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DISPUTE RESOLUTION IN THE BADMINTON WORLD FEDERATION: *SUI GENERIS* EXPERT DETERMINATION?

Ilias Bantekas*

Abstract

The Badminton World Federation (BWF) has set up a poly-tiered dispute resolution mechanism to deal with alleged breaches of its institutional statutes. It calls these 'judicial' bodies even though they are not established by law. They consist of the Independent Hearing Panel (IHP) and the Sports Dispute Panel (SDP). The former entertains mostly governance-related disputes while the SDP enjoys jurisdiction for substantive sports disputes. The IHP also serves as an appellate forum against SDP decisions. Neither of these entities has been endowed with arbitral qualities and the BWF dispute settlement architecture is paradigmatic of expert determination. The two 'judicial' entities are complemented by a Referral officer who serves as *sui generis* prosecutor and who receives pertinent evidence from national confederations or the BWF (investigating parties). It is argued that while this represents a successful example of expert determination in a context with a relatively small caseload, the system itself would be better served by a self-contained arbitral tribunal, seated in an arbitration-friendly jurisdiction.

1. Introduction.

The Badminton World Federation (BWF) is by no means a newcomer to the international sports law and governance arena. It was established in 1934 by nine members, with its headquarters in London in the form of a nonprofit association.[1] Its original name was International Badminton Federation (IBF). However, in 1981 the IBF merged with the World Badminton Federation (WBF), but it was not until 2006 that the current name was assumed, namely the BWF. Given the huge popularity of the sport in Malaysia, Indonesia, China, Thailand, and Korea, it was a natural consequence that the seat of the BWF would ultimately be relocated to Asia. The BWF is incorporated in Malaysia under the country's International Organizations (Privileges and Immunities) Act 1992. The BWF was granted the status of an inter-governmental organization.[2] This is a spectacular arrangement given that the BWF was not set up by states, and hence, as a matter of public international law, it does not qualify as an inter-governmental organization. This is a personalized privilege, which very much. Served as an incentive for the relocation of the BWF from the UK to Malaysia. In terms of governance, the Annual General Meeting (AGM) is the highest authority[3] while the council undertakes the day-to-day business and other work of the BWF (albeit in doing so it cannot not override decisions of the AGM).[4] The council conducts its work

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[1] *See* BWF CONST. art. 1 (2023), https://extranet.bwf.sport/docs/document-system/81/1466/1467/BWF%20Constitution%20-%20May%202023.pdf. For a history of the sport, *see* Jean-Yves Guillain, *Badminton: An Illustrated History* (Publibook, 2004); Bernard Adams, *The Badminton Story* (BBC Books, 1980).

[2] Registration No PU A 363, available at: https://extranet.bwf.sport/docs/document-system/81/82/93/BWF%20-%20IO%20Status%20in%20Malaysia%20-%20Gazette%2028%20January%202018.pdf

[3] BWF CONST. art. 14, 15.

[4] *Id.* art. 19.

through an executive board and eight committees (governance and ethics; finance; marketing; communications and media; events; para-badminton; development; IOC and international relations). To further facilitate the work of the council, a select number of commissions have been set up, composed of both council members and external experts. While this article is chiefly devoted to the so-called judicial bodies of the BWF architecture, these cannot be fully understood without reference to two supporting entities of the BWF, namely the Independent Appointment Body (IAB) and the Independent Vetting Panel (IVP). Their creation demonstrates and, in fact, highlights the BWF's obsession with integrity and transparency.

The purpose of this article is to identify the dispute resolution bodies and procedures currently in operation in the BWF. The starting point is Article 31 of the BWF constitution, which stipulates the existence of four judicial bodies, namely the AGM, the council, the Independent Hearing Panel (IHP) and the Sports Disciplinary Panel (SDP). The first two of these are quintessentially the governance entities of the BWF and their capacity to resolve sports disputes as such is very limited.[5] The drafters of the BWF constitution must no doubt have been desirous of conferring a judicial window open to these governance entities in the event that their dispute resolution capacity may have been required in the future.[6] As a result, we shall not expand further on their judicial authority although they *no doubt* adopt decisions on important political issues.[7] The IHP and the SDP, on the other hand, were clearly designed to perform "judicial" functions. Appeals against the decisions of the IHP may be submitted to the Court of Arbitration for Sport (CAS), as stipulated in the BWF constitution[8] and its judicial procedures,[9] albeit this in no way dictates that IHP decisions are judicial or arbitral in nature. The CAS Anti-Doping Division (ADD) enjoys jurisdiction over doping-related offenses, as is explained in Section 4.

It is important to set out the nature of disputes susceptible to the judicial jurisdiction of the four bodies under Article 31 of the BWF constitution. The jurisdiction of these bodies does not involve competing claims as such (e.g., contractual claims), but an allegation by the BWF or its national confederations that one or more of its substantive rules (e.g., concerning doping or match-fixing) have been breached by persons or entities under its aegis. In order for an allegation to culminate into a "dispute" it must become the subject of investigation by a national confederation, or the BWF and then reach its way to the BWF's referral officer. The referral officer thus acts as a *sui generis* prosecutor or indictment officer, albeit the nature of the allegation is not criminal, but institutional.[10] Article 6.2 of the BWF Judicial Procedures stipulates that the referral officer shall

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[5] *Id.* art. 12 (referring to one incident of judicial authority of the council. Where a national federation claims to exercise jurisdiction over the geographical area contested by another national federation, relevant claims must be lodged with the council whose decision, following approval by the AGM, is final. In addition, art. 19 permits the council to decide disputes arising from the relationship between the BWF and general meetings. The council further enjoys disciplinary authority, under Art. 29 of the BWF constitution, "to penalize a Member, player, coach, competition official, or other person for infringement of the Statutes, for misconduct during competition, or for actions that bring the game of Badminton or the Federation into disrepute.").

[6] *Id.* art. 6 (confusingly, however, art. 6 of the BWF judicial procedures stipulates that judicial powers are only exercised by the IHP, SDP, and the referral officer).

[7] *See* BWF, "BWF Position on Participation of Athletes from Russia and Belarus," (Apr. 20, 2023), https://cms.bwfbadminton.com/wp-content/uploads/2023/04/BWF-Position-on-Participation-of-Athletes-from-Russia-and-Belarus-20042023.pdf.

[8] BWF Const. art. 30.1, § (g) – (i).

[9] BWF Jud. Proc. § 3.1 (2023), https://extranet.bwf.sport/docs/document-system/81/1466/1469/3.1%20Judicial%20Procedures%20-%20V2.2%20-%20May%202023.pdf.

[10] *See* Lisa A. Kihl ET AL., *Corruption in Sport: Understanding the Complexity of Corruption,* 17 Eur. Sport Mgmt. Q. 1, 1-5 (2017) (match-fixing, corruption, and doping also constitute criminal offences under national laws; hence,

have "judicial powers" under the terms of the procedures. It thus may be queried whether the claim of the referral officer, which in turn becomes the subject matter of the competent BWF judicial body is in fact a dispute. A dispute has long been defined by the Permanent Court of International Justice (PCIJ), the predecessor of the ICJ, as a "disagreement on a point of law or fact, a conflict of legal views or interests" by the parties to a particular relationship.[11] Scholars often distinguish between a dispute and a *situation* by noting that a situation involves a complex chain of events giving rise to several inter-linked disputes within a single context.[12] A dispute is of a legal nature, and hence within the jurisdiction of an investment or other tribunal, if it concerns a right or obligation as this arises from a valid source of law, whether domestic or international.[13] It is beyond doubt that the types of cases administered by the BWF judicial bodies are disputes and not claims or counter-claims against decisions of governance entities.

In the plethora of dispute settlement mechanisms, one encounters in the institutional rules of international sports federations,[14] those of the BWF stand out and are worthy of a critical commentary for at least two reasons, namely: (a) their elaborate transparency procedures for the appointment of panel members; and (b) because they lack a judicial or arbitral character, in stark contrast to other tribunals maintained international sports federations. While mapping out the various procedures, this article suggests that the "judicial" bodies of the BWF are in fact elaborate expert determination mechanisms and in the conclusion of the article a call for reform is made in favor of a single self-contained arbitral mechanism, even if the list of arbitrators is closed and restricted. The article is divided along the following lines: Section 2 sets off to examine the BWF's vetting mechanism on the basis of which panel members are appointed. Section 3 and its three subsections explore the work and jurisdiction of the IHP, the SDP, and the referral officer. Section 4 analyzes the likelihood of institutional appeals and further recourse to CAS from decisions of the IHP, as well as the role of the CAS ADD to hear BWF doping allegations. Section 5 explores the procedures underlying investigations for potential breaches of BWF statutes, while Section 6 looks at notable procedural aspects arising from the operation of the judicial bodies.

2. The BWF's Unique Vetting and Appointment Procedures.

It is not obvious to this author that cronyism or corruption have plagued the dispute settlement bodies of any sports-governing body. Such matters are well regulated by pertinent institutional rules, and moreover any allegation of corruption may be reported to the courts or prosecutors of the seat and appeals may be lodged to CAS. In recent years, a number of sports-governing bodies have delegated to external entities the task of setting up and operating dispute settlement mechanisms, including advertising and recruiting arbitrators and members thereof.

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the evidence collected for the purpose of BWF proceedings may be sought by one or more national authorities for the initiation of criminal prosecutions).

[11] *Mavrommatis Palestine Concessions* (Greece v. U.K.), Judgment, 1924 P.C.I.J. Rep, (ser. A) No. 2, at 12 (Aug. 30); *ATA v. Jordan*, Award, ¶ 98-120 (2010); *and Burlington Resources v. Ecuador*, Decision on Jurisdiction, ¶ 254ff (2010).

[12] Ademola Abass, *International Law* (Oxford University Press, 2012), 434.

[13] *See Suez, Sociedad General de Aguas de Barcelona SA and Interaguas Servicios Integrales del Agua SA v. Argentina*, Decision on Jurisdiction, ¶ 37 (2006).

[14] *See* Ilias Bantekas, *The Resolution of Professional Tennis Disputes*, 14 JIDS 1 (2023) (a good example is offered by FIBA's Basketball Arbitral Tribunal); *see also* Dirk R Martens, *Basketball Arbitral Tribunal: An Innovative System for Resolving Disputes in Sport (only in Sport?)* 11 Int'l Sports L.J. (2011).

Sports Resolutions is in fact undertaking this very task on behalf of BWF.[15] The BWF has been content to resolve the issue of judicial bias by introducing two mechanisms, one of which serves to vet potential applicants while another goes on to appoint them. Given that persons serving on the two BWF judicial bodies are very much akin to arbitrators or expert determinators, the BWF vetting procedure is puzzling.[16] In the practice of general commercial investment, and even sports arbitration, there are two ways to mitigate bias and impartiality. The first is the appointment of arbitrators by the parties and the second is a combination of institutional rules and laws of the seat of arbitration, where allegations of bias, corruption, and impartiality are dealt with by the arbitral institution or the courts of the seat. Article 12(1) of the UNCITRAL Model Law on International Commercial Arbitration[17] posits a general principle in this sense by demanding that an arbitrator:

> Shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

All institutional rules encompass relevant ethics provisions, in addition to more detailed ethical codes, such as the American Association of Arbitration (AAA) Code of Ethics for Arbitrators and the International Bar Association (IBA) Rules of Ethics for International Arbitrators.[18] Although it is expected that arbitrators must be impartial and independent, lest the award be set aside under the *lex arbitri* or refused enforcement at a later stage, there is no single internationally-accepted standard of impartiality.[19] As a result, ethical issues are largely driven by institutional codes of conduct which prescribe that the extent of disclosure, possible conflicts of

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[15] Sports Resolutions, a non-profit entity seated in London, has agreed with the BWF to undertake the functions of the Independent Appointment Body (IAB) https://www.sportresolutions.com/news/view/sport-resolutions-to-provide-independent-services-to-badminton-world-federation.

[16] In 2017, the BWF set up an External Judicial Experts Group (EJEG) under art. 31.1.4 of the 2017 version of the BWF judicial procedures to hear doping- and ethics-related disputes (also referred to as the Doping Hearing Panel), but with the coming into effect of the current constitution and judicial procedures, this entity has been effectively abolished. *See* https://corporate.bwfbadminton.com/news-single/2017/07/13/experts-to-judge. It did, however, entertain a few cases, such as *BWF v Kate Jessica Foo Kune*, Decision 2019/04 (Oct. 21, 2019). The BWF appealed the decision to CAS and as a result decided to refer future doping cases to CAS. BWF-related anti-doping cases have been delegated under art 8.1.1 of the BWF's Anti-Doping Regulations to the CAS ADD, which it now has authority over first instance hearings or waivers thereof and decision-making powers. https://extranet.bwf.sport/docs/document-system/81/1466/1468/2.3.%20Anti-Doping%20Regulations.pdf

[17] Model Law on Int'l Commercial Arbitration, U.N. Comm' on Int'l Trade Law (1985), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (the 2016 version of the Model Law is available online).

[18] Mini codes of ethics may also be found in some multilateral treaties, such as Annex 14(c) of the EU-Korea FTA and the code of conduct prescribed for persons sitting on dispute settlement panels under chapters 19 and 20 of NAFTA. Free Trade Agreement, 2010 O.J. (L. 127) 54; N. Am. Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289.

[19] English courts are generally in agreement that the appropriate test for impartiality is that of "real possibility of bias," as per the judgment in *AT&T Corp. v Saudi Cable Co.*; the IBA Rules of Ethics, on the other hand, provides that prospective arbitrators should disclose all facts or circumstances that may give rise to "justifiable doubts" as to their impartiality; Art 3(1) of the Portuguese Chamber of Commerce Code of Ethics introduces an "absolute" impartiality test. *AT&T Corp. v Saudi Cable Co.*, [2000] EWCA (Civ), 2 Lloyd's Rep 127 (Eng.); INT'L BAR ASS'N, RULES OF ETHICS FOR INT'L ARBITRATORS (1987); PORTUGUESE CHAMBER OF COMMERCE, CODE OF ETHICS, Art. 3(1).

interest, and the ultimate arbiter of such issues are the courts. These in turn are not averse to relying on the standards adopted in institutional rules.[20]

The two-tiered vetting process of the BWF derives its justification from the fact that IHP members are not appointed on an ad hoc basis, as is otherwise the case with arbitral proceedings, but are instead appointed for a defined period in the form of a standing "judicial body."[21] The duration of an appointment is four years, which is renewable, and hence it is important that those appointed undergo a thorough process to assess competence, impartiality, and independence.[22] An assessment of the independence and impartiality of IHP members is undertaken upon appointment to a hearing panel in accordance with Article 19 of the BWF Judicial Procedures.[23] In order to be appointed to the IHP in the first place (as opposed to a hearing following appointment), a person must be declared "eligible" in accordance with the criteria set out in Appendix II of the BWF Constitution.[24] In all cases, no one may be appointed to the IHP or remain in that position if that person has been employed by, advised, or been instructed to act for the BWF, a continental confederation, or a member association in the two years preceding that person's proposed appointment or during such appointment.[25]

Appendix II to the BWF constitution discusses the biggest part of the vetting process. The idea is that anyone who is appointed as an official in the BWF, from AGM members to IHP and SDP members, must be eligible for those positions, as well as be independent, conflict-free, and enjoy a solid reputation. Three entities are involved in this process, all of which are susceptible to assessment controls by each other. The vetting process as such is to be undertaken by the IVP. Its appointment is done by the AGM, subject to a recommendation by the IAB.[26] The vetting process is quite extensive. The IVP has the authority to vet the appointment of all officials except for its own three members. These three members are vetted by the IAB, which on this (and only this) occasion is designated as IVP.[27] To ensure the impartiality of the process, no member of the IVP must have had any formal or other relationship with the BWF.

As a result of this extensive and complicated process, the appointment of IHP members is based on a recommendation by the IAB for a renewable four-year term, which is confirmed by the AGM.[28] Where a member resigns or is otherwise unable to fulfill their duty, a replacement member may be appointed on an interim basis under the same process.[29] Despite this extensive vetting process, it is not clear to this author that it is wholly efficient and cost-effective. While the IHP and

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[20] US courts rely heavily, for example, on the AAA and ABA Code of Ethics for Arbitrators in Commercial Disputes in order to decide issues of independence and impartiality. *See Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673 (7th Cir. 1983); *Brandeis Intsel Ltd. V. Calabrian Chem. Corp.*, 656 F.Supp. 160 (S.D.N.Y. 1987); *Reeves Brothers, Inc. v Capital-Mercury Shirt Corp.*, 962 F.Supp. 408 (S.D.N.Y. 1997).

[21] BWF Jud. Proc. art. 7.2.1 (requiring that the IHP be composed of seven members, four of which must be lawyers with an expertise in sports law and three should have experience in sports governance, ethics and criminal investigations). *See also supra* note 8.

[22] BWF Jud. Proc. art. 8.2.2.

[23] *Id.* art. 19.

[24] BWF CONST. app. II.

[25] BWF Jud. Proc. art. 7.4.2.

[26] *Id.* art. 3.2.1; BWF CONST. app. II note **Error! Bookmark not defined.** (stipulating that the IAB is appointed by the AGM and upon appointment it is independent from its creator, BWF CONST. Art 22.A.3. Even so, there is no guarantee that IAB appointees will be free of favoritism from the AGM).

[27] *See supra* note **Error! Bookmark not defined.Error! Bookmark not defined.**.

[28] BWF Jud. Proc. art. 7.2.2.

[29] *Id.* art. 7.2.3; *BWF v. Nikita Khakimov*, IHP Decision 2020/01 (9 October 2020), ¶ 2-3 (where two IHP members revealed possible conflicts of interest arising from involvement in other organizations and requested a new formation, which was duly undertaken by the BWF President).

SDP enjoy stability, continuity, and build up expertise, this is extinguished upon appointment of new IHP and SDP members. One must not forget that this system is further sustained by the maintenance of two distinct entities, the IVP and the IAB. In the opinion of this author, a single internal arbitral mechanism dealing with disputes currently under the authority of the IHP and SDP is not only less complicated, efficient, and reduces cost, it moreover builds badminton-related expertise among a larger community of legal professionals that are appointed as arbitrators. Significantly, the decisions of this new arbitral entity would be enforceable at the courts of the seat. Given that neither the IHP nor the SDP are receiving significant numbers of cases (quite the opposite), this suggestion makes ample sense. The only impediment to an arbitral tribunal may be the question of arbitrator fees, but just like elsewhere, these may be capped and kept low and the BWF may retain some funds from its proceeds to sustain the tribunal. There is no reason why such a tribunal should not operate on the basis of a closed list of arbitrators, although it makes sense to keep the list competitive in order to attract more interest to the sport and the BWF as a whole.

3. The Key "Judicial" Entities of the Badminton World Federation.

The following sections will concentrate on the key judicial entities of the BWF, namely the IHP, the SDP, and finally the office of the referral officer. The CAS is not a constituent entity of the BWF and its appellate authority arising from appeals against decisions of the IHP will be explored in a distinct section. We shall not refer to past judicial bodies established under the 2017 BWF judicial procedures, such as the Ethics Hearing Panel[30] or the EJEG, save where they rendered a decision relevant to this discussion.[31]

a. The Nature and Jurisdiction of the Independent Hearing Panel.

As already stated, Article 31.1 of the BWF Constitution designates the IHP, along with the other three bodies, as "judicial."[32] It then goes on to confer on these judicial bodies "the power to make decisions and impose penalties in their areas of duty,"[33] including suspension from competitive badminton for life. The IHP is the only one among the four judicial bodies that is prevented from delegating its authority,[34] thus conferring upon it judicial qualities far above its other counterparts. Despite the fact that all four judicial bodies must adhere to fundamental fair trial guarantees in accordance with Article 32 of the BWF constitution, the legal nature of the IHP is far from clear. While it is not uncommon for SGB to set up non-judicial entities to deal with specific cases or disputes,[35] these generally operate alongside a fully-fledged arbitral entity. By way of illustration, the ITF's Independent Arbitral Tribunal derives its authority from Article 33 of the ITF constitution. Its arbitral nature is clearly spelt out in two relevant instruments. The ITF tribunal is complemented by an International Adjudication Panel. The panel's procedural rules emphasize that the independent tribunal is an arbitral tribunal whose proceedings are governed by

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[30] BWF CONST. art. 31.
[31] *BWF v. Raj Gaya*, BWF Ethics Hearing Panel Decision, 2018/02 (Nov. 21, 2018).
[32] BWF CONST. art. 31.1.
[33] BWF CONST. art. 31.2.
[34] *Id.*
[35] By way of illustration, Art. 9.1(j) of the International Tennis Federation (ITF) Bylaws sets forth the Internal Adjudication Panel. Art. 33(b) of the ITF Constitution provides for concurrent jurisdiction to both the Panel and the Independent Tribunal in respect of disputes falling within paragraph (a) of this provision but does not elaborate further.

English law and subject to the English Arbitration Act.[36] This is equally reiterated by Article 1.3 of the tribunal's own procedural rules. In contradistinction, there is nothing in the BWF constitution or its judicial procedures suggesting that the IHP is an arbitral entity subject to the *lex arbitri* of its seat, namely Malaysia. The fact that IHP decisions may be appealed to CAS is insignificant given that CAS does not oblige or request the judicial entities of SGBs to assume an arbitral or other character in order to receive appeals from them.[37] The absence of an arbitral character entails that decisions adopted by the IHP are not binding and enforceable on the parties at the seat, in the terms of the UNCITRAL Model Law or Malaysia's Arbitration Act,[38] and more importantly they are not susceptible to international enforcement under the terms of the 1958 New York Convention.[39] It is equally undeniable that despite its designation, the IHP is not a judicial entity because that status can only be conferred by law to courts operated by the state, and no such authority has been vested to the IHP by the laws of Malaysia.[40] The only available conclusion is that the IHP judicial function is predicated on the same grounds as so-called expert determination, whereby disputes are submitted to an independent technical expert or a panel thereof (chosen from a list pre-agreed by the parties), which determines purely technical issues (not matters of law, although these may also be dealt with), and whose decision is final and binding.[41] In large, long-term construction projects there is usually a standing expert–determination panel because of the frequency of relevant disputes. Although expert determination is fast, technically accurate, and binding, it does not constitute an arbitral award and is only enforceable as a matter of contract (i.e., if the expert's decision is ignored, there is a breach of contract).[42] That is precisely why Article 30 of the BWF constitution devotes a long provision entailing the duties of covered persons and organizations as a matter of contract or agreement.[43] The test used by common law courts to

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[36] ITF CONST. art. 7(b). *See also* Men's World Tour Regul. art. I.E.5. (emphasizing that "these regulations and any dispute arising out of or in connection with them (including any dispute relating to . . . non-contractual obligations) shall be governed by and construed in accordance with English law," to the exclusion of English private international law).

[37] *See* CAS Arbitration Code R.47 (stipulating that it enjoys jurisdiction over a decision of a sports federation "if the statutes or regulations of the said body so provide.").

[38] *See* Malaysian Arbitration Act, 2005 (Act No. 646) (Malay.). In Malaysia, Article 51 of the Central Bank Act of 2009 established a Shariah Advisory Council whose powers, however, serve to trump the authority of arbitral tribunals dealing with disputes pertaining to Islamic finance. Commentators have warned that awards rendered through the intervention of the Shariah Advisory Council are not susceptible to enforcement under the 1958 New York Convention. *See also* Abdullah A. Rahman, *Islamic Finance Arbitration: Enforceability Under the New York Convention 1958 of Arbitration Awards made Following a Reference to the Shariah Advisory Council Under the Central Bank of Malaysia Act 2009*, 35 OXFORD ARB. INT'L. 245 (2019).

[39] U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S 3.

[40] It is interesting that in *BWF v. Zhu Jun Hao,* the IHP called itself a "form of 'disciplinary committee' authorized by Article 29 of the BWF Constitution." Badminton World Federation IHP Dec. 2021/02 ¶ 42 (Aug. 11, 2021) (quoting BWF CONST. Art. 29).

[41] Douglas Harper v. Interchange Grp., Ltd. [2007] EWHC 1834 (Comm.); Union Disc. v. Zoller [2002] 1 WLR 1517.

[42] *See* Owen Pell Ltd. v. Bindi (London) Ltd. [2008] EWHC 1420 (TCC).

[43] *See generally* BWF CONST. §30.1(a)-(i). (recalling that Art. 30 BWF Constitution requires that covered persons agree to abide with: "(a) the Statutes of the Federation; (b) the Federation's authority on all matters concerning international Badminton; (c) the mandatory nature of the Statutes; (d) the Federation's jurisdiction and the right to make any decision or impose any sanction based on the Statutes of the Federation; (e) that Federation appeals, complaints and dispute resolution processes be fully exhausted before taking [cases to CAS]; (f) that . . . appeal[s] against decisions of the Federation and its judicial bodies must be lodged in accordance with the Judicial Procedures; (g) the . . . [CAS] as the only competent judicial authority external to the Federation, to the exclusion of any ordinary court of law in respect of the Federation and its Constitution and its rules, any civil judicial authority of

distinguish arbitration from expert determination is whether the relevant process was in the nature of a judicial inquiry.[44] Given that the IHP is neither an arbitral tribunal nor a court, its decisions are enforceable on a contractual basis and failure to comply constitutes a breach of the underlying contract (i.e., the BWF constitution, whose implementation was agreed between players, national federations, and the BWF). It should be noted that while the parties to expert determination must adhere to this procedure as a matter of contract, given that the outcome (i.e., the determination) is itself a contractual outcome, the parties thereto are not prevented from litigation. Article 30 of the BWF constitution cannot prevent access to the courts in the event that a party is dissatisfied with expert determination; as otherwise, the party in question will be prevented from its right to effective remedies and access to justice.[45]

In terms of jurisdiction, the IHP is the key dispute settlement body of the BWF with respect to intra-governance, regulatory, and ethical disputes. Under the terms of Articles 7.5.1, 7.5.3, 7.5.4, and 7.5.5 of the BWF judicial procedures, the IHP possesses authority over integrity and ethics disputes as these arise under the BWF Code of Ethics,[46] as well as alleged breaches of the BWF Code of Conduct with respect to actions or omissions by electoral candidates[47] and elected officials.[48] It also encompasses alleged infractions arising from the BWF Code on the Prevention of Manipulation of Competitions and the BWF Para Badminton Classification Regulations with respect to intentional misrepresentation. Second, the IHP serves as final arbiter of governance-related decisions adopted by Continental Confederations assuming all other internal processes therein have been exhausted.[49] Third, it resolves so-called *hybrid cases*, which concern situations where the facts under dispute simultaneously constitute a breach of a regulation under the jurisdiction of the IHP as well as of the SDP. In such cases, the IHP effectively overrides the authority of the SDP.[50] Fourth, the IHP hear "appeals against decisions of the Independent Vetting Panel."[51] Annex II of the BWF constitution, which relates to the power of the IVP, specifically refers to appeals against the Vetting Panel's decisions to the IHP. Unless otherwise agreed to or ordered by CAS, such appeals shall be handled on an expedited basis by the IHP which possesses authority to review the Vetting Panel's findings of fact and law. However, the IHP's decision in such cases is not final. It can be appealed to the CAS Appeals Arbitration Division but only with

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any country and any other arbitration body; (h) the decision of the CAS resolving any appeal may not be challenged in any forum or on any ground except as set out in . . . the Swiss Federal Code on Private International Law; and (i) the requirement to abide by the decisions of the Federation and/or CAS without attempting to hinder their application.").

