs to Go to Coachella 2018*, MONEY: EVERYDAY MONEY (Mar. 29, 2018), http://time.com/money/5217998/cost-coachella-2018-beyonce/.

88. Second Am. Compl., *supra* note 3, ¶¶ 33, 36.

89. *See id.* ¶¶ 1–2 (stating that Soul'd Out brought a lawsuit against Coachella along with codefendants Anschutz Entertainment Group, Inc., The Anschutz Corporation, Goldenvoice, LLC, and AEG Presents, LLC).

90. *See id.* ¶ 163 (explaining AEG's power to tie both the national and local markets for "open air music festivals," "hard-ticket concert performances," and "themed events").

91. *Id.*

92. *See* Soul'd Out Prod., LLC v. Anschutz Entm't Grp., Inc., No. 3:18-cv-00598-MO, 2019 WL 1212085, at *2 (D. Or. Mar. 14, 2019); *see also* Nadia Dreid, *Coachella Escapes Rival's Antitrust Suit for Second Time*, LAW360 (Mar. 14, 2019, 3:29 PM),

iv. *React's Radius Clause: SFX React-Operating LLC v. Eagle Theater Entertainment, LLC*

The second case, *SFX React-Operating LLC v. Eagle Theater Entertainment, LLC*, involves two promoters in the Electronic Dance Music ("EDM") market and has gained far less media attention.[93] React required artists to sign a contract with a radius clause that prohibited artists "from playing anywhere up to within a 500 mile radius of React's event for periods of 60, 90, or 120 days prior to and following the date of the event."[94] Eagle alleged that the radius clause was a per se violation of Section 1 of the Sherman Act.[95] Eagle alleged that the radius clause made it "nearly impossible for many nationally recognized EDM artists to play anywhere else in the Midwest."[96] Ultimately, the radius clause was not found to be a per se violation of the Sherman Antitrust Act.[97] As of February 15th, 2019, both parties settled, and the claims were subsequently dismissed.[98]

III. COACHELLA'S RADIUS CLAUSE VIOLATES SECTION 1 OF THE SHERMAN ACT

Section 1 of the Sherman Act states that "[e]very contract . . . in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal," making it applicable to Coachella's Radius Clause that is included in most of its contracts with artists.[99] In contracting to perform at Coachella, artists must agree to adhere to the limitations set forth by the Clause.[100] Further, the Radius Clause involves activities between separate entities — the promoters and the acts — to which Section 1 of the Sherman Act applies, rather than the promoters and wholly-owned

---

https://www.law360.com/articles/1138753 (discussing the District of Oregon's finding that Soul'd Out failed to prove Coachella's had the necessary market power to stifle competition).

93. *See* SFX React-Operating LLC v. Eagle Theater Entm't, LLC, No. 16-13311, 2017 WL 3616562, at *2 (E.D. Mich. Aug. 23, 2017).

94. *Id.*

95. *Id.* at *5–6.

96. *Id.* at *2.

97. *See id.* at *7 (holding that defendants did not allege facts necessary to find React's radius clause to be anticompetitive under the per se analysis).

98. Stipulation and Order of Dismissal of All Claims 1–2, ECF No. 59.

99. 15 U.S.C. § 1 (2018); Second Am. Compl., *supra* note 3, ¶ 37 (discussing the strict limitations imposed on artists by Coachella's Radius Clause and the effects of those limitations).

100. *See* Second Am. Compl., *supra* note 3, ¶¶ 5–6 (highlighting that Coachella invites artists to perform, but only on strict condition that they agree to certain terms including a radius clause that restricts the ability of artists to perform or advertise other performances besides Coachella).

subsidiaries.[101]