[44] Age Old Builders Party Ltd. v. Swintons Party Ltd. [2003] VSC 307.

[45] *Cf.* Semenya v. Switzerland, App. No. 10934/21, (July 11, 2023), https://hudoc.echr.coe.int/eng?i=001-226011 (challenging a CAS award on procedural and substantive grounds. The ECHR "found that the applicant had not been afforded sufficient institutional and procedural safeguards in Switzerland to allow her to have her complaints examined effectively, especially since her complaints concerned substantiated and credible claims of discrimination." It was immaterial for the Court that the Regulations in question were agreed to by all national track and field federations).

[46] BWF Jud. Proc. art. 7.5.1, § 3.1 (2023); *See also* BWF Jud. Proc. § 2.1 (2017), https://system.bwfbadminton.com/documents/folder_1_81/Statutes/CHAPTER-2---ETHICS/Section%202.1%20-%20Code%20of%20Ethics.pdf.

[47] BWF Jud. Proc. art. 7.5.1, § 3.1 (2023); *See also* BWF Jud. Proc. § 2.2.1 (2017), https://www.badmintonpanam.org/wp-content/uploads/2018/04/2.2.1-Candidates-for-Elections-Code-of-Conduct-01062017.pdf.

[48] *Id.* art. 7.5.1, § 3.1 (2023); *See also Id.* § 2.2.2 (2020), http://www.badmintonpanam.org/wp-content/uploads/2021/01/ 2.2.2-CC-Elected-Officials-Effective-Date-19-July-2020.pdf.

[48] BWF Jud. Proc. art. 7.5.3, § 3.1 (2023).

[49] *Id.* art. 7.5.4, § 3.1.

[51] *Id.* art. 7.5.5, § 3.1.

respect to fundamental procedural rights allegations culminating in an incorrect decision.[52] Finally, the IHP hears appeals against decisions of the *SDP*,[53] which in addition to the point above, is the only other instance where the IHP is endowed with authority over substantive sports disputes. Finally, in accordance with Article 7.5.6 of the BWF Judicial Procedures, the IHP enjoys jurisdiction over any other residual dispute specifically set out in the BWF Statutes or where such exceptional authority is conferred upon it by the BWF Council.[54] The IHP is headed by a president and deputy president, both of whom must be lawyers with significant experience. It is the job of the president to sit on a hearing panel and appoint members thereto with a view to constituting a hearing panel.[55] The deputy president undertakes the same tasks where the president is unable or is subject to a conflict.[56]

b. The Sports Disciplinary Panel.

As already stated, the authority of the SDP is reserved for purely sports competition-related issues and disputes. Article 8.4.1 of the BWF judicial procedures specifically circumscribes its jurisdiction as encompassing cases arising from breaches of the following sports-related regulations, namely general competition regulations, save if they are governed by the BWF complaint procedures;[57] specific tournament regulations adopted by continental confederations codes of conduct, save if they fall within the authority of the IHP; and any other case specifically stated in the BWF statutes or if otherwise referred by the BWF council. The SDP maintains residual jurisdiction over disciplinary cases arising from breaches of the statutes as long as these do not fall under the jurisdiction of the IHP.[58] The composition, expertise, and independence of members of the SDB[59] is identical *mutatis mutandis* to the pertinent requirements for membership to the IHP as explained above.

c. The Role and Function of the BWF Referral Officer.

We have already alluded to the fact that the BWF judicial procedures refer to this post as a judicial body, despite the fact that its role is to refer cases and effectively serve as a prosecutor. It is understandable, therefore, that the postholder must meet strict independence and impartiality criteria,[60] and undergo the rigorous vetting process described elsewhere. The investigative and referral function of the referral officer is crucial in identifying breaches and bringing them to the judicial attention of the IHP and SDP, which would otherwise have no knowledge of these. In this capacity, it is essential for the referral officer to maintain close contact with those on the ground, such as umpires, national federations and BWF officials, so that he or she be appraised of incidents and allegations. In practice, the referral officer will receive a dossier from the investigating entity containing material collected during the course of the investigation so that they can decide whether

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[52] BWF CONST. app. II, http://www.badmintonpanam.org/wp-content/uploads/2021/01/2.2.2-CC-Elected-Officials-Effective-Date-19-July-2020.pdf.
[53] BWF Jud. Proc. art. 7.5.2 (2023).
[54] *Id.* art. 7.5.6.
[55] *Id.* arts. 7.3.1, 7.3.3.
[56] *Id.* art. 7.3.4.
[57] BWF Compl. Proc. §3.2 (2020), https://extranet.bwf.sport/docs/document-system/81/1466/1469/3.2%20-%20Complaint%20Procedures%20-%20V2.0%202023.pdf.
[58] BWF Jud. Proc. art. 8.4.2 (2023).
[59] *Id.* arts. 8.2, 8.3.2.
[60] *Id.* arts. 9.2, 9.2.2.

the matter is ripe for referral to the panels.[61] In accordance with Article 9.3 of the BWF judicial procedures, the referral officer has authority to refer cases to the relevant judicial body, whose jurisdiction has been explained above. In addition, the referral officer decides on the admissibility of appeals to the IHP; validates the administrative resolution of disputes;[62] decides requests for interim measures, including provisional suspensions;[63] and any other matter specifically provided in the BWF instruments.

4. BWF Appeals and Recourse to CAS.

Just like all SGB international dispute resolution mechanisms, and in light of the principle of the right to a fair trial, so too a limited range of appeals exist in the BWF architecture. The IHP enjoys jurisdiction to entertain appeals in the following three circumstances: (a) against decisions of the SDP, save where these concern administrative fines; (b) against decisions rendered by continental confederations on issues concerning governance only and as long as all internal appeal routes have been exhausted; and (c) against decisions rendered by the BWF's Independent Vetting Panel, as already explained.[64] Appeals against decisions without grounds to the IHP are admissible only where: a) there was an error of law; b) the decision was not reasonably supported by the evidence adduced; c) the point in question was not justified by the reasons offered; or d) the sanction imposed was "manifestly excessive or unduly lenient."[65] No new evidence may be adduced in appeal proceedings, save if the new evidence capable of affecting the reasoned decision or the new evidence was not available or could not have been obtained with any degree of diligence during the first instance proceedings.[66] The referral officer has the authority to assess whether the appeal is frivolous and whether it satisfies the formal requirements set out in the judicial procedures. If the referral officer finds that it does not, the appeal may be dismissed.[67]

Decisions rendered in the first instance by the IHP may be appealed to CAS. Applicants, including athletes, officials, as well as the BWF itself,[68] have twenty-one days to file the appeal from the time it was served.[69] Appeals against the first instance decision of the IHP are available

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[61] Zulfadli bin Zulkiffli v. BWF, CAS Case 2018/A/5846 *BWF*, CAS Case ¶ 16, (2018) https://extranet.bwf.sport/docs/ document-system/81/210/382/Zulfadli%20Zulkiffli%20&%20Tan%20Chun%20Seang%20%20Ethics%20Hearing%20Panel% 20-%2027042018.pdf (concerning match fixing and the collection of such evidence by BWF investigators, which was passed on to the referral officer by the BWF secretary general).

[62] BWF Jud. Proc. art. 9.3; *see also Id.* art. 17.2.3 (administrative resolution arises where a covered person admits to the charges or the alternative sanction in order to mitigate the sanctions and avoid a hearing. The alternative, softer sanction offered must be approved by the referral officer in accordance with Art 17.2.3).

[63] BWF Jud. Proc. art. 16 (2023).

[64] BWF Jud. Proc. art. 37.1 (2023).

[65] *Id.* art. 36.2.

[66] *Id.* art. 36.3.

[67] *Id.* art. 37.2.6.

[68] *See* BWF v. Jessica Kate Foo Kune, CAS Award 2019/A/6587 (2019) (lodged by BWF and turned out to be successful).

[69] There are several provisions concerning notification in the BWF Judicial Procedures. However, given the gravity of the matters in question, the process of notification in the Procedures may not deviate from the law of the seat or the forum. *See* BWF v. Hendra Tandjaya et al, IHP Decision 2020/02, ¶¶ 51-52 (2020), (emphasizing that "in the absence of a standard in the BWF Judicial Procedures, the 'reasonable effort' standard applied in English law would prevail."); *see also* Ilias Bantekas, *Receipt of Written Communications in International Commercial Arbitration*, (2021) 31 Am. Rev. Int'l. Arb. 85 (arguing that a "best efforts" standard for the delivery of communications by the parties to arbitral proceedings generally suffices to satisfy the tribunal and the courts).

to the parties to the dispute, as well as to the BWF, even if it was not a party thereof.[70] Where the IHP serves as an appellate venue against decisions of the SDP, its decisions may not be appealed to CAS, save for a single exception. This exception arises where "there was a material breach of a party's fundamental procedural rights which lead to an incorrect decision."[71] It should be pointed out, however, a successful appeal to the IHP or CAS does not in and of itself prevent the sanction from taking effect unless these bodies order otherwise.[72]

The CAS enjoys further authority at first instance with respect to doping offenses in accordance with Article 8 of the BWF's 2021 anti-doping regulations.[73] This article has already explained that an entity known as EJEG was charged in 2017 with deciding doping allegations, but this has now been disbanded. Under this provision, the CAS "shall issue a written decision that conforms with Article 9 of the International Standard for Results Management,"[74] which includes the full reasons for the decision, the period of ineligibility imposed, the disqualification of results under Article 10.10, and if applicable, a justification for why the greatest potential consequences were not imposed.[75] If the athlete chooses not to contest the allegation, he or she may waive a hearing and agree to comply with the consequences imposed.[76] In line with article A21 of the CAS ADD Arbitration Rules, a CAS ADD award may be appealed to the CAS Appeals Arbitration Division within twenty-one days.[77]

5. **Investigations.**

Investigations are a crucial component of the BWF's dispute resolution architecture because without concrete evidence no judicial body can engage with a breach of BWF statutes, nor do judicial bodies possess investigative powers, let alone the means to undertake such a task. In accordance with article 10.1 of the BWF judicial procedures, a general power to investigate belongs to the BWF[78] as well as its constituent continental confederations (investigating parties), the latter only possessing this power within their geographical sphere of competence.[79] Both entities may delegate this task to third parties. In situations where the BWF would enjoy investigating authority, it may delegate this task to a continental confederation, whether at its own behest or following a request by a confederation. Even so, the BWF retains the power to resume its investigating role at any time in the process.[80] BWF national members possess authority to investigate and resolve disputes arising under their rules and pertinent to national matters, except where the dispute in question concerns the image or reputation of badminton or its Olympic and

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[70] BWF Jud. Proc. art. 38.2 (2023).
[71] *Id.* art. 38.3.
[72] *Id.* art. 39.1.
[73] BWF Jud. Proc., *supra* note 15.
[74] WORLD ANTI-DOPING AGENCY, *World Anti-Doping Code: International Standard Results Management* (2023), https://www.wada-ama.org/sites/default/files/2021-01/international_standard_irsm_-_abp_update_2023_final_0.pdf.
[75] BWF ANTI-DOPING REGUL., art. 8.2.1 (2021), https://extranet.bwf.sport/docs/document-system/81/1466/1468/2.3.%20Anti-Doping%20Regulations.pdf
[76] *Id.* art. 8.3.1.
[77] *See* Court of Arbitration for Sport [CAS], *Code of Sports-related Arbitration,* (Feb. 1, 2023), https://www.tas-cas.org/fileadmin/user_upload/CAS_Code_2023__EN_.pdf.
[78] BWF Jud. Proc., art. 10.2.3 (this largely encompasses major BWF tournaments, in accordance with art 10.2.1 of the BWF Judicial Procedures, as well as alleged breaches committed by any top 100-ranked player and related persons and BWF officials).
[79] *See id.* arts. 10.2.2, 10.2.3.2 (for the investigative ambit of continental confederations).
[80] *Id.* art. 10.2.4, art 10.2.5.

Paralympic status.[81] In many cases, there is a tip-off from an anonymous whistleblower and the matter is taken up by officials from the BWF Integrity Unit (in respect of match-fixing allegations).[82] Equally, a BWF incident report form may be submitted by an umpire that demonstrates elements of match manipulation in one way or another (e.g. lack of best efforts).[83]

The investigating party shall have the power to request any covered person to attend a formal interview and the latter has the right to have a lawyer present.[84] The request may be followed by a *demand* to provide access to pertinent evidence, whether electronic or otherwise.[85] Article 14 of the BWF judicial procedures demands that covered persons comply fully with the demands of the investigative party. However, given the express stipulation of fundamental fair trial guarantees in the BWF constitution,[86] failure to attend or provide access to evidence does not have an adverse impact on the covered person. Even so, it lends credence to the investigating party to refer the case to a judicial body in order to pass final judgment about the disputed facts.

Once the investigating party determines that there is sufficient evidence to ground an alleged breach, it shall make a referral request. Such request must fulfill the so-called "formal requirements," which include a list of the charges, a copy of all evidence against the covered person, as well as any exculpatory evidence.[87] Where the alleged breach pertains to a substantive sports dispute under the jurisdiction of the SDP, the request should be made to the BWF secretary general, who shall promptly forward it along with all material to the SDP president.[88] Where the breach in question concerns the jurisdiction of the IHP, the investigating party shall refer the matter to the referral officer in the first instance.[89]

6. Noteworthy Procedural Issues.

This section will only explore procedural matters not covered in other subsections of this article, although a very brief overlap may be inevitable. Both the BWF constitution[90] and the judicial procedures[91] are at pains to embed fundamental fair trial guarantees into the work of the judicial bodies. This is certainly welcome, despite the fact that neither the IHP nor the SDP would be susceptible to fair trial guarantees since as already explained are neither courts nor arbitral tribunals. Even so, BWF panels and the CAS have sustained and passed judgment on alleged fair trial breaches. In a match-fixing case, the athlete contended that, during his investigation, no counsel was present. The CAS explained that the athlete voluntarily and expressly dismissed legal assistance and that in any event:

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[81] *Id.* art. 10.2.6.
[82] *See BWF v. Hendra Tandjaya et al*, IHP Decision 2020/02, ¶¶ 9-11 (Nov. 6, 2020).
[83] See *BWF v. Li Jun Hui et al*, IHP Decision (January 24 2022), ¶ 5.
[84] BWF Jud. Proc. art. 11.
[85] BWF Jud. Proc. art. 12. *See also* Zulfadli bin Zulkiffli v. BWF, CAS Case 2018/A/5846 *and* Tan Chun Seang v. BWF, CAS Case 2018/A/5847, ¶¶ 9-15, (where BWF investigators requested the two athletes to present personal items, such as access to their bank accounts, mobile phones, and Whatsapp messaging history, to which they agreed).
[86] BWF CONST. art. 32.1.
[87] BWF Jud. Proc. art. 15.1.2.
[88] *Id.* art. 15.3.
[89] *Id.* art. 15.4.
[90] *See* BWF CONST., *supra* note 1, at art. 32.
[91] *See* BWF Jud. Proc., *supra* note 8, at art. 20.

> The relevant rights provided in the BWF Code, the right to have a legal counsel present and the right to request an interpreter are discretionary rights and there is no obligation on the BWF to exercise those rights on behalf of covered persons.[92]

Article 7.4 of appendix II to the BWF constitution stipulates that the BWF shall not make publicly available decisions of the vetting panel, the IHP or of CAS "except in response to public comments attributed to or based on information provided by the relevant person or their agent."[93] The same principle of confidentiality is iterated in article 21 of the BWF judicial procedure, although it may be waived. At the time of writing (September 2023), ten badminton-related decisions had been made public, and this author is not privy to decisions that have not reached the public domain. This in line with Rule 43 of the CAS Arbitration Code, which extends not only to the proceedings as such, but also to the award once it becomes final. However, under Rule 43, if the parties and CAS so agree, all related material and the award may be made public. Even so, there are cogent reasons underlying this approach. Article 35.5 of the BWF judicial procedures prohibits the publication of exonerating decisions, without the consent of the charged party, in order to avoid stigmatization and embarrassment. On the other hand, reasoned decisions (as explained below) may be made public by the investigating party subject to necessary redactions to safeguard the privacy and security of all concerned parties to the proceedings.

According to article 23 of the BWF judicial procedures, unless otherwise provided, the proceedings shall be governed and construed in accordance with English law.[94] The IHP and the CAS has on occasion made use of English law where the judicial procedures were silent,[95] but the IHP has also shown willingness to turn to CAS jurisprudence, even if the issue in question is sufficiently regulated by English law.[96] It is not clear from the text of the IHP and SDP decisions where they were seated, although this is irrelevant given that expert determination is not generally regulated by the seat's procedural laws and hence no *res judicata* is produced from this process.[97] However, if the process is deemed by the law of the seat to constitute expert determination then such law may well require the two judicial bodies to follow a particular body of law or apply its law of contracts *mutatis mutandis*.

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[92] *Zulfadli bin Zulkiffli*, *supra* note 55, at ¶ 79.

[93] BWF CONST. app. II. art. 7.4.

[94] *See also* CAS Arb. Code, *supra* note 32, at R58 (situating the SGB's chosen governing law at the apex, failing which it shall choose the law of the country where the SGB is domiciled, or finally, the law most appropriate to the case).

[95] *See Clement Krobapko v. BWF*, CAS Case 2021/A/7730, ¶ 89 (where the CAS Appeals Division took note of the application of English law but went on to note that it did not find it necessary to apply it); *but see Hendra Tandjaya*, *supra* note 76, at ¶¶ 51-52, 174 (where the IHP applied English law to establish an appropriate standard for notifications. In the same decision, however, in the absence of an express provision in the BWF Judicial Procedures concerning the appropriateness of cumulative sentences, the IHP turned to past CAS awards rather than English law).

[96] *Hendra Tandjaya*, at ¶ 174. *See id.* at ¶¶ 88-89 (concerning the assessment of evidence in corruption cases); *and* ¶ 169 (relating to appropriate ranges of sanctions in corruption cases). *See also Nikita Khakimov*, *supra* note 25, at ¶¶ 64-68.

[97] Awards and judgments produce *res judicata*, that is, a form of estoppel against future claims between the same parties under the same causes of action. *Res judicata* assumes the existence of an award between the same parties (encompassing both privity and mutuality), the same subject matter and the same claim of relief; the so-called triple identity test. A good example is Art 1351 of the French Civil Code. In the common law, the principle of *res judicata* is a form of estoppel, which in turn is a rule of evidence. More specifically, it constitutes both a cause of action estoppel as well as an issue estoppel. *Carl-Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1966] 2 All ER 536 at 564, per Lord Guest.

The chair of each judicial body has absolute discretion in setting out a procedural timetable,[98] as well as establish the procedure of the hearings. While as a general rule the parties must be present, it may be decided that the process be based simply on documentary or other evidence.[99] The chair shall be driven to any decision regarding the procedure of the hearings by reference to fairness, cost, and confidentiality.[100] In any event, all parties must be treated equally.[101]

According to article 31.1 of the BWF judicial procedures, all evidence is admissible as long as it is deemed "fair" and "relevant," even if such evidence would not ordinarily be admitted in the courts.[102] Given the prosecutorial nature of the BWF proceedings, the burden to prove an allegation rests exclusively with the investigating party.[103] The standard of proof is consistent with international standards and rests on a "balance of probabilities [with a fact deemed proven] if it is more likely to have occurred than not."[104] Under the CAS Arbitration Code, each sports federation is free to determine its standard of proof and hence the CAS rightly rejected an athlete's argument that a comfortable satisfaction standard be applied to construe the BWF's standard of proof.[105] The CAS emphasized that in order for the BWF's balance of probabilities test to be replaced by another, it has to be proven that it violates a national or international rule of public policy.[106] Witness evidence is allowed, but witnesses shall not give evidence under oath.[107] It is common in IHP proceedings for expert evidence to be invited and this has proven crucial in order to reach a sound and fair outcome in situations where a lack of best efforts charge would be hard to substantiate.[108]

The decisions of the hearing panel are adopted by simple majority, with the chair having the casting vote. Dissenting opinions are not permitted, and in line with confidentiality requirements explained above, deliberations and the final outcome are not to be made public.[109] Article 35.2 of the BWF judicial procedures suggests that decisions are to be delivered to the parties "without grounds."[110] This means that while the decision must include findings on any

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[98] BWF Jud. Proc. art. 27.1.

[99] BWF Jud. Proc. art. 26. *See also* BWFv. Zhu Jun Hao *et. al.*, *supra* note 35, at ¶¶ 46-49 (where the two impugned athletes agreed that the case against them be decided solely through their written submissions. The IHP was satisfied that the right to be heard had thus been observed).

[100] BWF Jud. Proc. art. 29.

[101] *Id. See also* Ilias Bantekas, *Equal Treatment of Parties in International Commercial Arbitration*, 69 international & comparative law quarterly 991 (2020).

[102] *See generally* Zulfadli bin Zulkiffli v. BWF *supra* note 60, at ¶ 16, *and* Tan Chun Seang v. BWF, *supra* note 79, at ¶ 88, the player claimed that he had not been served with a Demand Order by the BWF in order to surrender his mobile phone which contained incriminating evidence and hence related evidence should be inadmissible. The CAS disagreed, by emphasizing that voluntary handover suffices to render evidence admissible.

[103] *See* BWF Jud. Proc. art. 32.2.

[104] *Id.*; BWF Jud. Proc., art. 32.1. The applicable standard of proof was explained to be "a mere balance of probability, which is substantially less than beyond reasonable doubt and less than comfortable satisfaction." *See also BWF v. Kate Jessica Foo Kune*, [IHP] Decision 2019/04 (Oct. 21, 2019); Antonio Rigozzi & Ulrich Haas, *Breaking Down the Process for Determining a Basic Sanction Under the 2015 World Anti-Doping Code*, 15 INT'L SPORTS L.J. 3 (2015).

[105] This comfortable satisfaction standard was articulated in *Briginshaw v. Briginshaw* (1938) 60 CLR 336 (Austl.) decided by the Australian High Court in a family law case.

[106] Zulfadli bin Zulkiffli v. BWF *supra* note 60, at ¶ 16, *and* Tan Chun Seang v. BWF, *supra* note 79, at ¶ 88

[107] BWF Jud. Proc. art. 31.4.

[108] See *BWF v. Li Jun Hui et al*, IHP Decision 2022/01 ¶ 51, 104-108 (Jan. 24, 2022) (calling on several kinetic experts with a focus on badminton to decipher "lack of best effort." The IHP's findings were largely predicated on these expert reports).

[109] BWF Jud. Proc. art. 35.1.

[110] *Id.*

allegation or charge, it need not include "the reasons for making those findings."[111] Even so, the hearing panel shall deliver a reasoned decision to the BWF itself, albeit failure to do so does not in any way taint or invalidate the proceedings.[112] The range of sanctions that may be imposed vary significantly. Article 31.2 of the BWF constitution makes it clear that its judicial bodies possess authority to impose penalties, including any suspension "from all competitive events for such time as is seen fit, including possibly for life."[113] This is a significant power because it may effectively put an end to the career of professional badminton players and there is nothing in the jurisprudence of national and international courts and tribunals suggesting that such sanctions constitute a restraint of trade.[114] The range of possible sanctions are described in Article 41 of the BWF judicial procedures as follows: reprimand; suspension; dismissal; disqualification; forfeiture of awards;[115] venue exclusion order; monetary fines; and administrative sanctions. When imposing a sanction, the hearing panel is bound to exercise proportionality,[116] as well as take into consideration mitigating and aggravating factors and the impact of the sanction on the integrity of the sport.[117] The IHP has made it clear that lengthy ineligibility sanctions in match-fixing cases have proven not to constitute a deterrent and hence questioned the appropriateness of a twelve-year ban.[118] In the opinion of this author, such guidance to the panels is necessary because it is not out of the question that a disproportionate sanction may not be viewed by a court as an unnecessary restraint of trade.[119] The IHP has relied on CAS authority, rather than English law, in order to justify the passing of cumulative charges in the event of multiple breaches of BWF rules,[120] and has not ruled out reliance on the case law of other sports dispute resolution tribunals or its own past decisions.[121]

The practice of the EJEG suggested that doping violations where no intention and no negligence was established will culminate in the elimination of suspensions at the very least.[122] This is most likely what led to the EJEG's demise and its replacement with direct referrals to the CAS ADD.

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[111] *Id.*

[112] *Id.* art. 35.3.

[113] BWF CONST. art. 31.3.

[114] Ilias Bantekas, *Professional Tennis and Restraint of Trade in the English Common Law*, 22 VA. SPORTS & ENTM'T L.J. 1 (2023) (arguing that while certain sports contracts, especially between club or agent, and player, may be abusive and lead to a restraint of trade, this is generally not the case with sanctions imposed by sports tribunals, save if the sanction is excessive, unjustified, and wholly disproportionate).

[115] *See BWF v. Kate Jessica Foo Kune*, CAS 2019/A/6587, Arbitral Award IX(B) ¶87 (TAS Dec. 15, 2020).

[116] BWF Statutes § 3.1; BWF Jud. Proc., Part 10 art. 43.1 (2023); *BWF v. Nikita Khakimov* (where the IHP refined proportionality from CAS case law, rather than by a foray into English law).

[117] BWF Jud. Proc. art. 43.2. *See BWF v. Kate Jessica Foo Kune*, CAS 2019/A/6587, Arbitral Award IX(D), ¶100-111 (TAS Dec. 15, 2020) (where a suspension charge of two years for doping, which did not involve intention or negligence on the part of the athlete but was most likely a deliberate act of sabotage by a disgruntled former BWF official, was the basis for not applying the suspension).