The practice of using radius clauses meets the three elements required to establish a violation of Section 1, including: (1) "a contract," (2) "affecting interstate commerce" that (3) "imposes an unreasonable restraint on trade."[102] Specifically, Coachella's Radius Clause is present in performance contracts with artists.[103] The Clause, which extends over 1,300 miles across California, Nevada, Oregon, Washington, and Arizona, severely impacts interstate commerce because it diminishes an already small pool of touring artists by controlling over a hundred performers who play the event over each of the two weekends.[104] This restriction on performing in multiple states that impacts such a large number of artists unreasonably restrains the market for live performers.[105]

a. Coachella's Radius Clause is a Horizontal Restraint on Trade

Soul'd Out claims that Defendants have engaged in horizontal trade restraint by carving out exceptions to its Radius Clause for competing festivals in its 1300-mile restriction.[106] Though the practice of dividing the market among competitors does not explicitly involve price fixing, it does reduce output and divide market power.[107] Similar to *United States v. Topco Assoc.*, where Topco, an association of supermarket chains, divided the relevant market by conspiring with its members to only sell Topco-controlled brands within specified territories, Anschutz Entertainment Group, Inc. ("AEG"), Coachella's promoter, is working with other promoters of large

101. *See id.* ¶¶ 34–36; *see also* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 777 (1984) ("Any anticompetitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed adequately without resort to an intra-enterprise conspiracy doctrine. [T]he Federal Government, in its administration of the antitrust laws, no longer accepts the concept that a corporation and its wholly owned subsidiaries can 'combine' or 'conspire' under [Section 1 of the Sherman Act.]").

102. White & White, Inc. v. Am. Hosp. Supply Corp., 723 F.2d 495, 504 (6th Cir. 1983).

103. Second Am. Compl., *supra* note 3, ¶¶ 33–36.

104. *See id.* ¶¶ 152–53; *see also* Raisa Bruner, *Everything You Need to Know About Coachella 2018*, TIME (Mar. 27, 2018), http://time.com/5216002/coachella-2018/ (stating that in 2018, Coachella included over one hundred artists throughout the entirety of its five-stage festival).

105. Second Am. Compl., *supra* note 3, ¶ 177 (alleging that Coachella's Radius Clause "results in a decrease in the quality of festivals, a decreased supply of artists for both open air festival performances and also hard-ticket sales, and the shutdown of concert venues within the scope of the radius.").

106. *See id.* ¶¶ 178, 241 (explaining that only large and widely known festivals in competition with Coachella, including SXSW and Ultra Music Festival, were exempted from Coachella's radius clause).

107. *See, e.g.*, *id.* ¶¶ 183–84; HOLMES, *supra* note 45, at 2.

open-air festivals to divide the market.[108] By dividing the market for music festivals, Coachella is engaged in a horizontal restraint on trade similar to Topco's, which constitutes a per se violation of Section 1.[109] Along with a horizontal restraint on trade, AEG has created tying arrangements, which have also been found to be per se violations of the Sherman Act.[110]

b. Coachella and AEG's Tying of Open-Air Festivals and Hard-Ticket Sale Events is a Violation of Section I

Soul'd Out's allegation that defendants violated Section 1 through tying "open-air music festivals," "hard-ticket concert performances," and "themed events" comports with prior case law regarding the practice of tying.[111] Soul'd Out alleges that AEG's restriction on playing "any other festival or themed event" prevents performances in any other venue except those that would potentially benefit AEG and comport with the Supreme Court's definition of tying set in *Northern Pacific Railway Co. v. United States*.[112] Like in *Northern Pacific Railway. Co.*, where the defendant railroad company tied two markets by including a clause in its land-leasing contracts that forced lessees to ship any products produced on the leased lands over its lines, Coachella and its promoters are tying "open-air music festivals," "hard-ticket concert performances," and "themed events."[113] Consequently,

108. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 601–02 (1972); Second Am. Compl., *supra* note 3, ¶ 241; *see also* Iowa Pub. Emp.'s Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc., 340 F. Supp. 3d 285, 318 (S.D.N.Y. 2018) (holding that defendant's horizontal agreement to boycott new stock loan market entrants qualifies as a per se violation of the Sherman Act). *But see* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 136 (1998) (holding that the per se group boycott rule does not apply to a single buyer's decision to buy from one seller rather than another).

109. *See* Second Am. Compl., *supra* note 3, ¶ 240 ("AEG has engaged in a horizontal restraint of trade, carving up the festival market with its competitors."); *see, e.g.*, *Topco Assocs., Inc.*, 405 U.S. at 608 (holding Topco's horizontal restriction to be a per se violation of the Sherman Act).