[118] *BWF v. Zhu Jun Hao et al*, IHP Decision 2021/02 ¶164-66 (Aug. 11, 2021).

[119] *See Zulfadli Zulkiffli v. BWF*, Badminton World Federation Ethics Hearing Panel Decision 2018/01 ¶130 (April 27, 2018) (where the CAS emphasized that a spree of about thirty documented match-fixing incidents justified a ban of twenty years for the badminton athletes in question).

[120] *BWF v. Hendra Tandjaya et al., supra* note 53, ¶ 174.

[121] *BWF v. Ze Young Lim*, IHP Decision, 2020/03 (6 November 2020) ¶ 90.

[122] *See BWF v. Intanon*, BWF Anti-Doping Panel Decision, 2019/03 (4 October 2019) ¶ 80 (where the athlete in question was found to have been the victim of generalized meat contamination, although this decision of the BWF Doping Panel should not been seen as having any precedential value for reasons already explained).

7. Conclusion.

Ultimately, SGBs desire to be effective, productive, and cost-effective in their determination of disputes. In this sense, there is much to learn from other relevant mechanisms. At the same time, it has to be agreed that SGBs are resilient to big changes, including in their governance and dispute processes. This article has demonstrated that a relatively overshadowed SGB such as the BWF has not necessarily followed the path of other sports federations whose tribunals are inundated with cases, and which are more seasoned and experienced as a result. While arbitral mechanisms are flourishing in many SGB's internal structures, chiefly because the awards are enforceable at the seat as well as internationally, the BWF seemingly decided against the arbitral option. The choice to install a two-tier dispute resolution structure that was clearly not intended as an arbitral forum and which was confusingly labeled as a judicial body, while in fact it shares all the characteristics and functions of expert determination are surprising. Could the BWF have set up an arbitral tribunal? An arbitral tribunal would have delivered final and binding outcomes clad with *res judicata*. More importantly, the functioning of such a tribunal would not require the complex vetting procedure of the BWF, given that independence and impartiality would be regulated by reference to the pertinent rules, as well as the procedural law of the seat. And here is perhaps the issue against arbitration. If the seat of the tribunal were in the headquarters of the BWF, namely Malaysia, there would always exist questions about the country's interference in arbitral proceedings and potential human rights implications. It would be embarrassing for an award to be denied in another jurisdiction on public policy grounds, even if such a likelihood is remote. On the other hand, expert determination, while only enforceable as a matter of contract, does not produce *res judicata* and the parties may still pursue their claims before national courts or the CAS. It may also be the case that such considerations (i.e. expert determination versus arbitration) may be irrelevant in the context of a self-contained SGB where failure to comply with the provisions of the judicial procedures or the decisions of the BWF judicial bodies effectively ends the competitive careers of professional badminton athletes as well as the involvement of officials at all levels. If the current BWF dispute resolution structure satisfies its stakeholders, and its caseload is such that it does not constitute a burden, then there is little to no reason to upset the existing balance. The decisions of the IHP rendered thus far are meticulous and display a depth of expertise that is impressive. However, this author is convinced that a single arbitral mechanism (incorporating the jurisdiction of the IHP and SDP but retaining the office of the referral officer and the function of investigating parties) that is self-contained and operates in a jurisdiction that is arbitration-friendly is a far better alternative to the current structure. While the absence of *res judicata* may not have produced any adverse consequence, it is not unlikely that a person aggrieved by a decision decides to pursue the same matter before the courts. The finality of arbitral awards allows only a limited number of set-aside challenges, chiefly on procedural grounds.[123]

At the same time, the BWF dispute resolution architecture serves as a living example of how a successful expert determination mechanism, whether in the field of sport or otherwise, may look. Indeed, outside of construction, expert determination has been slow to flourish. Yet, this mechanism is very much fragmented, with its anti-doping dimension delegated to CAS ADD, especially given the debacle with the decisions of the BWF's own entity until the CAS ADD takeover. International sports federations that lack a sufficient caseload to build up expertise among their arbitrators and panel members are forced to make hard choices. In the face of anti-doping decisions that were inconsistent with CAS jurisprudence, the BWF was effectively forced

[123] UNCITRAL Model Law on International Commercial Arbitration, art. 34 (dealing with so-called set-aside challenges, which constitute the only type of challenge against a final award at the seat).

to defer to the expertise of CAS ADD. In all other respects, however, the BWF has demonstrated that self-contained mechanisms based on a significant amount of trust among their constituent members, even in the absence of a steady flow of cases, can render expert determination successful.

NOTIFICATION *AU PARQUET* IN SOUTH CAROLINA: A CRITIQUE OF SUBSTITUTED SERVICE ON FOREIGN CORPORATIONS

Julius H. Hines*

In 1967, Philip W. Amram, a prominent Philadelphia lawyer, addressed the United States Senate Committee on Foreign Relations. The topic before the Committee was the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters [1] (the "Hague Convention"), which had been adopted at the 1964 Hague Conference on Private International Law and signed by the United States the following year. The Foreign Relations Committee would recommend its ratification, which was forthcoming on April 24, 1967.[2]

In his remarks, Amram pointed out a particular evil in international service of process: "notification *au parquet*." Under this system of service, adopted in France,

> the process-server simply delivers a copy of the writ to a public official's office. The time

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[1] [1969] 20 U.S.T. 361, T.I.A.S. No. 6638.

[2] *Id.*

> for answer begins to run immediately. Some effort is supposed to be made through the Foreign Office and through diplomatic channels to give the defendant notice, but failure to do this has no effect on the validity of the service.[3]

According to Amram, the Hague Convention did away with notification *au parquet* through two key provisions. Article 15 of the Convention provided that, where a summons or similar document "had to be transmitted abroad for the purpose of service," judgment could not be given until it was established that the defendant was served in accordance with the state's internal law, or the document was "actually delivered" to the defendant by another method provided for by the Convention.[4] Service or delivery had to be effected "in sufficient time to enable the defendant to defend." Article 16 also gave judges power to relieve defendants from the consequences of judgment upon a showing that the defendant had no knowledge of the action in time to defend or appeal from judgment and had a *prima facie* defense on the merits.[5]

In a 1968 article, Amram noted with satisfaction that, although France had yet to ratify the Hague Convention, it had reformed the notification *au parquet* process to, among other things, allow an additional two months for appearances by defendants residing outside of Europe.[6] Foreign corporations sued in South Carolina should be so lucky. Due to a "substituted service" procedure reminiscent of notification *au parquet*, a foreign corporation can easily find itself defaulted by the time it receives suit papers. Foreign corporations that have not registered to do business in South Carolina—whether required to do so or not—can be sued through the South Carolina Secretary of State. Given sweeping changes in the law since substituted service was first devised, a review of the practice seems due.

This article will examine the development of substituted service on foreign corporations in general, and specifically on foreign corporations doing business in South Carolina. It will then turn to case law, from the United States Supreme Court and elsewhere, on the relationship of the Hague Convention to substituted service, touching in particular on South Carolina cases. It will conclude with remarks on whether there is any practical need for substituted service on foreign corporations, with proposals for reform if the procedure is to be retained.

I. SUBSTITUTED SERVICE IN SOUTH CAROLINA

Under current South Carolina law, any foreign corporation[7] doing business in South Carolina without first obtaining authorization is "considered to have designated the Secretary of State as its agent upon whom process against it may be served in any action or proceeding arising in any court in this State out of or in connection with the doing of any business in this State."[8] The concept of "substituted service"—service on the Secretary of State instead of the actual corporate defendant—first appeared in South Carolina in 1933, and is the product of South Carolina's early efforts to accommodate foreign corporations doing business in the State.

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[3] S. EXEC. REP. NO. 90-6, at 12 (1967).

[4] 20 U.S.T. 364.

[5] 20 U.S.T. 364-65.

[6] Philip Amram, *The Revolutionary Change in Service of Process Abroad in French Civil Procedure*, 2 INT'L L. 650, 655 & n. 18 (1968); *see also* William S. Dodge, *Substituted Service and the Hague Service Convention*, 63 WM. & MARY L. REV. 1485, 1489 (2022).

[7] A foreign corporation is defined as "a corporation for profit incorporated pursuant to a law other than the law of this State." S.C. Code § 33-1-400(12). Thus a North Carolina corporation and a Chinese corporation are both equally "foreign" in South Carolina.

[8] S.C. Code § 15-9-245(a).

A. EARLY SOUTH CAROLINA FOREIGN CORPORATION STATUTES

South Carolina's foreign corporation laws date back at least to 1893. An act from that year provided that all corporations

> duly incorporated under the laws of any State of the United States, or of any foreign country in treaty and amity with the said United States, are hereby permitted to locate and carry on business within the State of South Carolina in like manner as the natural born citizens of the States of the United States, or of such foreign country, might do under the law existing at the time . . .[9]

Foreign corporations owning property or conducting business in South Carolina were required, within sixty days of the 1893 act's passage, to file a stipulation with the South Carolina Secretary of State, designating a place within South Carolina where legal papers could be served on the corporation.[10]

This enactment, and others like it,[11] reflect the 1877 holding in *Pennoyer v. Neff.*[12] *Pennoyer* held that states could not generally exercise jurisdiction over persons outside their borders. They could issue process against property within their territories, but any judgment was limited to the property itself and had no *in personam* effect against its owner. The *Pennoyer* opinion, however, included the following invitation of sorts:

> Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State.[13]

South Carolina law similarly provided that service of process on a foreign corporation required the presence of an agent within the territory of the state on whom the suit papers could be served.[14] The innovation of direct service beyond the borders of a state was still a few decades away. A foreign

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[9] Act No. 298, 1893 S.C. Acts 409 § 1; *see* S.C. Code § 7764 (1932); S.C. Code § 4028 (R.L. Bryant Co. 1922); South Carolina Code of Laws § 2664 (Michie Co. 1912); South Carolina Code of Laws § 1779 (1902); Rev. Stat. of S.C. § 1465 (1894).

[10] Act No. 298, 1893 S.C. Acts 409 § 2; *see* S.C. Code § 7765 (1932). This was described as a "very common provision" in state statutes as early as 1882. Edwin G. Merriam, *Service of Process upon Corporations*, 8 S. L. REV. N.S. 199, 218 (1882).

[11] North Carolina adopted a similar enactment in 1901. See Fisher v. Traders' Mut. Life Ins. Co., 136 N.C. 217, 48 S.E. 667, 669 (1904); See also 1901 Cal. Stat. 332, § 93 p. 353; Holiness Church of San Jose v. Metro. Church Ass'n, 12 Cal. App. 445, 447, 107 P. 633, 634 (Cal. Ct. App. 1910).

[12] 95 U.S. 714 (1877), overruled in part by *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977).

[13] *Id.*

[14] *See e.g, State v. W.T. Rawleigh Co.*, 172 S.C. 415, 174 S.E. 385 (1934); *Calhoun Mills v. Black Diamond Collieries*, 112 S.C. 332, 99 S.E. 821, 821 (1919); *Abbeville Elec. Light & Power Co. v. W. Elec. Supply Co.*, 61 S.C. 361, 39 S.E. 559, 567 (1901).

corporation doing business in South Carolina was therefore expected to make itself amenable to in-state service of process by naming a place of business where papers could be served.

B. 1933 SOUTH CAROLINA SUBSTITUTED SERVICE PROVISION

Initially, a foreign corporation guilty of transacting business in South Carolina without naming a place for service was liable for a fine.[15] In 1933, the following language was added to what was then section 7765 of the South Carolina code of 1932:

> *Provided*, That whenever any foreign corporation transacts business within this State without first having complied with the provisions of the within section, ... said foreign corporation so transacting business without complying with said section shall be deemed to have designated the Secretary of State as his true and lawful agent upon whom may be served all legal process in any action or proceedings against said foreign corporation growing out of the transaction of any business in this State.[16]

This was the original "substituted service" statute in South Carolina. Although service was formally on the Secretary of State, the plaintiff was required to send notice of service and a copy of the process to the defendant corporation by registered mail, and to file the return receipt and an affidavit of compliance with the court. The court could also "order such continuances as may be necessary to afford the defendant foreign corporation reasonable opportunity to defend the action."[17]

That same year saw passage of the influential Illinois Business Corporation Act.[18] The Illinois Act similarly required foreign corporations to procure a certificate of authority before transacting business in Illinois.[19] To do so, the foreign corporation had to designate a registered office and agent in Illinois.[20] But what if the foreign corporation then failed to maintain a registered agent? "Whenever any foreign corporation authorized to transact business in this State shall fail to appoint or maintain in this State a registered agent," the Act provided, "the Secretary of State shall be irrevocably authorized as the agent and representative of such foreign corporation to accept service of process."[21] As recognized by the United States Supreme Court, such provisions were an improvement on the basic requirement that a foreign corporation appoint an agent before doing business in a state:

> The insufficiency of such provision is evident, for the death or removal of the agent from the state leaves the corporation without any person upon whom process can be served. In order to remedy this defect some states... have passed statutes ... providing that the corporation shall consent that service may be made upon a permanent official of the state, so that the death, removal, or change of officer will not put the corporation beyond the reach of the process of the courts.[22]

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[15] *See* S.C. Code § 2668 (1912) ($500 fine for failure to file papers required of foreign corporation doing business in South Carolina).

[16] Act No. 349, 1933 S.C. Acts 486 § 1, codified at S.C. Code § 7765 (1942).

[17] S.C. Code § 7765 (1942).

[18] Ill. Sen. Bill No. 225 (1933). *See infra* note 49 for the effect of the Illinois statute on the development of uniform corporate law in America.

[19] Ill. Business Corp. Act § 102.

[20] *Id.* at §§ 109(a), 109(b).

[21] *Id.* at § 111.

[22] *Mut. Rsrv. Fund Life Ass'n v. Phelps*, 190 U.S. 147, 158 (1903); *see also Liquid Veneer Corp. v. Smuckler*, 90 F.2d 196 (9th Cir. 1937); *Certain-teed Prod. Corp. v. Wallinger*, 89 F.2d 427, 429 (4th Cir.1937).

South Carolina's 1933 enactment differed from Illinois' corporation act in one crucial respect. Under Illinois law, a foreign corporation "authorized to transact business" in Illinois that failed to maintain the required agent was deemed to appoint the Secretary of State as its agent for service of process.[23] But under South Carolina's law, the Secretary of State was deemed the agent of "any" foreign corporation that transacted business in South Carolina without first appointing a registered agent—including foreign corporations that had not obtained authority to do business in South Carolina (perhaps because they correctly concluded that their activities did not require such authority). South Carolina's original substituted service statute was, in practical effect, a "long arm" statute. Provided there was sufficient nexus with South Carolina to satisfy the requirements of due process, an out-of-state corporation could be served with suit papers—albeit through the fiction of an in-state agent."[24]

II. CONSTITUTIONAL LIMITS ON SUBSTITUTED SERVICE

The innovation of substituted service on a foreign corporation implicated at least two areas of developing constitutional jurisprudence. First, service of process on a foreign person or corporation had to comport with the requirements of the due process clause. As stated in a 1913 United states Supreme Court case, "in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof."[25] Interstate transactions often failed that test. In *Old Wayne Mutual Life Association v. McDonough*,[26] the U.S. Supreme Court held that an Indiana insurer was not subject to substituted service on the Pennsylvania Insurance Commissioner based on an insurance policy issued in Indiana.[27] In *Simon v. Southern Railway Co.*,[28] the Court declined to uphold service on a Virginia railroad through the Louisiana Secretary State in connection with a New Orleans plaintiff's claim for injuries on a train traveling from Alabama to Mississippi.[29]

A second constitutional issue was whether state foreign corporation laws, including service of process provisions, impermissibly burdened interstate commerce. In *Dahnke-Walker Milling Co. v. Bondurant*,[30] a Tennessee corporation sued for breach of a contract for the sale of wheat produced in Kentucky. The defendant countered that the plaintiff had not complied with Kentucky's requirements to do business in that State, rendering the contract unenforceable. The United States Supreme Court held that the plaintiff had the right to engage in interstate commerce without Kentucky's permission, and that "the statute in question, which concededly imposed

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[23] Ill. Business Corp. Act § 102.

[24] Although South Carolina's enactment went beyond that of Illinois, it was not without support. A 1915 Supreme Court case had stated that "every state has the undoubted right to provide for service of process upon any foreign corporations doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law." *Simon v. S. R. Co.*, 236 U.S. 115, 130 (1915).

[25] *St. Louis Sw. Ry. Co. of Texas v. Alexander*, 227 U.S. 218, 226 (1913); *see also Int'l Harvester Co. of Am. v. Commonwealth of Kentucky*, 234 U.S. 579, 583, 34 S. Ct. 944, 945, 58 L. Ed. 1479 (1914) (holding "it is essential to the rendition of a personal judgment that the corporation be 'doing business' within the state.").

[26] 204 U.S. 8 (1907).

[27] *Id.* at 23.

[28] *Supra* note 25.

[29] 236 U.S. at 132.

[30] 257 U.S. 282 (1921).

burdensome conditions, was as to that transaction invalid because repugnant to the commerce clause."[31]

The South Carolina Supreme Court dealt with the first issue in the 1935 case of *Garrett Engineering Co. v. Auburn Foundry, Inc.*,[32] which appears to be the first reported decision on the 1933 "substituted service" addition to South Carolina's foreign corporation laws. Auburn Foundry, an Indiana corporation, sold "stokers" (coal-burning furnaces) in South Carolina through what appear to have been commission arrangements with dealers, including the plaintiff. Auburn Foundry had appointed a "state representative" in South Carolina to work with those dealers; it appears that representative was physically present in South Carolina, although the opinion is vague in that regard. The court held that, although Auburn Foundry might be engaged generally in interstate commerce, it was doing business in South Carolina through an agent in that state. It was therefore subject to substituted service.[33]

Contrast *Auburn Foundry* with *Springs Cotton Mills v. Machinecraft, Inc.*, a federal court case decided more than twenty years later.[34] In *Springs*, a South Carolina corporation sought jurisdiction over a Massachusetts corporation by serving the South Carolina Secretary of State.[35] Citing such jurisdictional authorities as *International Shoe v. State of Washington*,[36] a judge in the former Western District of South Carolina reasoned that "to subject a foreign corporation to state jurisdiction, constitutional due process requires the corporation to be 'present' within the state by doing business therein."[37] The defendant's sale of products through independent dealers in South Carolina did not equate to doing business in South Carolina for jurisdictional purposes.[38]

Due process and commerce clause issues converged in *State v. Ford Motor Co.*,[39] a 1945 case. There, the South Carolina Supreme Court upheld substituted service on a foreign corporation, even though the corporation was under no obligation to register in South Carolina and appoint a local agent. In *Ford*, the State of South Carolina sought to recover $7,300 worth of penalties allegedly due because Ford was doing business in South Carolina without having first appointed an agent for service of process, as then required by section 7765 of the 1942 South Carolina Code. Ford countered that it was engaged in interstate commerce and had no obligation to comply. It also moved to quash substituted service on the South Carolina Secretary of State on the grounds that it was not doing business in South Carolina. The South Carolina Supreme Court held that Ford was indeed doing business in South Carolina for purposes of substituted service (it had five distributorships and eighty dealers in South Carolina).[40] It was not, however, required to appoint

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[31] *Id.* at 293.

[32] 176 S.C. 59, 179 S.E. 693, 696 (1935).

[33] 179 S.E. 696. Other early South Carolina decisions refused to uphold substituted service in the context of interstate commerce, despite some degree of contact with South Carolina. *See Zeigler v. Puritan Mills*, 18 S.C. 367, 199 S.E. 420, 422 (1938) (foreign corporation not doing business in South Carolina despite soliciting business in and delivering products to South Carolina); *Deaton Truck Lines v. Bahnson Co.*, 207 S.C. 226, 36 S.E.2d 465 (1945) (North Carolina manufacturer selling equipment in interstate commerce not doing business in South Carolina, even though equipment had to be installed at a South Carolina plant).

[34] 156 F. Supp. 372 (W.D.S.C. 1957).

[35] *Id.* at 373.

[36] 326 U.S. 310 (1945).

[37] *Id.* at 372.

[38] *Id.* at 376.

[39] 208 S.C. 379, 402, 38 S.E.2d 242, 252 (1946).

[40] *Id.* at 382, 38 S.E.2d 243.

an in-state agent.[41] As Ford's business was "interstate in character," it was not required to domesticate in South Carolina and therefore not subject to penalty for not doing so.[42]

In so holding, the court recognized a critical distinction between transacting business in a state for purposes of personal jurisdiction, and transacting business for purposes of state regulation. With respect to the latter, states could not burden interstate commerce by requiring in-state registration, including appointment of a registered agent.[43] But commerce clause concerns did not arise in the context of jurisdiction and service of process—there the only concern was due process. From today's perspective, one might object that, even if national businesses like Ford have sufficient local contacts to support personal jurisdiction, why not serve them personally rather than resort to substituted service? In 1946, however, South Carolina's only other option was personal service "on an officer or other proper agent within the jurisdiction."[44] No general-purpose long arm statute had yet been adopted. The landmark *International Shoe* decision had only been handed down the previous year.[45] Long arm statutes, allowing for service of process beyond a state's boundaries, were a relatively new innovation and not yet in force nationwide. Substituted service was thus the only option for serving a foreign corporation with no officers or agents in South Carolina. Section 7765, the *Ford* court added, complied with "the fairest concept of due process;" indeed, its effectiveness was demonstrated by the fact that Ford "had timely notice" and had "vigorously defended."[46]

III. UNIFORM CORPORATION ACTS AND THEIR ADOPTION IN SOUTH CAROLINA

The previous century saw the development of various uniform or model corporation law acts. The first full edition of the American Bar Association's Model Business Corporation Act was introduced in 1950.[47] The 1933 Illinois Business Corporation Act discussed above has been described as the "parent act" of the 1950 Model Business Corporation Act (MBCA).[48]

Like its Illinois model, Section 99 of the 1950 MBCA provided that "[n]o foreign corporation shall have the right to transact business in this State until it shall have a procured a certificate of authority from the Secretary of State." The 1950 MBCA made no attempt to define what was meant by transacting business in the state. Instead, it excluded various activities from the concept.[49] Prominent among these exclusions was "[t]ransacting any business in interstate commerce."[50] The official comment noted that the list of excluded activities "does not establish a standard for those activities which may subject a foreign corporation to service of process."[51] That is, like the South Carolina Supreme Court in *Ford*, the MBCA recognized that a foreign corporation

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[41] *Id.* at 391, 38 S.E.2d 247.

[42] *Id.* at 405, 38 S.E.2d 254.

[43] *Id.* at 403-404, 38 S.E.2d 253.

[44] *Id.* at 402, 38 S.E.2d 252.

[45] 326 U.S. 310 (1945).

[46] *Id.* at 392, 38 S.E.2d 248. Indeed, none of the early substituted service cases involve default judgments.

[47] *See* 6 BUS. L. 1 (1950).

[48] Whitney Campbell, *The Model Business Corporations Act*, 11 BUS. LAW 98, 100 (1956).

[49] According to a comment, decisions on whether a foreign corporation's activities in a state were such as would require it to obtain authority to do business had "not been uniform." The MBCA therefore excluded certain activities that some courts had deemed constituted doing business within the jurisdiction. *See* 2 Model Business Corporation Act Annotated (1960) at 565-66.

[50] *Id.* at 81; *see* American Law Institute, *Model Business Corporation Act* (1950 rev.) § 99.

[51] American Law Institute, *Model Business Corporation Act* (1950 rev.) § 99, Official Comment.

could be subject to service of process in a state, even though it had no obligation to register or appoint an agent in that state.

> The 1950 MBCA contained the following substituted service provision:
> Whenever a foreign corporation authorized to transact business in this State shall fail to appoint or maintain a registered agent in this State, or whenever any such registered agent cannot with reasonable diligence be found at the registered office, or whenever the certificate of authority of a foreign corporation shall be suspended or revoked, then the Secretary of State shall be an agent of such corporation upon whom any such process, notice, or demand may be served.[52]

Thus, like the 1933 Illinois Act, the 1950 MBCA confined substituted service to foreign corporations that registered in the state but failed to maintain a local registered agent.[53] The Model Act did not extend substituted service to *all* foreign corporations transacting business of some form within the state, which was the effect of the 1933 South Carolina substituted service statute.

A. 1962 SOUTH CAROLINA BUSINESS CORPORATION ACT

South Carolina's corporate statutes were extensively revised in 1962, based largely on the MBCA.[54] The South Carolina Business Corporation Act of 1962 included chapter 13, dealing with foreign corporations.[55] Gone was the prior language about corporations from countries "in treaty and amity" with the United States; instead, no foreign corporation was to do business in this State without authorization. At the same time, and consistent with the MBCA and the requirements of the commerce clause, certain business activities were excluded from the definition of "doing business in South Carolina" (at least for purposes of the authorization requirement). Those activities included "[e]ffecting a transaction in interstate or foreign commerce" and "[o]wning and controlling a subsidiary corporation incorporated in or transacting business within" South Carolina.[56]

The 1962 Act similarly cautioned that the list of excluded activities did not establish a service of process standard.[57] Foreign corporations transacting business in South Carolina without authorization were still "deemed" to have designated the Secretary of State as an agent for service of process.[58] Such business included "any business for which authority need not be obtained" under the new corporate statute.[59] That is, a foreign corporation could be subject to *substituted* service in South Carolina just by engaging in the minimum amount of business activity necessary to establish personal jurisdiction under the U.S. Supreme Court's relatively recent due process

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[52] American Law Institute, *Model Business Corporation Act* (1950 rev.) § 108. Once served, the 1950 MBCA required the secretary of state to "immediately" forward a copy of the process by registered mail to the corporation at its principal office in the state or country where it was incorporated. Service on the Secretary of State was "returnable" in "not less than thirty days." *Id.* at 87.

[53] As one recent commentator put it, "[w]hen a foreign corporation fails to appoint or maintain and agent for service, one might argue that the foreign corporation is to blame for its failure to receive notice." Dodge, *supra* note 7, at 1496.

[54] *See* Ernest L. Folk, III, *The Model Act and South Carolina Corporation Law*, 15 S.C.L. Rev. 275 (1962).

[55] Act No. 847, 1962 S.C. Acts 1996.

[56] *Id.* at § 13.1(b). For a discussion of the Model Act's approach in this regard, *see* Thomas L. Bonham, *Entry and Regulation of Foreign Corporations under the Model Business Corporation Act*, 6 NAT. RESOURCES J. 617 (1966).

[57] *Id.* at § 13.1(c).

[58] *Id.* at 13.14(a).

[59] *Id.*

jurisprudence. Cases decided around this same time blur the distinction between the validity of substituted service and the separate constitutional question of personal jurisdiction under the United States Supreme Court's expanded jurisprudence.[60] Indeed, in *Shealy v. Challenger Manufacturing Co.*,[61] the United States Court of Appeals for the Fourth Circuit rejected the argument that substituted service "requires considerably more activity within the state than the minimum contacts requirement of due process."[62]

B. SOUTH CAROLINA'S LONG ARM STATUTE

South Carolina adopted the Uniform Commercial Code ("UCC") a few years after the Model Business Corporation Act.[63] Appended to Article 2 of the UCC was South Carolina's answer to the national trend toward "long arm" statutes extending personal jurisdiction beyond state boundaries.[64] The South Carolina Long Arm Statute, now codified at section 36-2-803 of the South Carolina Code of Laws, allows South Carolina courts to exercise personal jurisdiction over out-of-state defendants based on a host of activities, including "transacting any business in this State," "contracting to supply services or things in the State" or entering into "a contract to be performed in whole or in part by either party in this State." It was quickly recognized that the Long Arm Statute extended personal jurisdiction in South Carolina to the full limit of constitutional due process,[65] and was intended to "broaden the concept of what constitutes transacting business in this State of South Carolina and to extend South Carolina's jurisdiction accordingly."[66]

The 1966 Act also confirmed that, where the Long Arm Statute authorizes personal jurisdiction, "service may be made outside the State."[67] It added various methods of out- of-state service of process, including registered or certified mail.[68]

The South Carolina Business Corporation Act of 1981[69] moved the substituted service provisions for foreign corporations to Title 15, Chapter 9 of the South Carolina Code (dealing with service of process).[70] Somewhat incongruously, the South Carolina Long Arm Statute remained codified in Article 2 of the UCC despite it being generally available.[71]

C. 1984 MODEL BUSINESS CORPORATION ACT

The ABA released another proposed revision of the MBCA in 1983, which became official

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[60] *E.g. Bramlett v. Arthur Murray, Inc.*, 250 F. Supp. 1011, 1016 (D.S.C. 1966); *Graybill v. Sims Saddle & Leather Co.*, 241 F. Supp. 432, 434 (E.D.S.C. 1965).

[61] 304 F.2d 102 (4th Cir. 1962).

[62] *Id.* at 104; *see also Boney v. Trans-State Dredging Co.*, 237 S.C. 54, 61, 115 S.E.2d 508, 511 (1960).

[63] S.C. Act No. 1065, 1966 S.C. Acts 2716, 4027.

[64] *Id.* at § 2-803, 1966 S.C. Acts at 4114. *See* Robert K. Folks, *South Carolina's Uniform Commercial Code—the Demise of its Long-Arm Provisions*, 24 S.C. L. Rev. 474, 475 (1972).

[65] Duplan Corp. v. Deering Milliken, Inc., 334 F. Supp. 703, 713 (D.S.C. 1973); Deering Milliken Research Corp. v. Textured Fibres, Inc., 310 F. Supp. 491, 502 (D.S.C. 1970).

[66] Triplett v. R.M. Wade & Co., 261 S.C. 419, 200 S.E.2d 375 (1973).

[67] 1966 S.C. Acts 4115; S.C. Code § 36-2-804.

[68] 1966 S.C. Acts 4115; S.C. Code § 36-2-806.

[69] Act. No. 146, 1981 S.C. Acts 504. See Gregory B. Adams, *The 1981 Revision of the South Carolina Business Corporation Act*, 33 S.C. L. REV. 405 (1982). The 1981 Act added a few items, such as soliciting orders that had to be accepted outside of South Carolina, from the list of activities that did not constitute transacting business for purposes of the in-state registration requirement. 1981 S.C. Acts 632.

[70] S.C. CODE ANN. § 15-9-245 (1994) (dealing with service of process).

[71] *Id.* § 36-2-803 (1966).

in 1984.[72] The 1984 MBCA revision purported to take secretaries of state out of the business of accepting service on corporations. Among other issues resolved by the 1984 revision was a quandary associated with the resignation of a registered agent. Prior to the revision, the resigning agent would file a notice with the secretary of state; the secretary of state would then send that notice to the corporation at its "registered office." All too often, the registered office was that of the same agent who had just resigned. To resolve this "circularity," the secretary of state was also to mail a copy of the resignation notice to the corporation's principal office.[73] As the same "circularity problem" existed in the case of service of process, a corporation with no registered agent could be served by registered or certified mail to its principal office.[74] The official MBCA comment noted that service by this method was not exclusive, with service under a "long arm" statute being an obvious alternative.[75] The 1984 MBCA applied the same approach to foreign corporations.[76]

South Carolina amended its corporation act in 1988.[77] With respect to domestic corporations, South Carolina adopted the 1984 Model Act's simplified procedure for notifying a corporation that its registered agent had resigned.[78] South Carolina also took its Secretary of State out of the business of accepting service of process, at least for domestic corporations. If the domestic corporation had no agent, or the agent could not be found, the court could order that the corporation be served by return receipt mail addressed to the office of the corporation's secretary at its principal office.[79] A similar procedure was available for *authorized* foreign corporations.[80] *Unauthorized* foreign corporations, however, remained subject to substituted service through the South Carolina Secretary of State.[81]

D. CURRENT MODEL BUSINESS CORPORATION ACT

Another revision to the MBCA came in 2016. The 2016 revision treats domestic- and locally-registered foreign corporations the same for purposes of Chapter 5, "Office and Agent."[82] Both are required to maintain a registered agent within the state.[83] The registered agent is the

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[72] *See* Committee on Corporate Laws, Section of Corporation, Banking and Business Law, American Bar Association, 1983 Revised Model Business Corporation Act (Exposure Draft 1983); Elliott Goldstein, *Revision of the Model Business Corporation Act*, 63 TEX. L. REV. 1471 (1985).

[73] Committee on Corporate Laws, Section of Corporation, Banking and Business Law, *supra* note 73, at § 5.03, pp. 5-6 to 5-8.

[74] *Id.* at § 5.04, pp. 5-8 to 5-11.

[75] *Id.* § 15.10 Official Comment, p. 15-33; Corporate Laws Committee, American Bar Association, Model Business Corporation Act, Official Text with Official Comments and Statutory Cross-References (2010). *See* 18A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 8740 (perm. ed., rev. vol. 2016).

[76] *See* Corporate Laws Committee, American Bar Association, Model Business Corporation Act, Official Text with Official Comment and Statutory Cross-References Revised through 1998, § 15.10(b) (1998).

[77] 1988 S.C. Act No. 444, 1988 S.C. Acts 2942.

[78] 1988 S.C. Act No. 444 § 2, 1988 S.C. Acts 3141; S.C. CODE ANN. § 33-5-103(b).

[79] 1988 S.C. Act No. 444 § 3, 1988 S.C. Acts 3911; S.C. CODE ANN. § 15-9-210.

[80] *Id.*, 1988 S.C. Acts 3912; S.C. CODE ANN. § 15-9-240(c). The statutes for service of process on corporations remain codified in Title 15 of the South Carolina Code of Laws rather than with the general corporate statutes in Title 33.

[81] *Id.*, 1988 S.C. Acts 3913; S.C. CODE ANN. § 15-9-245.

[82] Model Bus. Corp. Act § 5.01(b) (2016) (AM. BAR. ASS'N, amended 2021).

[83] *Id.* at § 5.01(a).

domestic or foreign corporation's agent for service of process.[84] If the corporation has no registered agent, or the agent cannot be found, service can be made by return receipt mail "addressed to the secretary at the corporation's principal office."[85] If that method fails, the 2016 revision resurrects the secretary of state as an "agent of the corporation upon whom process . . . may be served."[86] Service on the secretary of state is, in most cases,[87] available against foreign corporations that have withdrawn their local registrations or had them terminated.[88] A withdrawing foreign corporation is required to provide the secretary of state with an address to which process may be sent.[89]

South Carolina has not changed its laws for substituted service on an unauthorized foreign corporation since the 2016 MBCA revisions. Those laws continue to provide that, by doing "any business" in South Carolina, an unauthorized foreign corporation is "considered to have designated the Secretary of State as its agent upon whom process against it may be served in any action or proceeding arising in any court in this State out of or in connection with the doing of any business in this State."[90] It does not matter whether the foreign corporation's business was such as would require it to obtain authority in South Carolina—"any" business" will do, according to the statute.[91] As with the Long Arm Statute, the only limit is the Due Process Clause.

IV. PROCEDURAL ISSUES OF SUBSTITUTED SERVICE IN SOUTH CAROLINA

Under the current statute, substituted service on an unregistered foreign corporation doing business in South Carolina is made by delivering two copies of the suit papers to the South Carolina Secretary of State. The Secretary must "immediately" forward the process to the foreign corporation by certified mail to the corporation's registered office in its home jurisdiction, its principal place of business, or the last address known to the plaintiff.[92] Proof of substituted service is by affidavit accompanied by a signed receipt card "or other official proof of delivery," or, if delivery is refused, by evidence of refusal.[93] In the event of a refusal, the process and evidence of the refused attempt to serve by certified mail must be "sent promptly" to the foreign corporation; the statute does not say who sends these papers or how they must be sent.[94] Provided this is done, "the refusal to accept delivery of the certified mail or to sign the return receipt shall not affect the

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[84] *Id.* at § 5.04(a).

[85] *Id.* at § 5.04(b).

[86] *Id.* at § 5.04(c).

[87] *See id.* at § 15.07(b) (The 2016 MBCA permits substituted service on a withdrawn foreign entity "in any proceeding based on a cause of action arising during the time the entity was registered to do business in this state.").

[88] *Id.*

[89] *Id.* at § 15.07(a)(4).

[90] S.C. CODE ANN. § 15-9-245(a).

[91] *Id.* By contrast, Georgia has adopted provisions similar to the 1984 MBCA, allowing service on an officer of an authorized foreign corporation that fails to maintain a registered agent. *See cf.* GA. CODE ANN. § 14-2-504 (2000). North Carolina still provides for substituted service on the Secretary of State. Substituted service, however, is limited to foreign corporations authorized to conduct business in North Carolina that fail to maintain requested agents. *See* N.C. GEN. STAT. ANN. § 55-15-07 (2001) ("Each foreign corporation authorized to transact business in this State must maintain a registered office and registered agent as required by Article 4 of Chapter 55D of the General Statutes and is subject to service on the Secretary of State under that Article"); N.C. GEN. STAT. ANN. § 55D-33 (2001). According to a recent article "seventeen states permit substituted service on state officials for foreign corporations that do business in the state without registering". Dodge, *supra* note 7, at 1513. South Carolina is among those states.

[92] S.C. CODE ANN. § 15-9-245(b) (1994).

[93] *Id.* at (c). There must be filed "the original or a photostated or certified copy of the envelope with a notation by the postal authorities that acceptance was refused."

[94] *Id.*

validity of the service."[95]

The South Carolina Rules of Civil Procedure ("SCRCP") mesh easily enough with substituted service on foreign corporations. Rule 4(d)(3) of the SCRCP allows a corporation to be served by delivery to an agent "authorized . . . by law" to receive service of process on the corporation.[96] South Carolina Code section 15-9-245 makes the Secretary of State such an agent. Rule 4(f) of the SCRCP, allows service "beyond the territorial limits of the State" where "a statute so provides." Again, section 15-9-245 is such a statute.

Application of the Federal Rules is trickier. Federal Rule 4(h), which generally governs service on corporations, distinguishes between service within a judicial district of the United States[97] and service abroad.[98] State law methods of service are available only when service is made in a judicial district of the United States. For service on corporations abroad, Federal Rule 4(h) allows all the methods provided by Rule 4(f) for service on individuals in foreign countries, except for personal delivery.[99] Prominent among those methods is an internationally agreed method of service (*e.g.* the Hague Convention), but others are available in the absence of such an agreement.[100] Under Rule 4(f)(3), the court can order service "by other means not prohibited by international agreement."[101] Although the rule does not require "exhaustion of all possible methods of service" before other means of service will be ordered,[102] federal courts do seem to encourage at least some effort to serve parties through more conventional means, such as the Hague Convention.[103]

Is service on a statutory agent such as a secretary of state considered to take place in a judicial district of the United States for purposes of the Federal Rules, even if the defendant is a foreign corporation? At least one federal appellate court has taken that view.[104] Some district courts, however, have treated substituted service on foreign entities as "other means" of service for which a court order is required.[105]

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[95] *Id.*

[96] SC R. CIV. P. 4(d)(7) also allows service on a corporation "in the manner prescribed by statute."

[97] FED. R. CIV. P. 4(g)(1).

[98] *Id.* 4(g)(2).

[99] *Id.* 4(h), (f).

[100] Service in accordance with a foreign country's laws, or as directed by the foreign authority in a response to a letter rogatory. FED. R. CIV. P. 4(f)(2).

[101] FED. R. CIV. P. 4(f)(3). *See Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1014 (9th Cir. 2002)

[102] *AngioDynamics, Inc. v. Biolitec AG*, 780 F.3d 420, 429 (1st Cir. 2015); *see also Birmingham v. Doe*, 593 F. Supp. 3d 1151, 1156 (S.D. Fla. 2022) (Rule 4(f)(3) does not require plaintiff to "attempt[] service of process by other means.").

[103] *See e.g. United States v. Lebanese Canadian Bank SAL*, 285 F.R.D. 262, 267 (S.D.N.Y. 2012); *Madu, Edozie & Madu, P.C. v. SocketWorks Ltd. Nigeria*, 265 F.R.D. 106, 115 (S.D.N.Y. 2010); *Baker Hughes Inc. v. Homa*, No. CIV.A. H-11-3757, 2012 WL 1551727, at *17 (S.D. Tex. Apr. 30, 2012); *Exp.-Imp. Bank of U.S. v. Asia Pulp & Paper Co.*, No. 03CIV.8554(LTS)(JCF), 2005 WL 1123755, at *4 (S.D.N.Y. May 11, 2005); *Ryan v. Brunswick Corp.*, No. 02-CV-0133E(F), 2002 WL 1628933, at *2 (W.D.N.Y. May 31, 2002) (requiring showing that plaintiff "reasonably attempted to effectuate service" before ordering service by other means); *see* In GLG Life Tech Corp. Sec. Litig., 287 F.R.D. 262, 266 (S.D.N.Y. 2012) ("there will undoubtedly be many instances where significant efforts to make service under the Hague Convention should be required by a court before alternative service is ordered"); *but see Brown v. China Integrated Energy, Inc.*, 285 F.R.D. 560, 563 (C.D. Cal. 2012) ("A plaintiff need not pursue other methods of service before requesting that the court authorize an alternative method under Rule 4(f)(3)"). *See also* 4B Wright & Miller, FED. PRAC. & PROC. CIV. § 1134 (4th ed.) (Rule 4(f)(3) appropriate when "none of the other methods of service expressly provided for in the rule is satisfactory or likely to be successful").

[104] *Silvious v. Pharaon*, 54 F.3d 697, 701 (11th Cir. 1995).

[105] *See LG.Phillips LCD Co. v. Chi Mei Optoelectronics Corp.*, 551 F. Supp. 2d 333 (D. Del. 2008). This case upheld service on a Taiwanese corporation through the Delaware Secretary of State, but only after application of FRCP

V. APPLICABILITY OF THE HAGUE CONVENTION TO SUBSTITUTED SERVICE

As noted above, the Hague Convention was ratified by the United States in 1967. Under the Supremacy Clause of the United States Constitution, the Hague Convention "pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies."[106] That broad statement, however, only raises the question of when the Convention applies. That issue was considered in a landmark 1988 United States Supreme Court case.

A. SUPREME COURT JURISPRUDENCE ON THE HAGUE CONVENTION

Volkswagenwerk Aktiengesellschaft v. Schlunk involved service of process on Volkswagen of Germany through its American subsidiary, Volkswagen of America, Inc. The issue before the Supreme Court was whether service on a foreign defendant through its U.S. agent had to comply with the Hague Convention. The Supreme Court looked to Article 1, which made the Convention applicable "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document abroad."[107] The Court reasoned that, since service was accomplished through Volkswagen's agent in the United States, there was no occasion to transmit a legal document abroad. The fact that Volkswagen's U.S. subsidiary presumably needed to forward the suit papers to its overseas parent was immaterial. "Where service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications."[108]

In a concurring opinion joined by two other justices, Justice William Brennan warned that allowing a signatory's internal law to deem as domestic what was effectively international service of process could undermine the objectives of the Hague Convention and "revive notification *au parquet*."[109]

More recently, the Supreme Court resolved a longstanding split in the case law over whether Article 10(a) of the Hague Convention permits direct service by mail of the initial pleadings in a case.[110] Article 10(a) states that, "[p]rovided the State of destination does not object," the Hague Convention does not restrict "the freedom to send judicial documents, by postal channels, directly to persons abroad."[111] Lower court cases had split over whether Article 10(a) applied to direct service by mail of the initial summons and complaint, or else was limited to subsequent papers

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4(h)(2) and 4(f)(3). Taiwan was not a signatory to the Hague Convention, which meant that service could be made in a manner allowed by the foreign country. As service by registered mail was permissible in Taiwan, service was valid where the applicable Delaware statute required the plaintiff to send the process by registered mail to the nonresident defendant. 551 F. Supp. 2d at 341-42. *But see Alternative Delivery Sols., Inc. v. R.R. Donnelley & Sons Co.*, No. CIV.SA05CA0172-XR, 2005 WL 1862631, at *2 (W.D. Tex. July 8, 2005) (treating service on the Texas Secretary of State as within the judicial district for purposes of FRCP 4(h)(1)); *Nocando Mem Holdings, Ltd. v. Credit Commercial De France, S.A.*, No. CIV.A.SA-01-1194-XR, 2004 WL 2603739, at *5 (W.D. Tex. Oct. 6, 2004). It is notable that these Texas cases both hold that substituted service on the Secretary of State is still subject to the Hague Convention, even though they apply FRCP 4(h)(1) on the grounds that service is effected in a U.S. judicial district. The same result was reached by the Eleventh Circuit in *Silvious v. Pharaon*, *supra* note 102.

[106] *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988).

[107] *Id.* (quoting 20 U.S.T. at 362).

[108] 486 U.S. at 707.

[109] *Id.* at 711. (Brennan, J., concurring); *Borschow Hosp. & Med. Supplies, Inc. v. Burdick-Siemens Corp.*, 143 F.R.D. 472, 477 (D.P.R. 1992) (as one case has candidly expressed, state law may "triumph over the Convention by making its application unnecessary.").

[110] *Water Splash, Inc. v. Menon*, 581 U.S. 271, 137 (2017).

[111] Protection of Children and Co-operation in Respect of Intercounty Adoption; Hague, 19 May 1993 *Trb.* 1994.

typically served by mail.[112] In *Water Splash, Inc. v. Menon*,[113] a unanimous Court held that Article 10(a) did allow direct service by mail of the initial pleadings in a case.

B. GENERAL CASE LAW ON SUBSTITUTED SERVICE

Since *Volkswagenwerk*, a number of courts have considered whether international service on various domestic statutory agents is governed by the Hague Convention. The weight of authority has concluded that, because such service typically requires the sending of process to the foreign defendant as part of the statutory procedure, "transmittal abroad" is a "a necessary part of service" for purposes of the Hague Convention.[114] The question does not seem to have received any scrutiny at the federal appellate level. Few cases have applied *Water Splash* to substituted service, but at least one pre-*Water Splash* decision intimated that "sending" pleadings abroad after formal service on statutory agent was consistent with Article 10(a) of the Hague Convention.[115]

C. SOUTH CAROLINA CASE LAW

Hammond v. Honda Motor Co., Ltd. involved a products liability claim for injuries sustained by a minor on "a Honda all terrain [sic] vehicle."[116] Two defendants were Honda

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[112] *Compare Ackermann v. Levine*, 788 F.2d 830, 839–40 (2d Cir.1986) (service of process by registered mail did not violate the Hague Convention), *with Bankston v. Toyota Motor Co.*, 889 F.2d 172, 174 (8th Cir. 1989) (sending initial pleadings abroad by registered mail does not comply with Hague Convention).

[113] 581 U.S. 271, 137 (2017).

[114] *See Kajeet, Inc. v. Infoweise Pty, Ltd.*, No. 6:21-cv-00704-ADA, 2022 U.S. Dist. LEXIS 125410, at *4 (W.D. Tex. July 15, 2022) (mailing by the Secretary of State to Australia implicates the Hague Convention); *Buffalo Patents, LLC v. ZTE Corp.*, 605 F. Supp. 3d 917, 927 (W.D. Tex. 2022) (Hague Convention applies to service on the Texas Secretary of State because "mailing of process abroad culminates in service"); *Topstone Commc'ns, Inc. v. Xu*, 603 F. Supp. 3d 493, 498 (S.D. Tex. 2022); *ACQIS Ltd. Liab. Co. v. Lenovo Grp. Ltd.*, 572 F. Supp. 3d 291, 301 (W.D. Tex. 2021) ("because the Texas statutes require the Secretary of State to mail service to the defendant abroad, the Hague Service Convention preempts the Texas statute and substituted service is improper."); *Howard v. Krull*, 438 F. Supp. 3d 711, 717 (E.D. La. 2020) ("[w]hile it is true that, under § 3474, service is valid once it is made on the secretary of state, it is not complete until notice has been mailed to the defendant"); *accord. Thompson v. Zielinski*, No. 6:22-CV-00562, 2022 U.S. Dist. LEXIS 99694, at *2 (W.D. La. May 31, 2022); *Lobo v. Celebrity Cruises, Inc.*, 667 F. Supp. 2d 1324, 1338 (S.D. Fla. 2009), aff'd, 704 F.3d 882 (11th Cir. 2013); *Vega Glen v. Club Mediterranee S.A.*, 359 F. Supp. 2d 1352, 1356 (S.D. Fla. 2005); *Froland v. Yamaha Motor Co.*, 296 F. Supp. 2d 1004, 1008 (D. Minn. 2003) ("[b]ecause Minnesota law requires 'transmittal of documents abroad' to effect international service via the Secretary of State, the Hague Convention applies"); *Darden v. DaimlerChrysler N. Am. Holding Corp.*, 191 F. Supp. 2d 382, 387 (S.D.N.Y. 2002); *Heredia v. Transp. S.A.S., Inc.*, 101 F. Supp. 2d 158, 161 (S.D.N.Y. 2000) ("New York law requires the transmittal of documents abroad and the Hague Convention applies"); *Wasden v. Yamaha Motor Co.*, 131 F.R.D. 206, 207 (M.D. Fla. 1990) ("[s]ince this method of service also requires the transmittal of documents abroad, in accordance with the rule in *Volkswagenwerk*, the Hague Convention applies here as well"); *Curcuruto v. Cheshire*, 864 F. Supp. 1410, 1411 (S.D. Ga. 1994); *Norrenbrock Co. v. Ternium Mexico, S.A. De C.V.*, No. 3:13-CV-00767-CRS, 2014 WL 556733, at *2 (W.D. Ky. Feb. 12, 2014) ("service via Kentucky's Secretary of State requires the transmittal of documents abroad"); *Macrosolve, Inc. v. Antenna Software, Inc.*, No. 6:11-CV-287, 2012 WL 12903085, at *2 (E.D. Tex. Mar. 16, 2012); *Alternative Delivery Sols., Inc. v. R.R. Donnelley & Sons Co.*, No. CIV.SA05CA0172-XR, 2005 WL 1862631, at *2 (W.D. Tex. July 8, 2005); *Cupp v. Alberto- Culver USA, Inc.*, 308 F. Supp. 2d 873, 880 (W.D. Tenn. 2004) ("Since mailing a copy to L'Oréal S.A. in France involves transmitting documents abroad, the Hague Convention applies."); *McClenon v. Nissan Motor Corp. in U.S.A.*, 726 F. Supp. 822, 825 (N.D. Fla. 1989). *But see Melia v. Les Grands Chais de France*, 135 F.R.D. 28, 32 (D.R.I. 1991) ("Although the statute requires the secretary of state to forward notice to the defendant corporation, other states with similar statutes have interpreted the statutes to mean that service is complete when the secretary is served."); *Daewoo Motor Am., Inc. v. Dongbu Fire Ins. Co.*, 289 F. Supp. 2d 1127, 1130 (C.D. Cal. 2001).

[115] *Quinn v. Keinicke*, 700 A.2d 147, 155 (Del. Super. Ct. 1996).

[116] *Hammond v. Honda Motor Co., Ltd.*, 128 F.R.D. 639 (D.S.C. 1989).

companies based in Japan.[117] The plaintiff attempted to serve those defendants "by substituted service" on the South Carolina Secretary of State, by direct mail pursuant to the Long Arm Statute, and by service on Honda's domestic subsidiary.[118] The Japanese defendants challenged all three methods of service. United States District Court Judge Joe F. Anderson upheld service by direct mail, noting that Japan had not objected to this method of service as permitted by Article 10 of the Hague Convention, and rejecting the line of cases limiting direct mail service to documents other than the initial pleadings. In this regard, Judge Anderson correctly anticipated the Supreme Court's decision, nearly thirty years later, in *Water Splash*.

Judge Anderson also agreed that service on agents of the Japanese defendants "ma[de] unnecessary the application of the Hague Convention."[119] Service on Honda's domestic subsidiary was squarely within *Volkswagenwerk*, although the court reserved judgment on whether a sufficient agency relationship had been shown.[120] Judge Anderson also seems to have assumed that service on the Secretary of State did not implicate the Hague Convention, although he noted the absence of "proof of service by the Secretary" in the form of "[n]otice of compliance . . ., along with a signed return receipt."[121] As noted above, most of the decisions on this point have held that substituted service on an official such as the Secretary of State *does* implicate the Hague Convention, if the official is charged with sending the suit papers abroad.[122] Similarly, Judge Anderson did not apply the predecessors of Rules 4(f) and 4(h) of the FRCP,[123] which govern service of process on a corporation outside any U.S. judicial district. Again, the assumption seems to have been that service on the Japanese entities had taken place in the District of South Carolina—as some cases have since held.[124]

Since *Hammond*, two unpublished cases in the United States Court for the District of South Carolina have considered whether substituted service on the Secretary of State is subject to the Hague Convention. In *South Carolina v. Bulgartabac Holding Group*,[125] Judge Cameron McGowan Currie reasoned that Section 15-9-245 of the South Carolina Code "itself requires 'the transmittal of documents abroad' as 'a necessary part of service,'" making the Hague Convention applicable.[126] By contrast, in *Peake v. Suzuki Motor Corp.*,[127] Judge J. Michelle Childs ruled that, because substituted service was effective upon delivery to the Secretary of State, the Hague Convention was not implicated.[128] That is, federal judges in South Carolina have differed on whether that state's substituted service provisions implicate the Hague Convention where service is on a foreign corporation based in another country.