110. *See* Second Am. Compl., *supra* note 3, ¶ 278 (explaining that AEG's economic power along with Coachella's alleged tying arrangement forces artists into signing Coachella's Radius Clause).

111. *See id.* ¶ 283 ("Effectively, if an artist performs at Coachella, that artist is required to use AEG's concert promotion business or venues if he or she wants to perform within the radius—a period that effectively lasts for months and that stretches thousands of miles beyond Coachella's local market.").

112. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5–6 (1958) (defining a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.").

113. *See id.* at 3, 6 (reasoning that the defendant railroad's practice of forcing lessees to ship products manufactured on its land over its railways substantially affected interstate commerce); *see also* Second Am. Compl., s*upra* note 3, ¶ 155 (explaining

Coachella is preventing artists from performing at more than just open-air festivals.[114]

A restraint is found to be a per se violation of Section 1 of the Sherman Act after a "considerable inquiry" into relevant market conditions.[115] AEG's tying arrangement is unreasonable because of its dominance over both the open-air festival market and the market for hard-ticket sales and themed events.[116] Coachella's status as one of the largest music festivals in the world coupled with its ability to enforce its overbearing Radius Clause is representative of its power in the open-air festival market.[117] According to Soul'd Out, this market dominance extends into "hard-ticket sales in the Pacific Northwest" by tying artists' rights to performances in the Pacific Northwest to performances at AEG venues or AEG's concert promotion business.[118]

AEG's tying arrangement differs from the alleged tying arrangement in *Illinois Tool Works Inc. v. Independent Ink, Inc.*, where the respondents did not establish market power.[119] In AEG's case, the there is no patent at issue, and its market dominance is exemplified by Coachella's status as one of the

---

AEG's ability to use its market power to limit artist availability).

114. *See N. Pac. Ry. Co.*, 356 U.S. at 3, 11–12 (holding that appellant rail road companies' land lease contracts containing "preferential routing" clauses, which required the "grantee or lessee to ship over its lines all commodities produced or manufactured on the land, provided that its rates (and in some instances its service) were equal to those of competing carriers," were per se violations of Section 1); Second Am. Compl., *supra* note 3, ¶¶ 284, 287 (explaining that the manipulation of artists performances outside of Coachella extends to other markets because AEG's definition is broad and inclusive of smaller festivals that do not directly compete with Coachella).

115. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779–80 (1999) (Breyer, J., concurring in part and dissenting in part) (citing Nat'l Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85, 104 (1984)).

116. *See N. Pac. Ry. Co.*, 356 U.S. at 6–7 (noting that the preferential routing clauses are unlawful restraints on trade because of the extensive landholdings, which create a substantial restriction on interstate commerce); *see also* Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 35 (2006) (showing of market power required to show illegality of tying arrangements).

117. *See* Second Am. Compl., *supra* note 3, ¶¶ 164–65 (stating that the power of Coachella, and therefore AEG, allows the company to force tying where there is no benefit for the artist, consumer, or the festival, but would benefit AEG's other interests); Ashley Rayner, *The 25 Biggest Music Festivals Around the World in 2018***,** THE TRAVEL (June 29, 2018), https://www.thetravel.com/the-25-biggest-music-festivals-around-the-world-in-2018/ (noting the transformation Coachella has undergone from indie music festival to a major event attracting big industry names such as Beyoncé and Lady Gaga).

118. *See* Second Am. Compl., *supra* note 3, ¶¶ 156, 168 (explaining that AEG owns two venues in Seattle which seat less than 2,000 people, along with a larger music festival that takes place in Seattle and its own ticketing agency).

119. *See Ill. Tool Works Inc.*, 547 U.S. at 45–46 (holding that the holder of a patent does not automatically give the patentee market power).

largest music festivals in the world and extends to the market for hard-ticket sales.[120] The egregious effects of AEG's tying arrangement on the market, such as lost profits and inability of artists to form relationships with promoters, differentiate it from other restrictions, such as restrictive covenants in property law and non-compete clauses.[121]

c. Departure from Restrictive Covenants and Non-compete Clauses

While Coachella's Radius Clause may resemble restrictive covenants in property law, it differs in key aspects.[122] Radius clauses in commercial leasing agreements prevent tenants from operating certain retail businesses in the same area as the anchor tenant,[123] while radius clauses in the live festival market prevent hundreds of artists from performing across several states.[124]

The similarities between Coachella's Radius Clause and non-compete clauses in employment contracts, which are analyzed under the rule of reason, include the restrictions both place on the party's ability to work.[125] Employment non-compete clauses generally affect a single employee after his or her departure, while Coachella's Radius Clause applied to over 170 acts in 2018, thus affecting the freedom of over 100,000 consumers to choose when and where they can see the artists perform.[126] Further, the decreased economic growth and mobility throughout the market caused by strict enforcement of non-compete clauses are increased exponentially in the case of Coachella's Radius Clause due to the long list of artists restricted from performing within the Clause's broad geographic reach.[127]

120. *See, e.g.*, Second Am. Compl., *supra* note 3, ¶ 168 (highlighting AEG's ownership of smaller venues throughout Seattle along with its own ticketing company).

121. *See id.* ¶¶ 156, 159 ("Soul'd Out Productions has been damaged through the loss of profits from performances by artists who wanted to perform at the Soul'd Out Music Festival but were pressured not to by AEG, relying on the Radius Clause[,] along with its reduced ability to develop ongoing relationships with artists . . . ."). *See generally Corporate Counsel*, *supra* note 69 (discussing restrictive covenants in non-competes).

122. *See* Gogel, *supra* note 2, at 87–88 (analogizing radius clauses in the live music industry to radius clauses in other industries).

123. *See id.* at 88–89 (explaining that radius clauses are used as tools to protect the value of a lease).

124. Second Am. Compl., *supra* note 3, ¶¶ 4, 7, 9.

125. *See Corporate Counsel, supra* note 69, at 18; Gogel, *supra* note 2, at 89.

126. *See generally* Fessier, *supra* note 3 (discussing the attendance at Coachella in 2018).

127. *See id.*; OFFICE OF ECONOMIC POLICY, *supra* note 74.

d. Soul'd Out's Allegations and the Rule of Reason

Coachella's Radius Clause also differs from other types of restraints that courts usually analyze under the rule of reason.[128] Applying the rule of reason would require further inquiry into whether, under all of the circumstances present in the case, a restraint poses a restriction on competition.[129] Unlike in *Ohio v. American Express Co.*, where the Supreme Court applied the rule of reason test to analyze American Express's antisteering provisions because they constituted a vertical restraint, AEG imposed a horizontal restraint on trade in the open-air festival market by carving out exceptions for other large open-air festivals, which rises to the level of a per se violation.[130]

Coachella's Radius Clause also differs from *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, in which the Supreme Court applied the rule of reason test to decide whether respondent's claim that petitioner's ceasing to sell in respondent's stores due to respondent's policy to "refus[e] to sell to retailers that discount its goods below suggested prices" violated Section 1.[131] The Supreme Court's reasoning that respondent's "rel[iance] on pricing effects absent a further showing of anticompetitive conduct" did not rise to the level of a per se violation is not applicable to Coachella's use of the Radius Clause because Soul'd Out was able to show several instances of anticompetitive conduct detrimental to its business.[132]

AEG's actions also differ from *Brantley v. NBC Universal*, where

128. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2280, 2284 (2018) (stating that all parties consented to a rule of reason analysis because they agreed the antisteering allegations against American Express constituted a vertical restraint on trade); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885–87 (2007) (applying the rule of reason test where respondent's attempt to prevent discounted prices was insufficient to show a per se violation of section 1); Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1195–96 (9th Cir. 2012) (holding that competition among television channel distributors was not negatively affected where consumers were forced to buy bundled television channel packages).

129. White & White, Inc. v. Am. Hosp. Supply Corp., 723 F.2d 495, 505 (6th Cir. 1983) (quoting Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332 (1982) (explaining that a rule of reason analysis takes into account all details of a case, making it time consuming and expensive to litigate).

130. *Am. Express Co.*, 138 S. Ct. at 2280; Second Am. Compl., *supra* note 3, ¶¶ 6, 10; *see also* United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972) (discussing the differences between horizontal and vertical restraints).