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[117] *Id.* at 639.
[118] *Id.* at 641.
[119] *Id.* at 642.
[120] *Id.* at 643.
[121] *Id.*; see Dodge, supra note 7, at 1520.
[122] *See supra* note 112.
[123] FED. R. CIV. P. 4(f) and 4(h). The current versions of these rules became effective in 1993.
[124] *See supra* note 102.
[125] *South Carolina v. Bulgartabac Holding Group*, No. CV 3:05-124-22, 2005 WL 8165771 (D.S.C. May 24, 2005).
[126] *Id.* at *2.
[127] No. 0:19-CV-00382-JMC, 2019 WL 5691632, (D.S.C. Nov. 4, 2019).
[128] *Id.* at *8.

VI. A CRITIQUE OF SUBSTITUTED SERVICE IN SOUTH CAROLINA

Substituted service in South Carolina resembles notification *au parquet*,[129] in that service is on an official who, by statute, is constituted the involuntary agent for parties domiciled beyond the boundaries of the jurisdiction. Granted, some form of actual notice—usually the forwarding of suit papers by certified or registered mail—is also required so as not to offend the basic requirements of due process. But South Carolina's version of substituted service can still be quite harsh in its operation, mainly because it is deemed effective upon delivery to the statutory agent—not on receipt by the defendant.[130] Consider the typical case: suit papers are delivered to the South Carolina Secretary of State, starting the clock on the foreign corporation's response deadline—a relatively short twenty-one days or thirty-five days, depending on the venue.[131] The Secretary of State must then forward the papers to the foreign corporation. According to the statute, this must happen "immediately," but no set timeframe is prescribed.[132] At least some time is required for the Secretary of State to transmit the suit papers by certified mail—how long could depend on a host of variables.

Once sent, the suit papers must make their way to the overseas defendant. Experience teaches that domestic mail is seldom the fastest way to send important papers. In the case of genuinely "foreign" corporations, as opposed to those in other U.S. states, the pleadings must transit two postal systems: that of the United States and that of the destination country. Add to that the formalities of obtaining, or attempting to obtain, a signed receipt card, and by the time the pleadings are actually received by the overseas defendant, the deadline for serving a response may be imminent—or may have passed. Nor will it be obvious to the average foreign defendant that the response deadline must be calculated based on receipt by a hitherto unknown statutory agent in a foreign land—to say nothing of the further difficulties of language barriers and international differences in practice and procedure.

One unreported South Carolina case serves as an example of how substituted service can go awry. The pleadings in a federal court lawsuit were sent by certified mail to the Secretary of State for service on several overseas corporations.[133] All defendants were eventually placed in default.[134] Correspondence from the Secretary of State showed that some eighteen days elapsed between acceptance of substituted service and the date of letters from the Secretary of State addressed to the various foreign defendants.[135] Furthermore, no certified mail receipts were ever filed, nor was there any evidence of refusal of delivery by the various defendants.[136] It appeared the suit papers had simply not been sent, despite the existence of correspondence addressed to the defendants. Although the court ultimately lifted the default,[137] that was only after motions practice by the defaulted defendants.[138] Needless to say, no party wishes to start a court case in default,

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[129] Another commentator recently remarked that "[t]he fact that states in the United States similarly permitted substituted service on state officials—an American version of notification *au parquet*—seems to have largely escaped attention." *Dodge*, *supra* note 7, at 1527.

[130] *Holman v. Warwick Furnace Co.*, 318 S.C. 201, 204, 456 S.E.2d 894, 896 (1995).

[131] SC R. CIV. P. 6(e) adds five days to the response deadline where service is "upon a person designated by statute to accept service." There is no counterpart in the federal rule.

[132] S.C. Code Ann. § 15-9-245(b) (1988).

[133] *See Factory Mutual Insurance Company v. MV Amazon River et al.*, Case No. 2:10-cv-00519-RMG (D.S.C.), Entry Nos. 6-9 (April 22, 2010).

[134] Entry of Default Judgement, *Amazon River* Entry No. 15 (Jan. 26, 2011).

[135] Motion for Entry of Default Judgment, Exhibit 2, *Amazon River* Entry No. 13-2 (Nov. 11, 2010).

[136] Order on Motion to Set Aside Default, *Amazon River* Entry No. 27 at 2 (June 29, 2011).

[137] Order on Motion to Set Aside Default, *Amazon River* Entry No. 27 (June 29, 2011).

[138] Motion For Relief From Default Judgment, *Amazon River* Entry No. 16 (April 13, 2011).

even if grounds for relief appear to exist.[139]

Substituted service can also complicate the process of removal. To remove a case, all properly joined defendants must join in the removal petition. Ordinarily, a defendant that has been served with the summons and complaint can be located fairly easily by another defendant seeking to remove the case. This is not always the case with substituted service. In *Funchess v. Blitz U.S.A., Inc.*, suit papers forwarded to a foreign corporation by the Secretary of State were returned as undeliverable.[140] The court nevertheless held that the foreign corporation had been properly joined such that its consent to removal was required.

More importantly, substituted service on foreign corporations, as applied in South Carolina, is a relic of the pre-*International Shoe* era. In 1933, when South Carolina first adopted the practice, service of process was generally confined by state borders. Substituted service was the only means of serving foreign corporations that, although doing business in South Carolina, failed to designate a local place for service of process. Three decades later, South Carolina adopted a general-purpose long arm statute. That statute allows out-of-state service by certified mail, the same method used by the Secretary of State to notify foreign corporations that they have been served. The Hague Convention, moreover, allows direct mail service of defendants in signatory states absent an objection to Article 10(a)—the U.S. Supreme Court's decision in *Water Splash* now makes that clear. It might be asked why the Secretary of State should still be burdened with sending copies of legal process to foreign corporations when private parties can accomplish the same thing themselves under the Long Arm Statute.[141]

Substituted service on the South Carolina Secretary of State does offer the plaintiff some benefits over ordinary direct mail. It can be effective even if delivery of the suit papers is refused,[142] which is not the case with the Long Arm Statute.[143] Moreover, substituted service offers a tactical advantage; the foreign corporation must respond to a lawsuit based on the Secretary of State's acceptance of the summons, possibly weeks before the papers are received abroad. The Hague Convention was intended to ameliorate such situations—Article 15(b) provides that "judgment shall not be given until it is established that . . . the delivery or service was effected in sufficient time to enable the defendant to defend."[144] But if, as *Hammond* suggests, the Hague Convention does not apply to substituted service, Article 15(b) is no help. It should also be noted that many nations have objected to direct mail service pursuant to Article 10(a) of the Convention.[145]

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[139] See *Colleton Preparatory Acad., Inc. v. Hoover Universal*, 616 F.3d 413 (4th Cir. 2010), for an example of a long legal battle leading to the lifting of default on appeal.

[140] No. CA 5:10-1634-MBS, 2010 U.S. Dist. LEXIS 121924, at *6 (D.S.C. Nov. 16, 2010).

[141] Data furnished by the South Carolina Secretary of State indicates that service on foreign corporations was accepted 284 times during the 2021-2022 fiscal year; of these acceptances, the vast majority were on corporations in other U.S. states, although eleven were on corporations in other countries.

[142] S.C. CODE ANN. § 15-9-245(c) (2023).

[143] *Id.* § 36-2-806(2) (2023) (proof of service by certified mail under the Long Arm Statute "shall include a receipt signed by the addressee"). *Cf.* SC R. CIV. P. 4(d)(8) (if process served by certified mail is "refused or returned undelivered, service shall be made as otherwise provided in these rules.").

[144] 20 U.S.T. 364.

[145] The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matter, art. 10, Nov. 15, 1965. Hague Conference on Private International Law. (The Hague Conference website lists Brazil, China, Germany, India, South Korea and Switzerland among the nations that have objected to the methods of service listed under Article 10 of the Hague Convention); *see Briggs v. Castillo*, No. 6:21-CV-02120, 2022 WL 473533 (W.D. La. Jan. 20, 2022) ("Mexico formally objected to all alternative channels of service, including service via mail, under Article 10 of the Hague Convention").

The reasoning of *Hammond* allows those objections to be disregarded in the case of substituted service on a foreign corporation.

Courts in South Carolina should consider following the majority trend and holding that, notwithstanding *Hammond*, the Hague Convention applies to substituted service on the South Carolina Secretary of State. Under that view, substituted service would not be allowed as to defendants in signatory states that object to service of process through postal channels. Substituted service would be otherwise be available, but subject to the procedural protections of the Hague Convention in addition to those of due process.

Similarly, it would be better to discard the fiction that genuinely "foreign" corporations are served in the District of South Carolina for FRCP Rule 4(h) purposes, when in reality the pleadings must be transmitted abroad by the Secretary of State before service is enforceable. Under that more realistic approach, substituted service on an overseas corporation would, in federal court, require a court order pursuant to FRCP Rule 4(f)(3).[146] The obstacle of court approval would likely induce many litigants to attempt service on their own before seeking to burden the Secretary of State. Additionally, it would afford federal courts an opportunity to weed out cases in which substituted service was sought more for tactical advantage than anything else.

Legislative reform should also be considered. The General Assembly of South Carolina should consider simply abolishing substituted service on unregistered foreign corporations as obsolete given South Carolina's adoption of a long arm statute freely permitting service outside the state. In 1933, substituted service was the only way to serve a foreign corporation with no registered agent or appointed place of service in South Carolina. That is no longer true. Substituted service adds very little to ordinary service by mail and burdens the Secretary of State with clerical tasks just as easily handled by private litigants. Moreover, South Carolina's substituted service provisions are out of step with the MBCA. The MBCA has always intended substituted service as a means of serving a domesticated foreign corporation that fails to maintain a registered agent. The drafters of the model acts never intended substituted service as a general-purpose long arm statute for foreign corporations.

If substituted service is retained, it should be amended to reflect the delays inherent in international service by mail. Perhaps the most obvious reform would be to extend the responsive pleading deadline where substituted service is made. Rule 6(e) of the South Carolina Rules of Civil Procedure could be amended to add more than a meagre five days where international service of process is made on a statutory agent. Rule 6 of the Local Rules of the United States District Court for the District of South Carolina could be similarly amended.

Alternatively, the statute itself could be amended to provide that, although service is effective as of receipt by the Secretary of State, the response period is tolled until the suit papers have either been delivered to the defendant or are refused. But there is no reason to put foreign corporations lawfully engaged in international business at an unfair disadvantage in litigation in South Carolina. Substituted service on foreign corporations, in which the response deadline drains away like sand in an hourglass while suit papers linger in a government office or meander their way through international postal channels, smacks too much of notification *au parquet*. It should be abolished or reformed.

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[146] FED. R. CIV. P. 4(f)(3); *See Brockmeyer v. May*, 383 F.3d 798, 806 (9th Cir. 2004) (prior court approval required for service by other means). For examples of Rule 4(f)(3) applications for permission to serve a foreign corporation through a statutory agent, s*ee Ctr. Way Co. Ltd. v. Fuzhou Puhua Minghui Trading Co.*, No. 20-CV-01377-SVK, 2020 WL 4673942, at *1 (N.D. Cal. Aug. 12, 2020).

RICO'S LONG ARM

*Randy D. Gordon**

ABSTRACT

RICO has for over 50 years presented something of a parlor game for lawyers, mostly because its text leaves wide latitude in interpretation. And, as is often the case with RICO, resolution of one question begets more. The Supreme Court's recent decision in Yegiazaryan v. Smagin proves no exception. Here, the Court brought some clarity to a question left open by RJR Nabisco: viz, what must one plead and prove to satisfy the "domestic injury" requirement necessary to invoke an extraterritorial application of RICO. The Court held that a foreign plaintiff can indeed, given the right facts and circumstances, establish a domestic injury. But it declined to establish a bright line test—or really any test, leaving that to the lower courts to flesh out. The Court also declined to engage the question of whether RICO is an appropriate vehicle for enforcing all (or perhaps international) arbitral awards. And—more generally—domestic judgments. Those and many other questions remain for another day.

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Introduction

For decades, American courts have struggled with the question of if and when to apply US law to conduct involving foreign actors or injuries. This question arises because "other nations" hold "legitimate sovereign interests."[1] Often, but not always, the question narrows to whether it is "it reasonable to apply [US] laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?*"[2] In the context of antitrust laws, "[n]o one denies that . . . foreign conduct can interfere with a foreign nation's ability independently to regulate its own commercial affairs."[3] One might therefore ask, "[w]hy should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?"[4] The answer depends on reasonableness, and therefore "courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused."[5]

Extraterritoriality and RICO

As with antitrust law, there are often questions as to the extraterritorial reach of RICO. The relevance of antitrust law to RICO comes from the fact that the language of § 1964(c) of RICO is derived from § 4 of the Clayton Act,[6] both of which give private plaintiffs standing to sue for otherwise criminal violations that cause them injury.[7] Because the meaning of § 4 had been

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[1] *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).
[2] *Id.* at 165.
[3] *Id.*
[4] *Id.*
[5] *Id.* at 156
[6] HERBERT HOVENCAMP, FEDERAL ANTITRUST POLICY § 16.1, 804 (5th ed. 2016) ("By its language, § 4 appears to give a cause of action to every person who is injured by a cartel or overcharging monopolist. The courts have concluded that the statute cannot be as broad as it purports to be, however, and they have devised ways to limit its scope."); *see also, e.g.*, *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 729 (1977) (holding that, in the context of illegal overcharging, only the overcharged direct purchaser—and not others down the line—constitute a person "injured in his business or property"). The same may be said of RICO. *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 267 (1992) ("[w]e have repeatedly observed that Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws [and] § 4 of the Clayton Act, which reads in relevant part that 'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."); *Id.* at 266 ("This construction is hardly compelled, however, and the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover persuades us that RICO should not get such an expansive reading."). *See* Clayton Act of 1914, ch. 323, § 4, 38 Stat. 731 (codified as amended at 15 U.S.C. § 15).
[7] The federal antitrust laws—at least as interpreted by the courts after the 1970s—have migrated from a model condemning a wide range of conduct to one condemning only conduct that causes deleterious economic effects. Broadly stated, "Congress's objectives included not only the economic goal of low prices and high quality brought about through competition, but also social and political ends." David F. Shores, *Antitrust Decisions and Legislative Intent*, 66 MO. L. REV. 725, 747 (2001). We see this view enshrined in the earliest cases, which found all restraints—reasonable or not—illegal. *See, e.g.*, United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290 (1897). This view quickly eroded in favor of condemning only "unreasonable" restraints, and by the time we arrive at the late the 1970s, the Supreme Court migrated to the view that antitrust claims must be grounded in "demonstrable economic effect." Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977).

litigated for over half a century at the time of § 1964(c)'s adoption, it's reasonable to ask whether the two sections should be viewed in the same light. Both sections provide that "any person injured in his business or property by reason of" a substantive antitrust or RICO violation may seek treble damages.[8] But this apparent simplicity "belies the complexity of the many questions it has raised."[9] Read literally, any person injured, even remotely or unforeseeably, by prohibited conduct can state a claim under either statute. But courts have concluded that the right to sue cannot be so open ended and to staunch the litigation flow have erected multiple embankments to steer many potential claims away from the docket.[10]

Despite the acknowledgement of common ancestry, courts have not universally interpreted Section 4 and Section 1962(c) in tandem. Some of this can be explained not only by different statutory aims (regulation of competition versus racketeering), but also by amendments to the antitrust law. For instance, "the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury. It does so by setting forth a general rule stating that the Sherman Act 'shall not apply to conduct involving trade or commerce . . . with foreign nations.'"[11] But "[i]t then creates exceptions to the general rule, applicable where, roughly speaking, that conduct significantly harms imports, domestic commerce, or American exporters."[12] RICO, by contrast, benefits from no such statutory guidance.

RJR Nabisco and the Limits of Extraterritorial Application of RICO

In *RJR Nabisco, Inc. v. European Community*,[13] the Supreme Court sought to construct a framework for analyzing extraterritorial issues under RICO. It did so by posing two questions that must be answered: "First, do RICO's substantive prohibitions, contained in § 1962, apply to conduct that occurs in foreign countries? Second, does RICO's private right of action, contained in § 1964(c), apply to injuries that are suffered in foreign countries."[14] As a default, the "basic

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[8] 18 U.S.C. § 1964(c). As further evidence of shared DNA, both Section 4 of the Clayton Act and 1964(c) of the RICO Act contain the same "causation" language found in Section 7 of the Sherman Act, as originally adopted in 1890. *See generally*, *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390 (1906) (quoting language from Section 7 of the Sherman Act).

[9] HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY § 16.1, 804 (5th ed. 2016).

[10] I have written extensively on these issues over the years. *See e.g.*, *RICO Had a Birthday! A 50-Year Retrospective of Questions Answered and Open*, 105 MARQUETTE L. REV. 131 (2021 [hereinafter *RICO Had a Birthday*]; *Of Gangs and Gaggles: Can a Corporation Be Part of an Association-in-Fact RICO Enterprise?*, 16 U. PA. J. BUS. L. 973 (2014); *Clarity and Confusion: RICO's Recent Trips to the United States Supreme Court*, 85 TULANE L. REV. 677 (2011); *Crimes That Count Twice: A Reexamination of RICO's Nexus Requirements Under 18 U.S.C. § 1962(c) and 1964(c)*, 32 VT. L. REV. 171 (2007); *Rethinking Civil RICO: The Vexing Problem of Causation in Fraud-Based Claims under 18 U.S.C. § 1962(c)*, 39 USF L. REV. 319 (2005).

[11] *Empagran*, 542 U.S. at 155 (quoting 15 U.S.C. § 6a).

[12] *Id.* at 158.

[13] 579 U.S. 325 (2016). I first wrote on this case shortly after it was decided and then later as part of a RICO retrospective. *See* Gordon, *supra* note 9; *Making Meaning: Towards a Narrative Theory of Statutory Interpretation and Judicial Justification*, 12 OHIO ST. BUS. L. J. 1 (2017) [hereinafter *Making Meaning*]. So, at this point, I am somewhat repeating myself. But there is no way to understand *Yegiazaryan* without having a summary of *RJR Nabisco* at hand.

[14] *Id.* at 335.

premise of our legal system that, in general, 'United States law governs domestically but does not rule the world.'"[15]

The case arrived at the Supreme Court against a complicated procedural and factual backdrop. In terms of procedure, the European Community ("EC") and six of its member states first sued RJR and several related entities for RICO violations in 2000.[16] The litigation spawned at least three separate actions and multiple oscillations between federal district and appellate courts.[17] Of immediate concern was the district court's dismissal of the case, followed by the Second Circuit's reinstatement.[18]

Reduced to the essentials, the EC alleged that RJR and organized criminal organizations "participated in a global money-laundering scheme."[19] In one thread of the scheme, Colombian and Russian "drug traffickers smuggled narcotics into the [EC]," sold the drugs for euros, and then used these proceeds to purchase large blocks of RJR cigarettes that were sold into the EC.[20] In another thread of the alleged scheme, RJR conspired with South American drug traffickers and money launderers and—in violation of international sanctions—sold cigarettes to Iraq.[21] The EC also alleged that RJR's acquisition of Brown & Williamson Tobacco Corporation was ostensibly for the purpose of expanding the pattern of illegality.[22]

Cast in RICO's statutory terms, the EC alleged that RJR engaged in a pattern of racketeering activity rooted in predicate acts ranging from money laundering to support of foreign terrorist organizations, mail and wire fraud, and Travel Act violations.[23] RJR and its cohorts "allegedly formed an association in fact" enterprise dubbed the "RJR Money-Laundering Enterprise."[24] Once assembled, these factual bits constitute an averment that RJR violated all four of RICO's criminal prohibitions: (1) using income derived from the pattern of racketeering to invest in, acquire an interest in, and operate the RJR Money-Laundering Enterprise in violation of § 1962(a); (2) acquiring and maintaining control of the enterprise through the pattern of racketeering in violation of § 1962(b); (3) operating the enterprise through the pattern of racketeering in violation of § 1962(c); and (4) conspiring with other schemers in violation of § 1962(d).[25] These violations allegedly caused the EC harm, "including . . . competitive harm to their state-owned cigarette businesses, lost tax revenue from black-market cigarette sales, harm to European financial institutions, currency instability, and increased law enforcement costs."[26]

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[15] *Id.* (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)).
[16] *See Eur. Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771, 2011 WL 843957, at *1 (E.D.N.Y. March 8, 2011) (cataloguing the case's procedural twists and turns).
[17] *See id.* at *1–2.
[18] *Compare id.* at *1 (dismissing RICO claims), *and Eur. Cmty. RJR Nabisco, Inc.*, 814 F. Supp. 2d 189, 192 (E.D.N.Y. 2011) (dismissing state-law claims), *with Eur. Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 133 (2d Cir. 2014) (reversing the district court's dismissal of all claims).
[19] *RJR Nabisco, Inc., v. Eur. Comm.*, 579 U.S. 325, 325 (2016).
[20] *Id.* at 332.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 333.
[25] *Id.*
[26] *Id.*

The Court had at its disposal a previously developed "two-step framework for analyzing extraterritoriality issues."[27] The first step entails a look at a statute's language to see whether it gives an unequivocal, affirmative indication of extraterritorial reach.[28] If not, then the second step determines whether the facts alleged push the case into the statute's "focus."[29] RICO presents a particular challenge because—although nothing in § 1962 itself makes an unequivocal statement of extraterritorial application—many of the "predicate acts" that may alleged to demonstrate a "pattern of racketeering"[30] do expressly apply with extraterritorial force.[31] This was enough for the Court to conclude that "Congress's incorporation of these (and other) extraterritorial predicates into RICO gives a clear, affirmative indication that § 1962 applies to foreign racketeering activity."[32] What this means is that § 1962 *can* apply extraterritorially, but only to the extent "that the predicates alleged in a particular case themselves apply extraterritorially."[33] Stated differently, RICO covers *some* foreign racketeering activity—viz., "a pattern of racketeering that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself extraterritorial."[34]

So we know that foreign conduct can support a substantive, criminal violation of RICO. But this doesn't end the inquiry with respect to a civil claim under § 1964(c), to which the Court found that it must "separately apply the presumption against extraterritoriality to RICO's [civil] cause of action despite our conclusion that the presumption has been overcome with respect to RICO's substantive prohibitions."[35] The European Union invited the Court to interpret § 1964(c) *in pari materia* to its direct ancestor, § 4 of the Clayton Act, which—under the Court's precedents—allows recovery for injuries suffered abroad.[36] But the Court declined the invitation, noting that—although the Clayton Act sometimes offers "guidance in construing § 1964(c)"—it had "not treated the two statutes as interchangeable."[37] As the matter now stands, absent a *domestic* injury, a prosecutable criminal RICO violation will fail as a civil claim.[38] But, as we will

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[27] *Id.* at 337.
[28] *Id.*
[29] *Id.*
[30] There are at least three interpretive and application problems with the statute. Structurally, it's complicated: to state a civil RICO claim a plaintiff must show that he was injured "by reason of" a criminal RICO violation, which entails pleading such a violation, which in turn requires him to identify the predicate commission of certain specified crimes (e.g., mail or wire fraud) and to satisfy certain defined terms (e.g., pleading the existence of an "enterprise"). *See* Gordon, *supra* note 9.
[31] *RJR Nabisco*, 579 U.S. at 339.
[32] *Id.*
[33] *Id.* at 326.
[34] *Id.* at 340.
[35] *Id.* at 346.
[36] *Id.* at 351–52. (referencing 18 U.S.C.S § 1964 (c); jurisdiction of courts; duty of US attorneys; and 15 U.S.C. § 4.)
[37] *Id.* at 352.
[38] To see how lower courts have ruled on the domestic injury requirement post *RJR Nabisco*, *see City of Almaty v. Khrapunov*, 956 F.3d 1129, 1132 (9th Cir. 2020) ("The Ninth Circuit has not yet addressed the question of how to determine whether an injury is domestic or foreign after *RJR Nabisco*, and we need not do so today. That is because Plaintiff's alleged injury is merely a consequential effect of its admittedly foreign injury, and not an independent injury cognizable under § 1964(c)."); *Humphrey v. GlaxoSmithKline PLC*, 905 F.3d 694 (3d Cir. 2018) (holding that an investigations firm that assisted foreign companies, doing business in China, with American anti-bribery regulations compliance did not suffer a domestic injury as required to establish a civil RICO claim when in their allegation that a multinational healthcare company destroyed their business and prospective business ventures as result of its bribery practices in China); *see also Bascuñán v. Elsaca*, 874 F.3d 806, 806–07 (2d Cir. 2017) (holding that an alleged scheme to: (1) steal funds held in a foreign bank account and launder stolen money using bank

now see, determining what counts as a "domestic injury" is a debatable matter, one that the Supreme Court recently—but only partly—settled.

Problems in Extraterritoriality: Who Can Sue Under RICO

Vitaly Smagin holds a multimillion-dollar California judgment against Ashot Yegiazaryan, a California resident.[39] The road to this judgment is tangled, as is its aftermath, but at least some background is necessary to understand its intersection with RICO.

For a number of years in the 2000s, Yegiazaryan allegedly committed fraud and stole Smagin's shares in a real estate venture worth more than $84 million.[40] Russian authorities indicted Yegiazaryan for these acts, and to avoid a criminal prosecution, he fled to the US and took up residence in a Beverly Hills mansion.[41] He was convicted in absentia and sentenced to prison.[42] As the Court saw the salient facts:

> In 2014, Smagin, who lives in Russia, won an arbitration award in London against Yegiazaryan for the misappropriation of his real estate investment (London Award). Yegiazaryan refused to pay that award, . . .[43]
>
> Seeking to collect, Smagin filed an enforcement action in the California federal court to confirm and enforce the London Award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[44] The District Court issued a temporary protective order, followed by a preliminary injunction, freezing Yegiazaryan's California assets.[45]
>
> In his application for injunctive relief, Smagin informed the District Court that Yegiazaryan had received a sizeable arbitration award in an unrelated proceeding against another Russian businessman, Suleymon Kerimov (Kerimov Award).[46] At the time, Yegiazaryan had received no funds in satisfaction of that award, but Smagin was concerned that when they were paid, Yegiazaryan would transfer them out of Smagin's reach.[47]
>
> [Smagin's worries became reality:] in May 2015, Yegiazaryan received a $198 million settlement that satisfied the Kerimov Award.[48] To avoid the District Court's asset freeze, Yegiazaryan accepted the money through the London office of an American law firm headquartered in Los Angeles.[49] Yegiazaryan then created 'a complex web of offshore

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accounts in the United States and elsewhere did not allege a domestic injury, (2) misappropriate funds held in New York bank account owned by plaintiff did allege a domestic injury, and (3) misappropriate bearer shares owned by principal did allege a domestic injury).

[39] *Yegiazaryan v. Smagin*, 599 U.S. 533, 536 (2023). By way of full disclosure, I participated in a moot court on behalf of the Respondent, which was held at the Texas A&M School of Law, just prior to oral argument.

[40] *Id.*

[41] Brief of Respondent at 3, *Yegiazaryan v. Smagin*, 599 U.S. 533(2023) (No. 22-381).

[42] *Id.*

[43] *Yegiazaryan*, 599 U.S. at 537.

[44] *Id.* (citing June 10, 1958, 21 U.S. T. 2517, T.I.A.S. No. 6997, as implemented by 9 U.S.C. §§201–08).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 538.

[49] *Id.*

> entities to conceal the funds,' and ultimately transferred the funds to a bank account with CMB Monaco.[50]
>
> [Along the way], Yegiazaryan also directed those in his inner circle to file fraudulent claims against him in foreign jurisdictions, which he would not oppose, . . . that would encumber the [Kerimov Award], thereby blocking Smagin's access to it.[51]
>
> Around the same time, Yegiazaryan hid his assets in the United States through a system of "shell companies" owned by family members.[52] [For example, his brother owned a Nevada company, that was] "created for the purpose of sheltering [Yegiazaryan's] U. S. assets from his creditors, including Smagin."[53]
>
> Smagin did not learn about the [Kerimov Award], [or] Yegiazaryan's efforts to hide it, . . . until February 2016, when Smagin . . . intervene[d] in Yegiazaryan's California divorce proceedings.[54] [Shortly thereafter], the California District Court . . . granted Smagin's motion for summary judgment on his petition for confirmation of the [London] Award and entered judgment against Yegiazaryan for $92 million, including interest.[55] The court also issued several postjudgment [sic] orders barring Yegiazaryan and [his cohorts] from preventing collection on the judgment.[56]
>
> For failing to comply with those orders, the District Court subsequently found Yegiazaryan in contempt of court. To avoid [complying], however, Yegiazaryan falsely claimed he was too ill, and submitted a forged doctor's note to the District Court.[57] When Smagin . . . [sought] to depose the doctor . . ., Yegiazaryan used "intimidation, threats, or corrupt persuasion" to get the doctor to avoid service of the subpoena.[58]

Against this backdrop, Smagin filed a RICO claim.[59] As already noted, RICO provides a private right of action to "'[a]ny person injured in his business or property by reason of a violation of' a substantive RICO provision."[60] Under that provision, Smagin sued Yegiazaryan and CMB Bank (and ten other defendants who did not petition the Supreme Court),[61] asserting that each defendant operated or managed an enterprise through a pattern of racketeering, in violation of § 1962(c), and conspired to do so in violation of § 1962(d). In short, Smagin alleged that the

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[50] *Id.* (citing *Smagin v. Yegiazaryan*, 37 F.4th 562, 565 (9th Cir. 2022)).
[51] *Id.*
[52] *Id.* (citing Joint Appendix, 2023 WL 2348472 (U.S.), at 61a).
[53] *Id.* (citing Joint Appendix, 2023 WL 2348472 (U.S.), at 44a).
[54] *Id.*
[55] *Id*
[56] *Id.*
[57] *Id.* at 538–39.
[58] *Id.* at 539 (citing Joint Appendix, 2023 WL 2348472 (U.S.), at 82a).
[59] *Id.*
[60] *Id.* (quoting 18 U.S.C. § 1964(c)).
[61] *See generally Id.* at 539 note 1 ("Only Yegiazaryan and CMB Bank petitioned for the Court's review. The other defendants include three family members (Suren Yegiazaryan, Artem Yegiazaryan, and Stephan Yegiazaryan); an alleged Russian accomplice (Vitaly Gogokhia); French, Russian, and Luxembourger individuals who have been administrators of the trust holding the $198 mil- lion (Natalia Dozortseva, Murielle Jouniaux, and Alexis Gaston Thielen); an allegedly corrupt Russian bankruptcy officer (Ratnikov Evgeny Niko-laevich); and a registered company hired by Yegiazaryan (Prestige Trust Company, Ltd.) and its U.S. lawyer (H. Edward Ryals).

defendants frustrated Smagin's efforts to collect on the California judgment through a pattern of wire fraud and other predicate acts, including witness tampering and obstruction of justice.

The district court dismissed the complaint because—in its view—Smagin had "fail[ed] to adequately plead a domestic injury," as required by *RJR Nabisco*.[62] The district court "place[d] great weight on the fact that Smagin [was] a resident and citizen of Russia and therefore experience[d] the loss from his inability to collect on his judgment in Russia."[63]

The Ninth Circuit reversed, declining Yegiazaryan's invitation to follow the domestic-injury approach of the Seventh Circuit, "which has adopted a rigid, residency-based test for domestic injuries involving intangible property" that would arguably include a judgment.[64]

Because the Seventh Circuit's approach locates an injury to intangible property at the plaintiff's residence, Smagin could not allege a cognizable domestic injury by virtue of his Russian residence.[65] The Ninth Circuit eschewed this rule and instead adopted a "context-specific" approach that it found in harmony with the approaches of the Second and Third Circuits.[66]

The Ninth Circuit thus concluded that Smagin had pleaded a domestic injury by alleging that his efforts to execute on a California judgment in California against a California resident were foiled by racketeering acts that largely "occurred in, or [were] targeted at, California" and were "designed to subvert" enforcement of a California judgment in California.[67]

The Supreme Court granted certiorari to resolve the circuit split and answer whether a foreign plaintiff can state a civil RICO claim when its efforts to enforce a U.S. judgment are thwarted by racketeering acts in the U.S.[68] To answer this question, the Court had to determine the meaning of the "'domestic-injury' requirement for private civil RICO suits" set forth in *RJR Nabisco*.[69]

In the Court's view, the question presented in *RJR Nabisco* was whether RICO applies extraterritorially.[70] To answer that question, the *RJR Nabisco* Court "employed the presumption against extraterritoriality, which 'represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate.'"[71]

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[62] *Smagin v. Compagnie Monegasque De Banque*, No. 220CV11236RGKPLA, 2021 WL 2124254, at *6 (C.D. Cal. May 5, 2021); *see RJR Nabisco*, 579 U.S. 325, 334 ("A private RICO plaintiff therefore must allege and prove a *domestic* injury to its business or property").
[63] *Yegiazaryan*, 599 U.S. at 540 (internal quotations omitted).
[64] *Smagin v. Yegiazaryan*, 37 F.4th 562, 568, 570 (citing Armada (Sing.) *PTE Ltd. v. Amcol Int'l Corp.*, 885 F.3d 1090, 1091 (7th Cir. 2018)).
[65] *Id.* at 570.
[66] *Id.* at 568–70; *see also Bascuñán* v. Elsaca, 874 F.3d 806, 809 (2d Cir. 2017); *and Humphrey* v. *GlaxoSmithKline PLC*, 905 F.3d 694, 696 (3d Cir. 2018).
[67] *Smagin*, 37 F.4th at 567–68.
[68] *Yegiazaryan*, 599 U.S. 533, 540 (2023).
[69] *Id.* at 542.
[70] *Id.* at 541.
[71] *Id.* (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010)).

Thus, "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application."[72]

To assess whether allowing a plaintiff in Smagin's shoes to invoke RICO would offend the presumption, the Court looked to the "[d]ual rationales support[ing] the presumption against extraterritoriality."[73] One rationale reflected "concerns of international comity" and avoiding "unintended clashes between our laws and those of other nations which could result in international discord"; while the other was "informed by 'the commonsense notion that Congress generally legislates with domestic concerns in mind.'"[74]

The Court acknowledged that *RJR Nabisco* distilled the presumption into two steps: "the first asks 'whether the statute gives a clear, affirmative indication that it applies extraterritorially.'"[75] An affirmative finding rebuts the presumption and obviates the need to proceed to step two.[76] But if the presumption is not rebutted, then "step two asks whether the case involves a domestic application of the statute, which is assessed 'by looking to the statute's "focus."'"[77]

But the *RJR Nabisco* inquiry was only marginally relevant to the matter at hand. This is so because the *RJR Nabisco* Court was concerned first with the extraterritoriality of two of RICO's substantive provisions, a matter not contested at the pleadings stage of Smagin's suit. And with regard to § 1964(c), RICO's private right of action, the *RJR Nabisco* Court's conclusion is somewhat off-point. That is, the *RJR Nabisco* Court determined that § 1964(c) does not overcome the presumption at step one because there is no "clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States."[78] Thus framed, the *RJR Nabisco* Court concluded that "[a] private RICO plaintiff . . . must allege and prove a *domestic* injury to its business or property."[79] But in announcing the domestic injury requirement, "the Court did not have occasion to explain what constitutes a 'domestic-injury,' because the plaintiffs in *RJR Nabisco* had stipulated that they were not seeking redress for domestic injuries."[80] Therefore, "the question now before the Court [wa]s whether Smagin has alleged a domestic injury."[81] In other words, invoking the *RJR Nabisco* holding begs the question presented here.

What a proper domestic-injury inquiry should entail reduces to a choice between two alternatives: (1) a bright-line, plaintiff's-residence rule, much like that announced by the Seventh Circuit; or (2) a facts-and-circumstances approach, much like that taken by the Ninth Circuit.[82]

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[72] *Id.* (quoting *RJR Nabisco, Inc. v. Eur. Comm.*, 579 U.S. 325, 335 (2016)) (internal quotation marks omitted).
[73] *Id.* (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115, 133 S.Ct. 1659, 185 L.Ed.2d 671 (2013)) (internal quotation marks omitted).
[74] *Id.* (quoting *Smith v. United States*, 507 U.S. 197, 204 n. 5 (1993)).
[75] *Id.* (quoting *RJR Nabisco*, 579 U.S. at 337).
[76] *Id.* at 542.
[77] *Id.* (citing *RJR Nabisco*, 579 U.S. at 337).
[78] *RJR Nabisco*, 579 U.S. at 328.
[79] *Id.* at 346 (emphasis added).
[80] *Yegiazaryan*, 599 U.S. at 542.
[81] *Id.*
[82] *Id.* at 540.

Defendants presented the Court with two alternatives for a bright-line rule: one broad, one narrow.[83] Under the broad version "*any* injury cognizable under § 1964(c) is necessarily suffered at the plaintiff's residence because the private cause of action remedies only economic injuries, and a plaintiff necessarily suffers that injury at its residence where the economic injury is felt."[84] Under the narrow version, "at least when the alleged injury involves *intangible* property, such as the judgment here, relevant common-law principles locate the intangible property at the plaintiff's place of residence, such that the injury is also located there."[85] On either version of the proposed rule, Smagin's claim fails for want of a domestic injury because he lives in Russia.[86]

Smagin, by contrast "defend[ed] a contextual approach that considers all case-specific facts bearing on where the injury 'arises,' not just where it is 'felt.'"[87] As applied to his claims, "Smagin argue[d] that he ha[d] stated a domestic injury because he has alleged that he was injured in his ability to enforce a California judgment, against a California resident, through racketeering acts that were largely designed and carried out in California and were targeted at California."[88]

The Court ultimately agreed with Smagin and the Ninth Circuit that "determining whether a plaintiff has alleged a domestic injury for purposes of RICO is a context-specific inquiry that turns largely on the particular facts alleged in a complaint."[89] So going forward, "courts should look to the circumstances surrounding the alleged injury to assess whether it arose in the United States. In this suit, that means looking to the nature of the alleged injury, the racketeering activity that directly caused it, and the injurious aims and effects of that activity."[90]

To the Court, this approach to analyzing domestic injury has a couple of signal virtues. First, it is consistent with *RJR Nabisco*, which had already noted that the domestic-injury requirement "does not mean that foreign plaintiffs may not sue under RICO."[91] Second, and as the *RJR Nabisco* Court also noted, "application of [the domestic-injury] rule in any given case will not always be self-evident, as disputes may arise as to whether a particular alleged injury is 'foreign' or 'domestic.'"[92] All told, then, the *RJR Nabisco* Court already staked a path "toward a case-specific inquiry that considers the particular facts surrounding the alleged injury."[93] In making a plaintiff's residence outcome determinative, the bright-line rule wholly discounts just this subtlety, "thus barring all foreign plaintiffs, exactly as *RJR Nabisco* said it was not doing."[94]

The Court also suggested that the contextual approach better reflects the genesis of the domestic-injury requirement, which sprung from an examination to the statute's "focus," which *RJR Nabisco* located in § 1964(c)'s emphasis on injuries in "business or property by reason of a

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[83] *Id.* at 543.
[84] *Id.* (emphasis in original).
[85] *Id.* (emphasis in original).
[86] *Id.*
[87] *Id.*
[88] *Id.* (internal quotations omitted).
[89] *Id.* (internal quotations and alteration omitted).
[90] *Id.* at 543–44.
[91] *Id.* at 544 (citing *RJR Nabisco, Inc.* 579 U.S. at 353).
[92] *Id.* (citing *RJR Nabisco*, 579 U.S. at 354).
[93] *Id.*
[94] *Id.*

violation of RICO's substantive provisions."[95] This means that "§ 1964(c)'s focus is on the injury, not in isolation, but as the product of racketeering activity," which demands "a case-specific analysis that looks to the circumstances surrounding the injury."[96] Thus, if the circumstances "ground the injury in the United States, such that it is clear the injury arose domestically, then the plaintiff has alleged a domestic injury."[97]

The downside of this approach is that "no set of factors can capture the relevant considerations for all cases" because "RICO covers a wide range of predicate acts and is notoriously expansive in scope."[98] As a consequence, "what is relevant in one case to assessing where the injury arose may not be pertinent in another."[99]

Applying this reasoning to the facts of the case, the Court found that "[w]hile it may be true, in some sense, that Smagin has felt his economic injury in Russia, focusing solely on that fact would miss central features of the alleged injury."[100] As we've already seen, Smagin alleged that Yegiazaryan's domestic actions injured him by thwarting his efforts to collect his massive judgment.[101] To be sure, parts of the scheme occurred abroad, but even those foreign acts "were devised, initiated, and carried out . . . through acts and communications initiated in and directed towards Los Angeles County, California, with the central purpose of frustrating enforcement of [the] California judgment."[102] But even more to the point, "the injurious effects of the racketeering activity largely manifested in California," because the judgment was obtained in California and the rights associated with the judgment exist only in California, "including the right to obtain post judgment discovery, the right to seize assets in California, and the right to seek other appropriate relief from the California District Court."[103] And because the alleged RICO scheme thwarted those rights and thereby undercut the orders of the California District Court and Smagin's collection efforts, Smagin sufficiently alleged domestic injury.[104]

Where is Injury to Property Felt?

In something of an aside, given its holding, the Court paused to consider Defendants' common law arguments, which appear to tilt in favor of a bright line test.[105] The gist of the *Smagin* defendants' argument was that, because Smagin alleged an "economic injury" or an "injury in intangible property," common law principles dictate "the situs" of such injuries, which then informs the determination of whether those injuries are foreign or domestic.[106] In support, with respect to economic injuries, Defendants pointed to the Restatement (First) of Conflict of Laws Sec. 377, from which they derived the notion that "a fraud plaintiff suffers an economic loss at the

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[95] *Id.* (quoting 18 U.S.C.A. § 1964) (internal alterations omitted).
[96] *Id.* at 545.
[97] *Id.*
[98] *Id.* (internal quotations omitted).
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.* at 545–46.
[103] *Id.* at 546.
[104] *Id.*
[105] *Id.* at 546–48.
[106] *Id.* at 546.

plaintiff's domicile."[107] As to intangible injuries, Defendants relied on the principle of *mobilia sequuntur personam*, which in their view "generally locat[es] intangible property at the domicile of its owner."[108] Under both principles, so the argument goes, Smagin's was injured at his residence.[109]

But the Court was unpersuaded that these principles were relevant, let alone determinative.[110] The Court apparently was persuaded by an amicus brief filed by Professor George Bermann.[111] In that brief, Professor Bermann opined that Defendants' argument was at once off-point and wrong.[112] First, "[r]ather than directly identify the place of injury, within the meaning of RICO, Petitioners turn[ed] to general choice-of-law principles applicable to claims sounding in tort, as if the matter were a question of determining the applicable law in a tort case, rather than determining the applicability of RICO to the case at hand."[113] Even if, however, conflicts principles were deemed relevant, Defendants misread the relevant materials.[114] This is so because, at the time that RICO was adopted in 1970, the relevant conflicts principles were unsettled.[115] Professor Bermann noted:

> [T]he First Restatement was superseded in full in 1971 by the *Restatement (Second) of Conflict of Laws* ("Second Restatement"). [T]he Second Restatement fully repudiated its predecessor, flatly rejecting the notion that the law applicable in tort is necessarily the law of the victim's domicile. This position reflects the more general view taken by the Second Restatement that the law applicable to a given claim is not reducible to the law of a single predetermined jurisdiction, as under the First Restatement, without regard to the contacts the parties and the transaction may have with other jurisdictions.
>
> Instead, the Second Restatement enshrined the principle that, for all categories of claims, the applicable law is the law of the jurisdiction having the most significant interest in the issue to be decided, and further, that the applicable law should be determined in accordance with a series of factors laid down, for each category of claim, in the Restatement itself. By following this essentially "multi-factor" approach, the Second Restatement distanced itself entirely from the First Restatement's attachment to fixed choice-of-law rules.[116]

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[107] *Id.* at 546–47 (citing Sack v. Low, 478 F. 2d 360, 366 (Cal.App.2d 1973)) ("Under the First Restatement, 'loss from fraud is deemed to be suffered where its economic impact is felt, normally the plaintiff's residence.'").
[108] *Id.* at 547.
[109] *Id.*
[110] *Id.*
[111] *Id.* at 547 note 4. The Court noted:
> Although the First Restatement was in effect in 1970, when RICO was enacted, numerous jurisdictions had by then moved away from the First Restatement's methodology and toward a "'most significant relationship'" test, which resembles "the kind of 'multi-factor' analysis the Court of Appeals conducted here." Brief for George A. Bermann as *Amicus Curiae* 15. This shift was reflected in §145 of the Restatement (Second) of Conflict of Laws, which superseded the First Restatement the following year in 1971. Thus, even assuming choice-of-law principles are relevant, petitioners' identification and application of those principles is questionable.

[112] Brief for George A. Bermann as *Amicus Curiae* at 15, *Yegiazaryan v. Smagin*, 599 U.S. 533 (2023) (No. 22-381).
[113] *Id.* at 5. Of course, civil RICO is a statutory tort. *See e.g.*, 74 AM. JUR. 2D *Torts* § 5.
[114] Brief for George A. Bermann, *supra* note 109, at 5. *See e.g.*, 74 AM. JUR. 2D *Torts* § 5.
[115] *See id.* at 6.
[116] *Id.* at 6.

In sum, Professor Bermann found Defendants' position "shockingly outdated" and based on a flawed understanding of how Restatements are intended to guide judicial decision making.[117] That is, Defendants' notion that "the prevailing choice-of-law rules that were in operation at the time of RICO's . . . enactment" were somehow incorporated into RICO ab initio is without foundation.[118] Rather, "[i]t nearly goes without saying that, if a court chooses to be guided in its decision-making by a Restatement of Conflict of Laws, it consults the Restatement in effect at the time it makes its decision."[119]

At an even more basic level, the Court found the Defendants' position unavailing.[120] The court noted that "[t]he core problem with petitioners' approach is that it is unmoored from the presumption against extraterritoriality."[121] That is, "[w]hile legal fictions regarding the situs of economic injuries and intangible property have their justifications in other areas of law, those justifications do not necessarily translate to the presumption against extraterritoriality, with its distinctive concerns for comity and discerning congressional meaning."[122]

In a final stab to Defendants' situs-infused arguments, the Court offered a *reductio ad absurdum*:

> On petitioners' primary view, a business owner who resides abroad but owns a brick-and-mortar business in the United States can-not bring a § 1964(c) suit even if an American RICO organization burns down her storefront. Perhaps aware of how odd this seems, petitioners offer a fallback rule for intangible property. That rule fares no better. It provides that if racketeering activity targets the intangible business interests of two U.S. businesses, one owned by a U.S. resident and one owned by someone living abroad, only the former business owner can bring a § 1964(c) suit. There is no evidence Congress intended to impose such a double standard, especially because doing so runs its own risks of generating international discord. These implausible consequences are strong evidence that petitioners have gone astray in assessing the focus of §1964(c) and thus, the meaning of "domestic injury" as contemplated by *RJR Nabisco*.[123]

The Problem with Facts-and-Circumstances Approaches

Defendants' final argument—one the *Yegiazaryan* dissent embraced—is that a contextual approach "is unworkable because it does not provide a bright-line rule."[124] But, in the majority's view, "[a]n approach is not unworkable . . . merely because it directs courts to consider the case-specific circumstances surrounding an injury when assessing where it arises."[125] In fact, although a bright-line rule may have some facial allure, "a look beneath the surface quickly reveals that the

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[117] *Id.* at 6–7.
[118] *Id.*
[119] *Id.*
[120] *Yegiazaryan*, 599 U.S. at 547–48.
[121] *Id.* at 547.
[122] *Id.* at 547–48.
[123] *Id.* at 548.
[124] *Id.* at 536.
[125] *Id.*

test is inconsistent with *RJR Nabisco*, the presumption against extraterritoriality, and the thrust of §1964(c) itself."[126]

Justice Alito's dissent does not go quite so far as to sponsor the defendants' proffered bright-line test.[127] Rather, it suggests that "the Court's decision resolves very little. It holds only that ascertaining the site of intangible injuries for purposes of civil RICO requires a court to consult a variety of factors and that two factors it identifies show that respondent has suffered a domestic injury."[128] Justice Alito states that the majority holding "offers virtually no guidance to lower courts, and it risks sowing confusion in our extraterritoriality precedents" and "[r]ather than take this unhelpful step, [he] would dismiss the writ of certiorari as improvidently granted."[129]

In positing that the Court should shy from cases in which it is unable to establish a "rule" or at least a set of standards easier to follow than a consideration of "facts and circumstances," Justice Alito is tacitly acknowledging the view that the Supreme Court is what Brian Leiter has called a "super-legislature"—there to make rules, not do individual justice.[130] Anthony D'Amato elaborates on the idea, contending that the Supreme Court "is no longer a court that decides cases [and] has become . . . a legislative body which uses a case simply as a serendipitous vehicle for enacting social legislation."[131] This state of affairs is "exacerbated, of course, because the Supreme Court selects its docket—it picks the cases it wants to hear . . . and picks the cases where the federal circuits conflict or where the law is up for grabs . . ."[132]

Justice Scalia thus posited that—given this situation—a "common-law, discretion-conferring approach is ill suited . . . to a legal system in which the Supreme Court can review only an insignificant proportion of . . . decided cases."[133] Thus, "when an appellate judge comes up with nothing better than a totality of the circumstances test to explain his decision, he is not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact-finding."[134] Consequentially, in his view, "once we have taken the law as far as it can go, . . . once there is nothing left to be done but to determine [something] from the totality of the circumstances," then the Court should "leave that essentially factual determination to the lower courts."[135] This chimes quite well with Justice Alito's worry that "lower courts must . . . decide whether and how today's cryptic decision binds them, rather than continuing to think through unencumbered when intangible-property injuries are the basis of a domestic application of . . . RICO."[136]

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[126] *Id.*
[127] *See id.* at 549 (Alito, J., dissenting).
[128] *Id.*
[129] *Id.*
[130] Brian Leiter, *Constitutional Law, Moral Judgment and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601, 1601-17 (2015).
[131] Anthony D'Amato, *Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought*, 85 NORTHWESTERN L. REV. 113, 116 (1990); *see* Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").
[132] Leiter, *supra* note 127, at 1608; *see also* Sup. Ct. R. 10 (setting forth "the character of the reasons the Court considers" in exercising its discretion to grant a petition for writ of certiorari).
[133] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989).
[134] *Id.* at 1180–81.
[135] *Id.* at 1186.
[136] *Yegiazaryan*, 599 U.S. at 552 (Alito, J., dissenting).

In fairness, of course, we must acknowledge that the majority did resolve a circuit split and lower courts will, going forward, have the opportunity to devise standards for evaluating injuries to intangible property in an international setting. Justice Alito would counter, though, that "it is not worth our deciding a case when we provoke so many more questions than we provide answers."[137] But those of us who have studied RICO cases for decades would remark that that always seems to be the case with RICO decisions. Perhaps what seems to be an infinite regress of answers begetting questions is a consequence of RICO's complicated structure, ambiguous language and syntax, and conflicting policy goals inherent in RICO's criminal and civil aspects.

What Next?