131. *See Leegin Creative Leather Prods., Inc.*, 551 U.S. at 885 (declining respondent's reasoning that the per se rule was justified).

132. *See id.* at 885, 899 (holding that the rule of reason test was applicable to decide whether petitioner's ceasing to sell in respondent's stores due to respondent's policy of exclusively selling to retailers at a fixed price violated Section 1 of the Sherman Antitrust Act); *see also* Second Am. Compl., *supra* note 3, ¶ 7.

defendants, television programmers, impaired competition between program television distributors by bundling channels in which they had full or partial ownership, leaving consumers with no choice but to purchase the bundled channels.[133] The effects of enforcing Coachella's Radius Clause extend beyond difficulties for the individual consumer, as it leaves the consumers with no way to see their favorite acts other than paying at least $429 for general admission tickets.[134] Coachella's Radius Clause could also lead to shutdowns of smaller venues that are unable to book enough acts to remain operational due to a great number of artists being prevented from touring in the area.[135]

Further, unlike in *Brantley* and *American Express Co.*, where all parties agreed the applicable test was the rule of reason, Soul'd Out alleges that Coachella's Radius Clause is a per se violation of Section 1, which makes the rule of reason analysis inapplicable.[136]

Additionally, the rule of reason test is often criticized as costly,[137] which may contribute to a smaller promoter's inability to bring suit, as exemplified by the disparity in Coachella's and Soul'd Out's sizes and cost of attendance.[138] The overall effects of Coachella's Radius Clause on the market differentiates it from cases that are reviewed under the rule of reason, bringing it to the level of a per se violation.[139]

e. Coachella's Radius Clause Compared to React's Radius Clause

Soul'd Out's allegations against Coachella are analogous to Eagle's case against React's radius clause. Unlike Coachella, which includes hundreds of artists across multiple genres,[140] React exclusively covers the EDM

133. *See Brantley*, 675 F.3d at 1195–96 (explaining that the rule of reason was not implicated because the requirement to sell both high and low demand channels together did not negatively affect competition).

134. Leonhardt, *supra* note 87.

135. *See* Second Am. Compl., *supra* note 3, ¶ 37.

136. *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) (citing Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)) ("The parties also correctly acknowledge that, like nearly every other vertical restraint, the antisteering provisions should be assessed under the rule of reason."); *Brantley*, 675 F.3d at 1197.

137. *See* Stucke, *supra* note 40, at 1462–63, 1465 (explaining that the high amount of "fact-intensive, time consuming, [and] costly" issues relevant in the rule of reason analysis lead to inaccurate and inconsistent results because "[n]either the judiciary nor economic experts have sufficient expertise on the actual workings of the market to accurately assess the likely effects of these nuanced restraints.").

138. *See, e.g.*, Vagra, *supra* note 86 (discussing the details of Coachella's 2018 festival); Leonhardt, *supra* note 87 (discussing the cost of attending Coachella).

139. Second Am. Compl., *supra* note 3, ¶¶ 54–55, 58.

140. *See* Fessier, *supra* note 3 (highlighting Coachella's success in 2018).

market.[141] Further, React's radius clause "prohibits artists from playing anywhere up to within a 500 mile radius of React's event for periods of 60, 90, or 120 days prior to and following the date of the event,"[142] while Coachella's Radius Clause covers 1,300 miles.[143] The restricting effects of React's radius clause, even though it doesn't reach as far as Coachella's Clause, are proportional to the smaller EDM market.