The Court's ruling is confined to just one aspect of the question upon which it had granted cert.: namely, whether a foreign plaintiff—because of his or her "foreignness"—can ever state a civil RICO claim.[138] That is, the Court did not engage the adjacent issues that the parties and amici joined, ranging from case-specific issues like whether the Plaintiff suffered cognizable RICO injury to more general issues like whether RICO is an appropriate vehicle for enforcing an international arbitral award. On the latter question, Professor Bermann thought "yes;" other amici and the Defendants disagreed. To Professor Bermann, RICO is not limited, as Defendants urged, "to cases involving 'criminal infiltration of legitimate enterprises . . . .'"[139] This falls in line with decades of court opinions holding that, although RICO is an anti-Mafia statute, it is not just an anti-Mafia statute.[140] But Professor Bermann is on shakier ground in opining that "[t]he statute contains no limitation on the spheres of activity to which it may be applied." Indeed, plenty of courts have found that some fraudulent and illegal conduct fall beyond RICO's ambit.[141] For the moment, let's set aside whether RICO should be available to redress acts that don't look like gangster acts and consider whether there are reasonable grounds to dispute whether RICO should be available to enforce an international arbitral award. For a couple of reasons, Professor Bermann thinks it should be.[142]

First, he frames a negative argument: i.e., nothing in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") suggests that recourse to RICO as an enforcement mechanism is improper.[143] Second, the New York Convention "establishes the right of an award creditor to enforcement of an award rendered in its favor, as well as imposing an affirmative obligation on courts of Contracting States to enforce those awards, absent a Convention defense to enforcement."[144] How this works in the US is pursuit of a judgment confirming the award,[145] followed by execution "upon the judgment against the debtor's locally

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[137] *Id.*
[138] *See id.* at 542.
[139] Brief for George A. Bermann as *Amicus Curiae, supra* note 110, at 21 (quoting Brief of Petitioner at 55, *Yegiazaryan* v. Smagin, 599 U.S. 533 (No. 22-381)).
[140] *See* Gordon, *supra* note 9; *see also* Gordon, *supra* note 12.
[141] Brief for George A. Bermann as *Amicus Curiae, supra* note 110, at 21–22.
[142] *See id.* at 22.
[143] *Id.*
[144] *Id.* (citing Convention on the Recognition and Enforcement of Foreign Arbitral Awards, [1970] 21 U.S.T. 2517, T.I.A.S. No. 6997, Art. III [*hereinafter* New York Convention]).
[145] *Id.* (citing 9 U.S.C. § 207); *Pao Tatneft v. Ukraine,* 21 F.4th 829, 835 (D.C. Cir. 2021), *cert. denied,* 143 S. Ct. 290 (2022) ("The New York Convention in general requires American courts to enforce international arbitral awards.").

situated assets, as it would with any domestic judgment."[146] Although Professor Bermann does not pursue the latter point, it does call the question (which we will take up later) whether RICO would be a proper enforcement mechanism for a *domestic* arbitral award.

Despite the New York Convention being mostly concerned with recognition and enforcement of international arbitral awards, "it also indirectly addresses execution of the judgments by which awards are enforced . . ." by requiring "contracting States to enforce awards in accordance with their domestic rules of procedure."[147]

There is no debate that judgment execution thus forms a critical part of the award enforcement process and that signatory States are authorized to deploy their domestic rules in enforcing international awards.[148] But when Professor Bermann opined that, "[i]n the United States, RICO is precisely one such means of redress where, as here, the award (and judgment) debtor is alleged to have engaged in activities constituting a RICO violation in an effort to defeat effective enforcement," that sentence ends in a period, not a citation. My point here is that it's an open question—not settled law—whether RICO can be used in aid of execution on a judgment confirming an international arbitral award.

If we assume that US law authorizes RICO as a judgment enforcement mechanism, Professor Bermann's conclusion that, "[a]lthough RICO was certainly not established for the specific purpose of ensuring that arbitral awards are enforced and judgments of enforcement executed, if the requirements of the RICO statute are satisfied, a civil RICO claim represents one such means of enforcement under US law within the meaning of Article VII" and does not exhaust

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[146] *Id.* (citing Fed. R. Civ. P. 69(a)) (providing for enforcement of monetary judgments by writ of execution); *Ministry of Def. & Support for the Armed Forces of the Islamic Rep. of Iran v. Cubic Def. Sys. Inc.*, 665 F.3d 1091, 1094 n.1 (9th Cir. 2011) (once a foreign arbitration award is reduced to judgment, it "has the same force and effect of a judgment in a civil action and may be enforced by the means available to enforce any other judgment").

[147] *Id.* (citing New York Convention, Art. III ("Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . . .")); *CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58, 75 (2d Cir. 2017) (explaining that Article III of the New York Convention leaves the availability of "a theory of alter ego liability, or any other legal principle concerning the enforcement of awards or judgments" to "the law of the enforcing jurisdiction").

[148] *Id.* ("Article VII of the Convention expressly provides that a party seeking enforcement of a Convention award may avail itself, alongside the Convention, of any remedy in aid of enforcement of an award available under domestic law."); New York Convention, art. VII ("The provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."). The New York Convention thus invites award creditors to make use, in addition to the Convention itself, of any other means available under the law of the place of enforcement to effectuate a foreign arbitral award. Comm'ns Import Export S.A. v. Congo, 757 F.3d 321, 328 (D.C. Cir. 2014) ("the underlying rationale of Article VII is that the 'Convention is aimed at facilitating recognition and enforcement of foreign arbitral awards; if domestic law or other treaties make recognition and enforcement easier, that regime can be relied upon.'") (quoting Albert Jan van den Berg, *The New York Convention of 1958: An Overview, in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS 39, 66 (Emmanuel Gaillard & Domenico Di Pietro, eds., 2008)); *In re Arb. of Chromalloy Aeroservs., a Div. of Chromalloy Gas Turbine Corp. v. Arab Rep. of Egypt*, 939 F. Supp. 907, 910 (D.D.C. 1996) ("[U]nder the Convention, [the award creditor] maintains all rights to the enforcement of this Arbitral Award that it would have in the absence of the Convention."); *Photopaint Tech., LLC v. Smartlens Corp.*, 335 F.3d 152, 159 (2d Cir. 2003) (explaining that "an action at law offers an alternative remedy to enforce an arbitral award").

the related lines of argument.[149] In particular, questions remain with respect to RICO's place in the international order and the related comity concerns espoused in *RJR Nabisco*. These questions animate the amicus brief of several private international law scholars.

RJR Nabisco noted the presumption against extraterritoriality is rooted in the "potential for international friction . . . by merely applying U.S. substantive law to that foreign conduct."[150] As examples, the Court held up antitrust and securities laws: "[W]e have observed that [t]he application . . . of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy in other nations, even when those nations agree with U.S. substantive law on such things as banning price fixing."[151] The principal worry is that "to apply [U.S.] remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody."[152] More specifically, "[m]ost foreign countries proscribe securities fraud" but "have made very different choices with respect to the best way to implement that proscription," such as "prefer[ring] 'state actions, not private ones' for the enforcement of law."[153] The same may be said of RICO: "Allowing recovery for foreign injuries in a civil RICO action, including treble damages, presents the same danger of international friction."[154] It is against this backdrop that the International Scholars opined.[155]

According to the International Scholars, "[i]n the context of foreign arbitral award enforcement, a private action under [RICO] is fundamentally different from what the laws of the UK and EU countries allow."[156] That is,

> [w]hen a judgment or award debtor dissipates their assets to obstruct the creditor's right to payment, there is no private cause of action akin to RICO in the UK or EU countries, and there is no possibility of treble damages. The closest analogues in English law are the tort law causes of action for "unlawful means conspiracy" and the so-called "*Marex* tort." Damages under both causes of action are strictly compensatory in nature. In addition, if

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[149] In something of a throw-away, Defendants complained that Smagin was improperly seeking multi-jurisdictional enforcement, specifically in Liechtenstein and the United States. Professor Bermann argued:

> However, the New York Convention has never been understood to bar a creditor from seeking enforcement in multiple jurisdictions, provided double recovery is not awarded. *E.g. Salini Costruttori S.P. A. v. Kingdom of Morocco,* 233 F. Supp. 3d 190, 201 (D.D.C. 2017) ("The New York Convention scheme for enforcement of an arbitral award explicitly allows for confirmation of an award in multiple jurisdictions."). No support can be found for the contrary proposition. A creditor is not required to confine its enforcement efforts under the Convention to a single jurisdiction, and no Convention State can escape its enforcement obligations on the ground that enforcement has been sought, and possibly achieved, elsewhere, again assuming no double recovery.

Brief for George A. Bermann as *Amicus Curiae, supra* note 110, at 25–26.

[150] *RJR Nabisco, Inc.,* 579 U.S. at 347.

[151] *Id.* (internal quotations omitted).

[152] *Id.* (internal quotations omitted).

[153] *Id.* at 348 (quoting Brief for Rep. of Fr. as Amicus Curiae at 20 *Morrison*, 561 U.S. 247 (2010) (No. 08-1191).); *see id.* ("Even when foreign countries permit private rights of action for securities fraud, they often have different schemes" for litigating them and "may approve of different measures of damages").

[154] *Id.*

[155] *See* Brief of Private Int'l L. Scholars as Amici Curiae Supporting Petitioner at 2, *Yegiazaryan v. Smagin*, 599 U.S. 533 (2023) (No. 22-381).

[156] *Id.*

> called upon to enforce a RICO multiple-damages judgment, courts in the UK and EU countries would generally decline to do so as contrary to public policy—a public policy evident in a broad range of substantive laws, ranging from recognition of foreign judgments to competition to choice of law.[157]

So viewed, a court facing an extraterritoriality issue must employ the "canon of statutory construction known as 'prescriptive comity,' [which] 'cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.'"[158] This doctrine smooths the way when—as is often the case—nations agree that certain conduct (e.g., price fixing or securities fraud) should be unlawful yet "disagree dramatically about appropriate remedies."[159] The issue becomes particularly pointed when a US statutory scheme authorizes treble or punitive damages.[160]

To the International Scholars, "the use of Section 1964(c) in the context of arbitral award enforcement—including in the context of intentional evasion by the award debtor—contrasts sharply with the approaches of other nations."[161] In especial, it is the automatic treble damages aspect of 1964(c) that triggers concern, principally (contra Professor Bermann) under the New York Convention because most European jurisdictions "do *not* provide a private cause of action akin to RICO, or any other mechanism which leads to treble damages."[162] Competing public policies lurk behind the US-UK/EU divide with respect to damages enhancements. First, the UK/EU states are hostile to non-compensatory remedies under the belief that "the aims of punishment and deterrence underlying treble and punitive damages are proper to criminal law rather than to civil law, as they interfere with the state's monopoly on penalization."[163] Second, the aim of private enforcement is and should be limited to compensation. [164]

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[157] *Id.* at 2–3.
[158] *Id.* at 3 (quoting *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164–65 (2004)).
[159] *Id.* (quoting *Empagran*, 542 U.S. at 167 and citing *RJR Nabisco*, 579 U.S. at 347) (internal quotations omitted).
[160] *Id.* (citing *Empagran*, 542 U.S. at 167–68 (citing amicus briefs submitted by Germany, Austria, Japan, and Canada)); *RJR Nabisco*, 579 U.S. at 346–47, 347 n.9; *Hartford Fire Ins. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).
[161] Brief of Private Int'l L. Scholars as Amici Curiae Supporting Petitioner, *supra* note 153, at 4.
[162] *Id.* (discussing *Lakatamia Shipping Co. v. Su* [2021] EWHC 1907 (Comm)).
[163] *Id.* (citing Bundesgerichtshof [BGH] [Federal Court of Justice] June 4, 1992, 118 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 312 (Ger.)) (holding that it is a fundamental legal principle of German law to award damages with the sole objective of reimbursing what the victim has lost).
[164] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014 O.J. (L 349) art. 3(2) ("[f]ull compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed" and expressly excluding "overcompensation, whether by means of punitive, multiple or other types of damages"); *See generally* Rome II Regulation 161 (choice-of-law instrument for the determination of the law applicable to noncontractual obligations, including international torts) These sentiments are expressed in a variety of other contexts, ranging from choice-of-law instruments to national blocking statutes; *Id.* (citing Rome II Regulation 164 (choice-of-law instrument for the determination of the law applicable to noncontractual obligations, including international torts)); British Protection of Trading Interests Act of 1980, ch. 11 ("direct[ing] British courts not to enforce treble damage awards against British firms"); *Swiss Life v. Kraus*, EWHC (QB) (2015) (describing history of and policy against multiple damages) UK courts have applied this policy to judgments issued to private parties under RICO; *Lewis v. Eliades* WLR 692 (2003) (severing trebled and compensatory portions of RICO

The Court dodged the concerns over the comity aspects of the case, probably because comity was not fully implicated on the facts. That is, it is one thing to subject a foreign citizen to punitive US law for acts taken abroad but quite another to grant a foreign resident access to the US legal regime to redress injury caused by acts taken in the US by a US resident. All this is to say that a RICO suit to enforce an international arbitral award with only tenuous connections to the US may present a fresh opportunity to challenge this enforcement tactic.

With respect to the ultimate success of the suit, we must first recall how circumscribed the Supreme Court's opinion is. It declined the invitation to venture beyond the question of whether Smagin—as a foreign resident—had standing to sue.[165] As the case stands, Smagin will still have to establish all aspects of his substantive RICO claims, including, for example, the existence and continuity of a cognizable RICO enterprise and the various "nexus" aspects needed to prove a pattern of racketeering, as well as other aspects of § 1964(c) standing not taken up by the Court like third-party fraud. In this latter connection, it bears mentioning that, at oral argument, Justice Jackson drew a distinction between injury to a judgment itself (the property) and "conduct to injure or interfere with the execution of the judgment."[166] She appeared to suggest that the two types of injury converged on the facts alleged, but it is a point worth further exploration. Smagin received a judgment for $92 million, an amount that still stands. So what is the nature of the injury to the property itself, given that "a showing of injury requires proof of concrete financial loss, and not mere injury to a valuable intangible property interest[?]"[167] Perhaps one avenue would be to offer expert testimony sufficient to show that there is a market for buying and selling judgments and that Smagin's judgment, which is saddled with collection difficulties, is worth only some fraction of its face value.[168] In any event, the case is intriguing for a host of reasons and will doubt offer copious opportunities for commentary as it progresses.

Conclusion

RJR Nabisco mandated that, to establish standing, a civil RICO plaintiff allege and prove that it suffered a "domestic" injury.[169] But that decision left open what would qualify as a domestic injury when a case involves some foreign parties and acts.[170]

In *Smagin*, the Court partially closed the loop in holding that a civil RICO "plaintiff has alleged a domestic injury for purposes of §1964(c) when the circumstances surrounding the injury indicate it arose in the United States."[171] And because Smagin alleged that he was (1) "injured in California because his ability to enforce a California judgment in California against a California

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judgment); Service Temps Inc. v. MacLeod CSOH 162 (2013) (declining to enforce Texas judgment with compensatory and enhanced aspects).

[165] *See Yegiazaryan*, 599 U.S. at 533.

[166] Transcript of Oral Argument at 58, *Yegiazaryan v. Smagin*, 599 U.S. 533 (2023) (No. 22-381).

[167] Gomez v. Wells Fargo Bank, N.A., 676 F.3d 665, 660 (8th Cir. 2012) (quoting Regions Bank v. J.R. Oil Co., 387 F.3d 721, 728 (8th Cir. 2004)).

[168] *The Ultimate Guide to Have Someone Buy Your Judgmen*t, HALF DOME CAPITAL JUDGMENT COLLECTION (last visited Sept. 12, 2023), https://californiajudgments.com/buy-judgment/ (last visited Sept. 12, 2023), [https://perma.cc/7AZC-33R7].

[169] *RJR Nabisco, Inc.*, 579 U.S. at 346.

[170] *Id.* at 325.

[171] *Yegiazaryan*, 599 U.S. at 536.

resident"; and (2) that "was impaired by racketeering activity that largely occurred in or was directed from and targeted at California," he then stated a domestic injury.[172]

[172] *Id.* at 545–46.

Challenges of Merger Control in the GGC

Talal Al Awadhi

Abstract

This research study investigated the challenges confronting Gulf Corporate Council (GCC) states in merger control. For the purpose of this research, the term merger control is used to refer to the law and regulations on how anticompetitive mergers should be identified, controlled and/or prevented. This research study was carried out using a secondary data analysis. The secondary data was collected from the literature. Research findings indicate that mergers in general are underdeveloped in GCC states. As a result, the law on merger control has lagged severely behind developed states. Research findings also indicate that there are four main challenges to merger control in GCC states. The four challenges are underdevelopment of mergers and merger control laws; Shariah compliance, restrictions on foreign ownership; and the prominence of family-owned firms in the GCC. The researcher also observed that the lack of law and harmonization of the law on mergers in GCC states is also a challenge for merger control. The researcher concluded that the primary problem for merger control in GCC states is the lack of mergers in the region. An improvement in the key areas (underdevelopment of mergers/merger control, Shariah compliance, restrictions on foreign ownership, and prominence of family-owned firms, and lack of harmony of merger laws) will help in the development of mergers and merger control in GCC states.

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Background and Introduction to the Study

Economic theories suggest that competition is the main method for ensuing market success and economic progress.[1] Competition is the rivalry between two or more parties.[2] The rivalry is aimed at outperforming one another or performing at a specific standard of production.[3] For competition to efficiently regulate the market it is required to be fair. What this means is that fair

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[1] O. Melnyk & I. Yaskal, *Theoretical Approaches to Concept of 'Competition' and 'Competitiveness'*, 2(2) ECOFORUM 1, 8 (2013).

[2] *Id.*

[3] E. Listra, *The Concept of Competition and the Objectives of Competitors*, 213 SOC. & BEHAVIORAL SCI.S, 1, 26 (2015).

competition involves banning activities that impede or restrain competition in a free, fair, and open market.[4]

Mergers which involve the conglomeration of two or more businesses can be a threat to fair competition if mergers are not controlled. Imagine a merger between United Airlines, Delta Air Lines, and American Airlines, who then offer lower-than-average prices for airline tickets. If merger control is weak or non-existent, new firms will be unlikely to enter the. Moreover, existing airlines would have difficulty competing with the combined airline.

Customers would also suffer in the non-competitive airline sector because there would be fewer choices, higher prices, and perhaps lower quality.[5] At the same time, mergers can provide consumers with greater efficiency, higher quality, and better prices.[6] Therefore, controlling mergers is important for achieving an outcome that is fair and conductive to open, free, and fair competitive markets.

Merger control laws are established by antimonopoly and fair competition laws. However, identifying and supporting beneficial mergers that do not restrain trade can be challenging. In the United States (US), the Federal Trade Commission (FTC) noted that identifying a merger that is beneficial and not controversial or anticompetitive takes a lot of time and resources. The pre-approval phase involves "a process that can take thousands of hours of investigation and economic analysis."[7] For example, when one large office supply business in the US attempted to buy out its most significant competition thereby creating a monopoly the FTC intervened, taking the matter to court and stopping the sale.[8]

When the FTC is required to go to court to stop an anticompetitive merger, questions about the effectiveness of merger control arise. If there are challenges for First World countries that are the main initiators of merger control, the challenges confronting developing countries are expected to be worse. Therefore, this research study takes on merger control challenges in developing countries. The country studied is the Kingdom of Saudi Arabia (Saudi Arabia). The study is carried out using qualitative secondary data analysis.

To identify and describe the challenges of merger control confronting GCC states, this study will delve into the history and development of merger control. By taking this approach, this study will be able to put the state of merger control in GCC countries in its proper perspective. This research will therefore be divided into two comprehensive chapters. The first chapter provides rich details about the history of merger control and will include the history of merger control in GCC states. The second chapter will discuss GCC states, the types of mergers, and merger controls in the context of types of mergers, which will reveal the effects of mergers. The study will also include an introduction and conclusion. The introduction to this study introduces the subject and provides some background to the study, the organization of the study, and the aims, objectives, research questions, significance of the study, the research problem, and the research methodology.

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[4] E. Buttigieg, *Competition Law: Safeguarding the Consumer Interest. A Comparative Analysis of US Antitrust Law and EC Competition Law*, Austin, TX: Wolters Kluwer, 2009, p. 4.

[5] Federal Trade Commission. "Competition Counts: How Consumers Win and Businesses Compete." (n.d.). https://www.ftc.gov/sites/default/files/attachments/competition-counts/zgen01.pdf (13 December 2020).

[6] *Id.*

[7] *Supra* note 4.

[8] *Id.*

Significance of the Study

Merger control is important for maintaining and promoting free, fair, and open markets so that consumers are offered better quality and quantity of goods and services offered to consumers are high.[9] When mergers corner the market and take advantage of market dominance, cartels and monopolies can be developed which are counterproductive to free trade and fair competition.

When we improve our understanding of what mergers are and how mergers function to distort free and fair competition, we can begin to develop more effective ways of identifying and controlling the formation of anticompetitive mergers. More importantly, studies such as this one can help to shed light on the main challenges confronting developing countries. Developing countries benefit from fair competition because it helps them to strengthen and maintain free and fair markets which run more efficiently. If mergers are uncontrolled in developing countries, they risk losing their current economic status and regressing, rather than progressing, economically.

Statement of the Problem

A literature review suggested that the bulk of the research on merger controls and competition laws in general is focused on First World countries such as the US and the European Union (EU). There is hardly any research at all on the Gulf Council Cooperation (GCC) states either as a regional group or as individual countries. Therefore, research on merger control in GCC states is long overdue. This research will close this gap in the literature by focusing on the GCC's challenges in the control of mergers.

A literature review further revealed that competition laws, including merger control, are in their infancy in GCC states. While First World countries like the US implemented merger control laws dating back to 1890, GCC states only saw their first 2004 when Saudi Arabia passed a competition protection statute. However, the mere fact that GCC states have finally enacted merger control laws does not mean that they are effective. This study examines these legislative efforts and determines whether they are effectively controlling mergers and what steps can be taken to strengthen merger control.

Objectives

The objectives of this research are to: (1) identify the importance of merger control in general; (2) to shed some light on the history and development of merger control with an emphasis on the GCC States; (3) to identify the current status of merger control in the GCC; and (4) to identity the challenges of merger control in GCC States.

Research Questions

To achieve the research's aim and objectives the following research questions are investigated: (1) what is merger control; (2) why are mergers controlled; (3) how are mergers controlled in the GCC; (4) is merger control effective in the GCC; and (5) what steps can be taken in the GCC to improve merger control?

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[9] R. S. Khemani, *Objectives of Competition Policy*, Competition Law and Policy Committee of the Organisation for Economic Co-Operation and Development, 1 (Dec. 2020).

Research Methodology

This research is carried out using qualitative and secondary data analysis. Since the middle of the 1990s, the use of secondary data for research has become increasingly popular.[10] Advances in communication technology have enabled the storage and availability of lots of data for researchers.[11] As Johnston points out, "in a time where vast amounts of data are being collected and archived by researchers all over the world, the practicality of utilizing existing data for research is becoming more prevalent."[12]

For the purpose of this research, secondary data is data that "was collected by someone else for another primary purpose."[13] Therefore, data contained in previous research on the merger control challenges in the GCC will be used in this study.[14]

Secondary data analysis is the only practical option for this research study. A literature review revealed that there is no unifying or single law in the GCC for merger control. Each state is responsible for only its own merger control. Therefore, collecting empirical data from six different states is impractical due to the time and resources necessary for doing so. Moreover, collecting data from six different states during the current global pandemic is also impractical and virtually impossible.

Besides, data on merger control in the GCC states is a matter of public record and is freely available to researchers. International organizations such as the United Nations (UN) and the Organization for Economic Co-operation and Development (OECD) have the capabilities and resources for collecting data from GCC states on their challenges for merger control.

The research study will be carried out using a socio-legal research approach. The socio-legal research approach involves studying the law in question and its impact as a means of determining whether the aim of the law studied has been or can be achieved. Therefore, the study involves studying and observing the law and facts, and coming to conclusions about whether there are identifiable patterns.[15]

Chapter 1: History of Merger Control

1. Introduction

Chapter one of this research study explores the history and origins of merger control. The purpose of this chapter is to ensure that the significance of merger control and how it developed over time is understood. In order to understand the status of merger control in GCC states, it is necessary to know where GCC states stand in relation to other states, especially the First World states where merger control originated.

Historically, merger control was aimed at regulating competition and was implemented through legislation, but typically placed in the hands of state agents for enforcement purposes.[16] Merger and acquisition control is an important concern for economists because how mergers are regulated directly impacts the country's economy. Therefore, governments will typically develop

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[10] Janet Heaton, *Secondary Analysis of Qualitative Data: An Overview.*, 33 HIST. SOC. RSCH. 33, 33 (2008).
[11] *Id.*
[12] Melissa P. Johnston, *Secondary Data Analysis: A Method of Which the Time Has Come*, 3 Qualitative & Quantitative Methods in *Libraries*, 619, 619 (2014).
[13] *Id.*
[14] *Id.*
[15] S. Blandy, *Socio-Legal Approaches to Property law Research*, 3 PROP. L. REV., X, 166 (2014).
[16] Rachid A. Khan & Gareth Davies, *Merger Control, and the Rule of Law*, 2 ERASMUS L. REV. 25, 26 (2009).

merger control laws that improve the state of the economy and enhance businesses' performance, all while balancing competitive priorities.[17]

In the US, the first merger control law was the Sherman Act which was passed by the US congress in 1890.[18] The Sherman Act was followed by the Federal Trade Commission Act 1914 and the Clayton Act 1914. The three statutes were subsequently amended but remain the three antitrust laws controlling mergers in the US.[19]

By comparison, the GCC has taken up merger control with laws dating back as far as thirty years.[20] The three GCC states to implement antitrust laws which include merger control were Saudi Arabia, Qatar, and Kuwait.[21] These laws were implemented in 2004 and 2007.[22] The United Arab Emirates and Oman were next with antitrust laws implemented in 2012 and 2014. Bahrain was last with antitrust laws combining the protection of consumers with competition laws.[23]

Objectives of Merger Control

The objectives of merger control can be established by referring to the purpose of statutes for controlling mergers. For example, the Sherman Act was implemented as a result of concerns about businesses coming together and threatening competition.[24] The Clayton Act went a bit further and stated that mergers are prohibited where "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."[25] In other words, merger control arose out of a need to prevent monopolies, or other firms that were large enough to somehow stifle competition, from forming.

The Sherman Act originated from the creation of what is described as trusts.[26] Trusts are amalgamations of firms under one management construct.[27] In this regard, business firms "combine their interests into a single legal entity" otherwise known as "the trust."[28] It is easy to understand how a trust can led to the creation of monopolies and be anticompetitive. The Sherman Act's purpose was therefore intended to prevent these trusts or anticompetitive transactions from forming.

In 1882, John Rockefeller's Standard Oil Co. formed a trust to consolidate oil refineries enabling the control of pricing and supplies while bypassing taxes and company law.[29] These kinds

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[17] Radu Ciobanu, *Mergers and Acquisitions: Does the Legal Origin Matter?*, 32 PROCEDIA ECON. & FIN. at 1236 (2015).

[18] C. Paul Rogers, *A Concise History of Corporate Mergers, and the Antitrust Laws in the United States*, 24 NAT'L L. SCH. INDIA REV. at 11 (2013).