Though Eagle alleged that the radius clause was a per se violation of Section 1 of the Sherman Act because it unreasonably prevented many EDM artists from booking shows,[144] React's radius clause presents similar tying and horizontal restraint issues that differentiate Coachella's Radius Clause from *Brantley* v. *American Express Co.* and *Leegin Creative Leather Products, Inc.*, which were both analyzed under the rule of reason.[145] Under this line of reasoning, both Coachella's and React's radius clauses should be analyzed as per se violations of Section 1 of the Sherman Act.

f. Coachella's Radius Clause Rises to the Level of a Per Se Violation of Section 1 of the Sherman Act

Coachella's overbearing Radius Clause imposes restraints on the live music industry. Smaller and mid-size acts are left without the ability to book venues within driving distance of the major festival.[146] Competing venues may lose out on bookings because artists' tours in the area are typically shorter than the one or two months covered by the radius clause.[147] In addition to harmful effects on artists, their decreased availability causes reduced hard-ticket sales and ultimately reduces the need for concert venues.[148] Artists' decreased availability also limits consumers' choice of when, where, and for how much they can see their favorite artists.[149]

141. SFX React-Operating LLC v. Eagle Theater Entm't, LLC, No. 16-13311, 2017 WL 3616562, at *2 (E.D. Mich. Aug. 23, 2017).

142. *Id.* at *1–2.

143. Second Am. Compl., *supra* note 3, ¶ 36.

144. *Id.* ¶ 26.

145. *Id.*; *see* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2283–85 (2018); Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 885–86 (2007); Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197 (9th Cir. 2012).

146. *See* Bain, *supra* note 6 (discussing the hazardous and costly circumstances faced by smaller acts when they cannot drive shorter distances between performances).

147. *See id.* (exemplifying how bands and venues lose economic opportunities due to restrictive radius clauses).

148. *See* Second Am. Compl., *supra* note 3, ¶¶ 89–90 (explaining the negative effects of decreased artist availability on concert venues).

149. *See* Gaillot, *supra* note 7; *see also* Second Am. Compl., *supra* note 3, ¶ 75 (explaining that radius clauses force an increase in demand for tickets at Coachella because consumers' options for seeing their favorite bands are limited).

Coachella's refusal to let artists advertise other performances in nearby states also harms the potential to draw crowds, harming both artists and smaller venues.[150]

Coachella's Radius Clause is a per se violation of Section 1 because it "facially appears to be one that would always or almost always tend to restrict competition and decrease output,"[151] and radius clauses "always or almost always tend to restrict competition or decrease output."[152] The effects that an overbearing radius clause has on restricting the success of competing venues and decreasing the availability of available artists are exemplified through both React's and Lollapalooza's radius clauses.[153] The harm caused by overbearing radius clauses consistently restrains trade; therefore, courts will likely be able to predict with certainty that they violate Section 1.[154] Further, AEG's practice of carving out exceptions to its Radius Clause for competing festivals constitutes a horizontal restraint, which is considered a per se violation of Section 1 when it reduces output or divides markets.[155]

Coachella's Radius Clause is comparable to Supreme Court cases where horizontal restraints were found to be per se violations of Section 1. Similar to *United States v. Topco Assoc.*, AEG's horizontal carveout for other large festivals is likely a per se violation.[156]

AEG's tying of open-air music festivals and hard-ticket concert performances and themed events constitutes a tying agreement, which has been found to violate Section 1.[157] AEG's tying agreement is similar to

---

150. *See* Second Am. Compl., *supra* note 3, ¶ 143 ("[E]ach of the performance agreements between [AEG] and the artists that were scheduled to play at Coachella contains the Radius Clause that prohibits them from advertising, publicizing, or leaking any Festival or Themed Event (as defined in the agreements) in the states of California, Nevada, Oregon, Washington, or Arizona between December 15, 2017, and May 7, 2018.").

151. *In re* Cardizem CD Antitrust Litig., 332 F.3d 896, 906 (6th Cir. 2003) (citation omitted).

152. Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 886 (2007) (citing Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)).

153. SFX React-Operating LLC v. Eagle Theater Entm't, LLC, No. 16-13311, 2017 WL 3616562, at *2 (E.D. Mich. Aug. 23, 2017); Wright, *supra* note 82 (discussing the claim that Lollapalooza's radius clause has decreased business for local venues and promoters).

154. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 6–7 (1958).

155. *See* Second Am. Compl., *supra* note 3, ¶¶ 183, 220; *see also* United States v. Topco Assocs., Inc., 405 U.S. 596, 608–09 (1972).

156. *See, e.g.*, *Topco Assocs., Inc.*, 405 U.S. at 608–09 (holding that Topco's market dividing scheme of allowing its members to use licenses granted by Topco to restrict competition in their territory was a per se violation of Section 1); *see* Compl., *supra* note 3, ¶ 298 (alleging that AEG exempting competing music festivals from Coachella's radius clause constitutes a horizontal restraint).

157. *See* Second Am. Compl., *supra* note 3, ¶ 171 ("AEG asserts that its definition of

Northern Pacific Railway Co. v. United States, where the railway possessed significant economic power, which it used to control large numbers of purchasers and give it preference over its competition.[158] Coachella's tying arrangement is unreasonable because of Coachella's proven dominance over the market for both open-air music festivals and hard-ticket sales.[159]

g. *Consequences of Finding Coachella's Radius Clause a Per Se Violation*

A decision to find an overbearing radius clause to be a per se violation of Section 1 of the Sherman Act would have far-reaching effects for smaller acts. If courts found the radius clause to be a per se violation, any similar clauses would be invalidated.[160] Promoters would no longer be able to utilize radius clauses with requirements similar to Coachella's restrictions.[161]

The industry could implement policies that would limit radius clauses to a state within which a festival is held, or within less than a hundred miles of and the same month as the date of the performance. This would ease the burden on small artists who would no longer need to drive hundreds of miles to reach their next venue.[162]

IV. MODIFIED TEST FOR RADIUS CLAUSES IN THE LIVE MUSIC INDUSTRY AND STATUTORY CHANGES

Based on the serious effects of the tying arrangements and horizontal agreements that stem from Coachella's Radius Clause, it should have been held to be a per se violation of Section 1 of the Sherman Act. As the radius clause lawsuits are only recently becoming more common, an initial standard that balances the rule of reason and per se analyses could be introduced to alleviate the courts' reluctance to find an unfamiliar type of restraint to be a

---

'festivals' and 'themed events' includes events like the Soul'd Out Music Festival, which does not directly compete with Coachella in the open air music festival market."); *N. Pac. Ry. Co.*, 356 U.S. at 5–7 (holding appellant railroad companies' land lease contracts containing "preferential routing" clauses, which required the lessee to ship anything produced on Defendant's land over its lines, to be a tying arrangement).

158. *See N. Pac. Ry. Co.*, 356 U.S. at 3, 7–8 (explaining that the defendant railroad company owned substantial amounts of land from which clients purchased goods and forced use of its railroad to ship the goods).

159. *Id.* at 6–7; Second Am. Compl., *supra* note 3, ¶¶ 31, 33–34; Rayner, *supra* note 117.

160. *In re* Cardizem CD Antitrust Litig., 332 F.3d 896, 906 (6th Cir. 2003) (explaining that per se violations occur when a restraint on trade lowers output and restricts competition in the majority of cases).

161. *See id.*

162. *See* Bain, *supra* note 6 (explaining that artists are forced to drive unsafe distances between shows to avoid violating overbearing radius clauses).

per se violation.[163]

A modified test would have to be only slightly more forgiving, require more depth than the per se analysis, and still be less burdensome than the costly and vague rule of reason test.[164] A potential modification to the rule of reason could be removing inquiry into procompetitive effects. Effects on Coachella's promoters are not anticompetitive because the festival would likely be profitable without the radius clause.

An already established quick look analysis provides an intermediate standard between the per se analysis and the rule of reason test and requires a less intensive inquiry into the relevant market.[165] Courts turn to the quick looks analysis when "no elaborate industry analysis is required to demonstrate the anticompetitive character" of restraints, such as horizontal agreements or agreements to withhold a particular service.[166] The quick look analysis could be used as the threshold for deciding whether overbearing radius clauses are per se violations of Section 1 until courts accumulate adequate experience in deciding these types of cases.[167]

Though the per se test should be the standard for overbearing radius clauses, using the quick look analysis rather than the rule of reason would lessen the need for costly discovery and allow smaller promoters and artists to bring suits against larger players.[168] Smaller promoters and artists are most negatively affected by overbearing radius clauses, and will be in a better position to bring suit if costs are lowered.[169]

Along with using a modified test or the quick look analysis in lieu of the rule of reason to establish per se unlawfulness, statutory changes at the state level could also prevent overbearing clauses. The Illinois Attorney

163. *See* White & White, Inc. v. Am. Hosp. Supply Corp., 723 F.2d 495, 504 (6th Cir. 1983) (explaining that some forms of restraint have been recognized as per se violations of the Sherman Act through the court's prior experience with that particular type of restraint).

164. *See* Stucke, *supra* note 40, at 1461–65.

165. *See* SFX React-Operating LLC v. Eagle Theater Entm't, LLC, No. 16-13311, 2017 WL 3616562, at *7 (E.D. Mich. Aug. 23, 2017).

166. *Id.* (stating that the quick look analysis "would not require an analysis of the surrounding market").

167. *White & White, Inc.*, 723 F.2d at 504 (stating that "judicial experience" has allowed courts to identify per se violations of Section 1).

168. *SFX React-Operating LLC*, 2017 WL 3616562, at *7; Bain, *supra* note 6. *See generally* Edward Burnett, *Antitrust Summary Judgment and the Quick Look Approach*, 62 SMU L. REV. 493 (2009) (discussing the efficiencies of the quick look analysis along with its use as a "middle-ground" test for antitrust litigation).

169. *See* Stucke, supra note 40, at 1462–65 (explaining that the rule of reason test is expensive because of the more intricate fact based analysis necessary to complete the test); Bain, *supra* note 6 (highlighting the negative effects on smaller artists and promoters caused by overbearing radius clauses).

General's investigation into Lollapalooza's radius clause shows that there is interest at the state level to prevent restraint on the live entertainment market.[170] For example, a state could require that radius clauses do not cover a geographic area outside the city and do not extend past the week or month of the festival. This would allow artists to freely tour before and after the festival and festivals to ensure consumers who are planning to attend festivals during that time will not be dissuaded from attending.

V. CONCLUSION

Radius clauses have been the industry standard for promoters of large open-air music festivals. These overbearing clauses have been brought to the public attention through lawsuits by smaller competitors who are being harmed by them. *Soul'd Out Productions, LLC v. Anschutz Entertainment Group, Inc.* gives an example of an overbearing radius clause and its harmful effects on the market.[171]

Coachella's overbearing Radius Clause should have been a per se violation of Section 1 of the Sherman Act; therefore, future cases where festivals have market dominance, overbearing radius clauses should be accepted as violations at face value and no longer require in depth analysis into market conditions. Moving away from the in-depth analysis would allow smaller promoters and artists to bring suits when their businesses are harmed. If per se analysis is initially refused by courts, the quick look analysis should replace the rule of reason as the applicable test in deciding whether radius clauses violate Section 1.

---

170. *See, e.g.*, Wright, *supra* note 82 (detailing the Illinois Attorney General's investigation into Lollapalooza's use of an overbearing radius clause).

171. *See, e.g.*, Bain, *supra* note 6 (highlighting the harmful effects of an overbearing radius clause).

* * *

American University Business Law Review

SUBSCRIPTION ORDER FORM

Subscription Options (check one):

______ $30.00 Alumni Subscription

______ $45.00 Domestic Subscription

______ $50.00 Foreign Subscription

______ $20.00 Single-Issue Only

______ **Please check here if you would like to enclose a check for the amount selected.**

Please complete the form below and send it with your check made payable to *American University Business Law Review* at:

American University Business Law Review
Washington College of Law
4300 Nebraska Avenue, NW
Suite CT11
Washington, D.C. 20016
Attn: Journal Coordinator

______ **Please check here if you would like to receive an invoice for the amount selected.**

Please complete the form below and email it to Sharon Wolfe, the Journal Coordinator, at shuie@wcl.american.edu.

Please begin my subscription with Volume ______ Single-Issue only ______

Name:

____

Institution:

____

Address:

____

City, State, Zip:

____

*Subscriptions are automatically renewed unless cancellation is requested.

* * *

* * *

American University Business Law Review
Washington College of Law
4300 Nebraska Avenue, N.W.
Suite CT11
Washington, D.C. 20016
www.aublr.org

Volume 8, Issue 3 AMERICAN UNIVERSITY BUSINESS LAW REVIEW Pages 245–418 2020