[19] *Id.* at 11.

[20] Ashok Dubey & Christopher Kummer, *Analysis of Mergers and Acquisitions in Gulf Cooperation Council Countries, Since Year 2000 – Impact and Imperatives*, 1 ARABIAN J. BUS. MGMT. REV. 1,1 (2016).

[21] Maria Casoria, *Competition Law in the GCC Countries: The Tale of a Blurry Enforcement*. 16 CHINESE BUS. REV. 141, 143 (2017).

[22] Economic and Social Commission for Western Asia, *Competition and Regulation in the Arab Region*, 13, U.N. Doc. E/ESCWA/EDID/2015/5 (Dec. 8, 2015).

[23] *Id.*

[24] Kathryn Fugina, *Merger Control Review in the United States, and the European Union: Working towards Conflict Resolution*, 26(2) NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS at 472, (2006)

[25] *Id.* at 474.

[26] Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective*, HARVARD BUSINESS SCHOOL WORKING PAPER 19-110, 1-2 (2020) https://www.hbs.edu/faculty/Publication%20Files/19-110_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf

[27] *Id.*

[28] *Id.* at 2.

[29] *Id.* at 2.

of trusts sprung up all over the US to the extent that state and federal authority passed antitrust laws and regulations in response during the latter part of the 1880s and into the 20th century.[30] It is important to note that mergers are not prohibited, but rather are regulated to prevent the formation of monopolies and anticompetitive business entities. As mergers changed to reflect the changes in modern business environments, laws were constructed around these changes to ensure that monopolies and anticompetitive entities did not slip through unabated.

In the GCC states, history reveals that from 1999 to 2004, mergers and acquisitions grew modestly.[31] However, in 2005 there was a noticeable increase in mergers. From there on, mergers increased significantly each year, and in 2008, they increased to an all-time high. As elsewhere, mergers decreased in 2009 due to the global financial crisis, but only slightly. The phenomenal trends in growth fluctuated in the ensuing years but were far more significant than they were during the period from 1999 to 2004.[32]

There is very little coverage of GCC mergers in the literature.[33] The literature generally focuses on the EU and the US, where there is a comprehensive history of mergers and acquisitions.[34] Compared to the US, the history of merger control in the GCC states is in its infancy.[35] The merger control laws which are typically found in competition and antimonopoly laws are left to each country in the GCC because there is no regional consolidation of these laws.[36]

There are six states in the GCC. There is Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates (UAE). Bahrain and Oman have no individual competition law. Kuwait's competition law was implemented in 2007, Saudi Arabia's law was implemented in 2004, Qatar's competition law was implemented in 2006, and the UAE's law was implemented in 2012.[37]

The International Labour Organization published a report in which it revealed that Bahrain has in fact implemented Law No. 31, concerning competition promotion and protection.[38] Oman also implemented a competition law in 2014 which came into effect in 2015.[39] The new law is entitled Competition Protection and Monopoly Prevention Law.[40] Thus, the earliest merger control laws in the GCC is the 2004 law promulgated by Saudi Arabia with the latest occurring in 2018 by Bahrain. It is therefore possible to state that merger control has a very recent history in the GCC states.

Merger Control Updates in GCC States

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[30] *Id.*

[31] Ashok Dubey & Christopher Kummer, *Analysis of Mergers and Acquisition in Gulf Cooperation Council Countries since Year 2000 – Impact and Imperatives*, S1, ARABIAN J. OF BUS. & MGMT REV., 2 (2016).

[32] *Id.*

[33] Said Gattoufi et al., *Assessment of Mergers and Acquisitions in GCC Banking*, 4(4) INT'L J. ACCT. & FIN., 358, 362 (2014).

[34] *Id.*

[35] *Id.* at 362.

[36] *Id.*

[37] United Nations, *Competition and Regulation in the Arab Region*, ECON. GOVERNANCE SERIES (2015).

[38] International Labour Organization. *NATLEX Database of National Labour, Social Security and Related Human Rights Legislation: Bahrain.* (Dec. 11, 2020) http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=109197&p_count=4&p_classification=01.

[39] Law No. 31 of 2018 concerning Competition Promotion and Protection, INT'L LAB. ORG. NATLEX DATABASE OF NAT'L LAB., SOC. SEC. & RELATED HUM. RTS. LEGIS., https://natlex.ilo.org/dyn/natlex2/r/natlex/fe/home (complete country field: Bahrain, subjects' field: Economic and social policy, and keyword field: "Law No. 31") (accessed 11 December 2020).

[40] Royal Decree 67/2014 Promulgating Competition Protection and Monopoly Prevention Law (issued 30 Nov. 2014, published 7 Dec. 2014) OG 1081 (Oman).

Saudi Arabia's competition laws have moved forward in 2019 with the passage of a new competition law. The new law is aimed at both protecting fair competition and preventing monopolies. The new law prohibits establishments that impede competition and regulates concentrated economic arrangements.[41] In other words, the new law in Saudi Arabia increased restrictions on mergers.

Oman's first specific law on competition and mergers appeared in its 2017 Competition Law. This law controls mergers by prohibiting arrangements between companies that would "result in abuse of market dominance."[42] Oman introduced its inaugural competition and merger regulations with the 2017 Competition Law, which aims to control mergers by preventing company agreements that could lead to market dominance abuse. Meanwhile, Kuwait has updated its competition regulations, initially established in 2007, with subsequent laws. These include the Law No. 7 of 2010, which established the Capital Markets Authority and regulated securities activities, and the Law No. 13 of 2016, which organized commercial agencies. These laws build upon and refine the original 2007 Protection of Competition Law to address evolving market needs[43]

The evolution of competition law in the GCC began with Saudi Arabia's legislation in 2004, setting a regulatory precedent in the region. Qatar was one of the earliest adopters, enacting its competition law in 2006 and amending it with additional regulations in 2008. Kuwait followed, updating its 2007 Protection of Competition Law with Law No. 7 of 2010 for the Establishment of the Capital Markets Authority and the regulation of securities activities, along with Law No. 13 of 2016 concerning the Organization of Commercial Agencies. The UAE introduced its singular competition law, Federal Law No. 4 of 2012, on the Regulation of Competition. Oman legislated its competition and merger law in 2017, the Competition Law, which prohibits company agreements that could lead to market dominance abuse. Finally, Bahrain enacted its anti-competition law in 2017, referred to as the Law for the Encouragement and Protection of Competition, which came into effect in 2018 and aims to limit and ban activities that compromise fair competition.[44]

The introduction of competition regulation in the GCC commenced with Saudi Arabia in 2004, influenced by its economic stature and regional hegemony, which likely served as a model for its neighbors. Qatar was next to enact competition law in 2006, which was further amended in 2008. Kuwait updated its competition framework with Law No. 7 of 2010 and Law No. 13 of 2016, enhancing its 2007 Protection of Competition Law. The UAE's response came in 2012 with Federal Law No. 4 on the Regulation of Competition. Oman's first competition and merger legislation, the Competition Law, was established in 2017, aimed at preventing agreements leading to market dominance. Bahrain followed closely with its anti-competition law passed in 2017 and effective in 2018, known as the Law for the Encouragement and Protection of Competition. Collectively, these legislative actions reflect a region-wide commitment to fostering fair competition and regulating mergers.[45]

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[41] *See* Competition Law, No. M/75, arts. 5 & 7 (2019) (Saudi Arabia).

[42] Curtis, Mallet-Prevost, Colt & Mosie LLP. *Anti-Monopoly and Competition Law in Oman*, OMAN LAW BLOG. (Sept.18, 2017, 7:30 AM). https://omanlawblog.curtis.com/2017/09/anti-monopoly-and-competition-law-in.html.

[43] *See* Fawaz KT Alkhateeb of Taher Group Law Firm. *Doing Business in Kuwait: Ove*rview, THOMSON REUTERS PRACTICAL LAW (2012) https://uk.practicallaw.thomsonreuters.com/w-012-8167?transitionType=Default&contextData=(sc.Default)&firstPage=true.

[44] *See* Federal Law No. 4 of 2012 on the Regulation of Competition (UAE).

[45] *See* McKinsey & Company. *Saudi Arabia Beyond Oil: The Investment and Productivity Transformation*, 2015 MCKINSEY GLOBAL INST. https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Employment%20and%20Growth/Moving%20

1.1.1 Origins of Merger Control

The EU's merger control system originated out of the 1957 Treaty Establishing the European Economic Community.[46] Mergers were covered by Articles 85 and 86. Article 85 prohibits:

> . . . any agreements between enterprises, and decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction, or distortion of competition within the Common Market.[47]

In other words, mergers are banned if those mergers result in competitive advantages being created. Therefore, a merger which may corner a market would not be accepted by virtue of Article 85 of the Treaty Establishing the European Economic Community.

> Still, Article 86 goes on to add that:
> . . . to the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market, or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited.[48]

Thus, if a merger is formed and the merger takes advantage of its dominant position, it will be perceived as inconsistent with the Common Market and will therefore be banned.

In 1990 however, the EU introduced a specific merger control legislation via the Merger Regulation.[49] According to Levy, the merger regulation is predicated on three principles. The elimination of internal barriers within the EU has led to significant corporate restructurings, particularly through mergers and acquisitions."[50]

However, in the UK, the doctrine of restraint of trade was in place for several centuries.[51] The doctrine of restraint of trade was a common law policy that can be traced back to 1414 in *Dyer's Case* which has been described as the "founding precedent."[52] It was not until after the Second World War that the UK introduced a modern statute that regulated mergers and controlled them through competition law.[53]

It would therefore appear that merger control originated under common law and countries that follow the common law system. Civil law countries can trace the origins of merger control back to the 19th century and this would include many of the states that are currently members of

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Saudi%20Arabias%20economy%20beyond%20oil/MGI%20Saudi%20Arabia_Executive%20summary_December%202015.pdf (12 December 2020).

[46] Ethan Schwartz, *Politics as Usual: The History of European Community Merger Control*, 18 YALE J. INT'L L., 610 (1993).

[47] *Id.* at 610. *See also*, *Treaty Establishing the European Economic Community*, (1957), art. 85.

[48] Schwartz, *supra* note 53 at 610.

[49] Nicholas Levy, *EU Merger Control: From Birth to Adolescence*, 26(2) WORLD COMPETITION, 195 (2003).

[50] *Id.* at 195.

[51] Andrew Scott, *The Evolution of Competition Law, and Policy in the United Kingdom*, (2009). London School of Economics, Law, Society and Economy Working Papers, 9, 4. http://eprints.lse.ac.uk/24564/1/WPS2009-09_Scott.pdf

[52] *Id.* at 4.

[53] *Id.* at 2.

the EU.[54] Colonization placed both civil law and common law in a sphere of influence in GCC countries in the past.

Most states in the Middle East and North Africa have developed competition laws as a means of entering the global economy.[55] These countries wanted to escape the gap between them and other developing countries in international trade.[56] The GCC introduced a draft law called the Standard GCC Competition and Antimonopoly Law.[57] It is proposed to function as an expansion of the GCC's Unified Commercial Policy Law. However, not all GCC states are on board with this law, and it is under review with the aim of obtaining approval from all GCC states.[58]

1.2.2 Council Regulation

While the GCC has developed a draft antimonopoly law which is intended to control mergers, the law has yet to be implemented and adopted. GCC states, however, have developed individual laws.[59] Therefore, at this point in time, there is no formal Council regulation of mergers in the GCC.[60] Each state must depend on its own laws for controlling mergers.

At this time, GCC member states have been pressured by international organizations with whom they have membership, such as the World Trade Organization (WTO) to implement and enforce competition laws.[61] While the GCC state competition laws tend to follow the standard language of antitrust laws, enforcement remains an issue throughout the GCC region. It also looks as though the formation of a regional fair competition code for GCC states will not be completed within the foreseeable future. For the time being, the GCC is more concerned about "economic integration."[62]

The law applicable to GCC states, and companies operating within GCC states, is the GCC 1981 Economic Agreement.[63] However, the 1981 Economic Agreement does not include provisions for regulating mergers and competition law in general.[64] Still, the enforcement of competition laws in the GCC will have to overcome a number of challenges, especially the English language barrier and the lack of a National Competition Authority for collecting and applying information appropriately.[65]

1.1.3 Community Jurisdiction

The Ministerial Council is comprised of ministers from member states. The Ministerial Council meets every third month. Extraordinary meetings can also be held depending on invitations from a member state. As with the Supreme Council, a meeting is only valid if one-third of the members are present. The Ministerial Council's powers are more specific than the powers

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[54] Ciobanu, *supra* note 17 at 1237.
[55] Economic Governance Series, *Competition and Regulation in the Arab Region*, 23, U.N. Doc. E/ESCWA/EDID/2015/5 (Jan. 2015).
[56] *Id.*
[57] *Id.*
[58] *Id.* at 65.
[59] Eamon Holley, *Competition Law Developments Across the Arabian Gulf, in* Antitrust Matters 10 (Apr. 2020).
[60] *Id.*
[61] Nora Memeti, *Evolving Dynamics in Competition Law: A GCC Perspective*, 12 Y.B. ANTITRUST & REGUL. STUD., 173, 175 (2019).
[62] *Id.*
[63] *See id.* at 190.
[64] *Id.*
[65] *See id.* at 191.

of the Supreme Council. The Ministerial Council can, among other activities, propose policies, make recommendations, carry out projects and studies for the cooperation among GCC states, and reviews issues passed on to the Ministerial Council by the Supreme Council.[66] Voting in the Ministerial Council is exactly like voting in the Supreme Council.[67]

In the institutions of the GCC there are also the Secretariat General and the Commission for the Settlement of Disputes.[68] In other words, the GCC is well-governed. Therefore, if the GCC wanted to implement a binding competition law and policy, it has the means to do so. However, the fact that competition laws are relatively new to the GCC states, the GCC is not yet ready to attempt to adopt a competition law and policy.

1.1.3 A. Concentration and Control

Concentration is one of the most serious concerns about mergers. This is due to the inherent nature of mergers, which are fundamentally processes of combining separate business entities into one. When consolidations are concentrated in one market, the risk of monopolies become graver.[69] According to Gattoufi, Al-Muharrami, and Al-Kiyumi, "consolidation consistently increases market concentration which may increase market power. The latter could lead to higher prices benefiting the owners (shareholders) at the expense of the consumers."[70] With the possible negative impact of concentration in mergers on market efficiency in mind, Gattoufi, Al-Muharrami, and Al-Kiyumi carried out research on bank consolidation among GCC banks.[71]

The Gattoufi, Al-Muharrami, and Al-Kiyumi study was aimed at determining the efficiency of the banking market due to GCC bank mergers. The study sample was comprised of forty-two GCC banks between the period from 2003 to 2007.[72] Research findings indicated that ten banks participated in mergers.[73] The performance of the ten banks was compared to the remaining thirty-two banks studied that were not involved in mergers.[74] The research study showed that banks that consolidated had greater improvements in performance than those that had not.[75]

The results of this study are not surprising. Businesses typically merge to improve efficiency. This alone is an indication that mergers improve a business' performance.[76] The Gattoufi, Al-Muharrami, and Al-Kiyumi study is important for its revelation that ten banks out of forty-two were involved in mergers from 2003 to 2007.[77] This was a relatively good period for financial markets globally. The subsequent global financial crisis would have increased the number of businesses merging to the detriment of banks that did not. However, a report by the International Monetary Fund (IMF) on the impact of the 2008 global financial crisis showed that banks in the GCC states continued to profit, although profits fell for 2008 and 2009.[78]

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[66] *Id.*
[67] *Id.* at 9.
[68] *Id.* at 6.
[69] Said Gattoufi et al. *The Impact of Mergers and Acquisitions on the Efficiency of GCC Banks,* 4 BANKS & BANK SYS. 94 (2009).
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] May Khamis et al., *Impact of the Global Financial Crisis on the Gulf Cooperation Council Countries and Challenges Ahead*, Int'l Monetary Fund 32 (2010).

According to Bindabel, cross-border mergers have increased significantly over the last few decades due to globalization.[79] However, increases in cross-border mergers in GCC countries have been modest for the same time period.[80] This is due to the fact that GCC states are Shariah states where financial instruments and laws can be obstacles to cross-border mergers and acquisitions.[81]

Controlling concentrations may not be much of an issue in GCC states. As Bindabei, Patel, and Yekini explain, the GCC states are Islamic states to which Shariah law and principles apply.[82] Although Shariah law and principles have shaped corporate governance that are found in Western systems, the practice and policies are quite different.[83] Therefore, cross-border mergers are quite complex and not as frequent and numerous in GCC countries compared to non-Islamic countries.[84]

Family-owned and operated businesses appear to be the norm in GCC countries. For instance, Darwish, Gomes, and Bunagan report that 60% of the gross domestic product is generated by family-owned businesses in the GCC region.[85] In addition, family-owned and operated businesses in GCC states are responsible for 80% of the labor force employment rates.[86] Literature on the likelihood of family-owned businesses becoming involved in mergers is unsettled.[87] At the same time, however, mergers can put an end to family dominance in the operation of the business as well as put an end to a family "legacy."[88]

Researchers have suggested that it is beneficial for family-owned businesses to participate in mergers because it can extend a business' life and help external expansions.[89] Half of all large businesses in the Middle East are owned and operated by families.[90] In Arabic family-owned businesses, the bonds are extremely strong with a significant intent to perpetuate family legacies, tribal cultures, and so on. Family-owned businesses are therefore especially prominent in Saudi Arabia with strong tribal and religious legacies.[91]

Based on the cultural and religious standards in GCC states, it can be concluded that, at this point in time, concentrations are not an issue for concern.[92] Due to the Shariah principles, policies, and law, together with deep rooted cultures, mergers are not as much of a threat to competition in the GCC states.[93] This is especially so with the prominence of family-owned

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[79] Wardah Bindabel, W., *M&A Open Innovation, and Its Obstacle: A Case Study on GCC Region*, 6 J. OPEN INNOVATION: TECHNOLOGY MKT & COMPLEXITY 138, (2020).
[80] W. Bindabel, *M&A Open Innovation, and Its Obstacle: A Case Study on GCC Region*, J. OPEN INNOVATION: TECHNOLOGY, MKT, & COMPLEXITY, vol. 6, (2020), p. 138
[81] *Id.*
[82] W. Bindabel, et. al., *The Challenges Faced by Integrating Islamic Corporate Governance in Companies of Gulf Countries with Non-Islamic Companies Across Border through Merger and Acquisition*, 3 AUSTRALASIAN J. ISLAMIC FIN. &AND BUS., VOL. 3, NO. 1, 29 (April 2016), p. 29.
[83] *Id.*
[84] *Id.*
[85] Saad Darwish et. al., *Family Businesses (FBS) in Gulf Cooperation Council (GCC): Review and Strategic Insights*, 27 ACAD. STRATEGIC MGMT. J., no.3, 2020, 1, at 1.
[86] *Id.* at 2.
[87] Maija Worek, *Mergers and Acquisitions in Family Businesses: Current Literature and Future Insights*, 7 *J. OF FAM. MGMT.*, no. 2 (2017), 177, at. 177-178.
[88] *Id.* at 178.
[89] *Id.* at 177-178.
[90] Abdulrahman Alsughayir, *The Effect of Family Member Reciprocity on the Family Firm Performance in Saudi Arabia*, 8(5) J. OF ENTREPRENEURSHIP & ORG. MGMT. 1, 1 (2009).
[91] *Id.* at 277.
[92] *Id.*
[93] *Id.*

businesses in the region.[94] It would appear that family-owned businesses are the norm in GCC states especially, Saudi Arabia, which is the leading economy with a very wealthy royal family with ownership in several Saudi firms.[95]

With rich and deep historical, cultural, and religious ties in GCC states, together with the prominence of family-owned and operated businesses, mergers have not spread to the GCC such that it feels it is necessary to regulate or control mergers or concentration. It is also important to accept that controlling mergers is a substantive issue. When voting on substantive issues, it only takes one member of the GCC's Supreme Council to vote against an issue to qualify as a veto. Attempts by the GCC to enact a regional competition law for the purpose of controlling mergers or the concentration of mergers can be handily defeated by a single veto vote from one country. The regulatory framework permits foreign ownership to penetrate the market, albeit with safeguards to maintain the competitiveness of family-owned businesses. There may be a number of reasons why any member state may not be comfortable with a binding competition law. Most of all, the need for competition law that controls mergers, and a concentration of mergers does not appear to be all that necessary in the GCC area.

1.1.3 B. Motivation and Review

The question for consideration in this section of the dissertation is: what motivates businesses to engage in mergers? The two main motivations behind mergers area increasing a firm's market share, and to improve the firm's ability to compete.[96] As Pineda points out, "[i]ndustry trends and evolving market behavior are several reasons that compel a company to merge with or acquire its competitor."[97]

Other reasons motivating mergers include business plans for diversifying the business, exploring new markets, and new segments of the current market.[98] Rather than introducing a new product which involves marketing, a company may determine that a merger with a company that already has a share of the targeted market is the better option. This kind of motivation is related to conceptualizing mergers and acquisitions as a means for entering markets.[99]

Companies are also motivated to merge with other companies in order to improve their company's ability to build the incentive for companies to exchange technology with peers makes mergers an increasingly attractive option.[100] One example is Porsche, a German automobile company that merged with Volkswagen, another German automobile company. The merger occurred in 2009. The merger was in response to the global financial crisis of 2008.[101] The financial crisis impacted profits, so the reason for merging with a competitor was to improve technologies and manufacturing abilities.[102]

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[94] *Id.*
[95] Zahra AL Nasser, *The Effect of Royal Family Members on the Board on Firm Performance in Saudi Arabia*, J. ACCT. IN EMERGING ECONS., 1, 19 (2019).
[96] Matthew Emmanuel Pineda, *Motivations for Mergers and Acquisitions*, PROFOLUS (Mar. 15, 2021) https://www.profolus.com/topics/motivations-for-mergers-and-acquisitions/.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*

Companies may wish to merge with other companies to accomplish internationalization goals.[103] As Pineda explained, many companies from Asian states that are going through great economic growth are more likely to engage in "cross-border mergers and acquisitions" as a means of internationalization.[104]

Whatever the motivation, mergers are generally regulated to avoid the creation of monopolies which are counterproductive to fair competition. To avoid this kind of corporate takeover, governments have the ability to review proposed mergers and acquisitions with a view to circumventing the formation of a monopoly.

In GCC states, each country has its own institutional body for the review of mergers. For example, in Saudi Arabia, the Capital Market Authority (CMA) reviews proposed mergers. The merger in question was Almarai and Hail Agriculture Development Company in 2009. Thus far, the public merger and acquisition market in Saudi Arabia "remains largely underdeveloped."[105] Since Saudi Arabia is the strongest economy in the GCC states and the Middle East in general, one can expect that once mergers pick up in Saudi Arabia and competition laws become more detailed and operative, other GCC states will follow.[106] For the time being, however, concentration and control do not appear to be an issue in GCC states.

1.2. Summary and Conclusion

This chapter provided a comprehensive review of the origins, history, and development of merger control. A literature review revealed that merger control originated in developed countries and, while it has been catching on for many years, it is a relatively new phenomenon in GCC states. The first time any form of merger control was introduced in GCC states was in 2004. The merger control laws were generalized competition laws in Saudi Arabia. Thereafter, other states in the GCC followed with two states going without any form of law on competition at all before making late changes. In other words, merger control has a very short history in GCC states and how it will develop from now on remains to be seen.

Chapter 2: Types of Mergers

2. Introduction

This chapter explores and describes the different types of mergers. The primary concern is the effects of the different types of mergers on competition. The main issue in this chapter is how anticompetitive mergers are identified and dealt with. For the most part, this chapter describes when authorities evaluate a merger, determine its deleterious effect on trade, and what steps are taken in response to these findings. This chapter will explain how and if these types of merger control steps are taken in GCC states.

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[103] *Id.*
[104] *Id.*
[105] Sanjarbek Abdukhalilov et al., *Overview of Public Merger & Acquisition Regulations of the Kingdom of Saudi Arabia*, SHEARMAN & STERLING IN ASSOCIATION WITH DR. SULTAN ALMASOUD & PARTNERS, (Feb. 2018), https://www.shearman.com/-/media/Files/Perspectives/2018/04/Overview-of-Public-Merger--Acquisition-Regulations-in-the-Kingdom-of-Saudi-Arabia-MA-081418.pdf?la=en&hash=367B270C63DC65C1F82818C05386595E1748AC5A.
[106] *Id.*

There are three types of mergers: horizontal, conglomerate, and vertical.[107] Mergers are defined by the effect they have on competition. This chapter will describe each of the three merger types and the effects they can have on competition. When we understand the types of mergers and their possible consequences for competition, we can identify the appropriate measures for reviewing and controlling mergers. GCC states do not approach mergers in ways that identify different types of mergers. The effects of mergers do not appear to be a major issue for consideration. Moreover, mergers are not treated as if they may be anticompetitive. For example, under Saudi Arabia's Public Merger & Acquisition Regulations 2007, mergers are basically regulated by the company law.[108]

Under the Saudi Public Merger and Acquisition Regulation 2007, the affected companies' shareholders must approve of the merger in an extraordinary meeting.[109] Moreover, the companies involved in the merger must enter into an agreement which must include details of the merger, asset value, liabilities, and shares that shareholders will own upon merger.[110] The 2007 regulation also provides that the merger must be completed within thirty days of the shareholders' resolution approving the merger.[111] Creditors are also able to challenge the merger within thirty days of the shareholder's approval of the merger.[112] Once a creditor objects to the merger, the merger must be placed on hold until such time as the creditor withdraws their challenge, their debt is satisfied, or they are given appropriate security.[113]

In Saudi Arabia, anticompetitive clearance is provided by the General Authority for Competition. If the General Authority for Competition objects to the transaction the offer and acceptance becomes null and void.[114] There is no explanation for what qualifies a proposed merger for anticompetition clearance. Nor is there an explanation for what the grounds for objection are. It also appears that where there is an objection there is no recourse and no opportunity to prove that the merger is not anticompetitive. In other words the General Authority for competition is the final authority.

Kuwait does not provide for the objection to a merger. Kuwait only requires that if the merger establishes market dominance, the companies involved must inform competition authority of this dominance within sixty days "before the data fixed for the start of control or for increasing such control."[115] Once the notification is given, the competition authority will publish a brief of the notification in Kuwait's Official Gazette as well as in four daily newspapers. Any party with

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[107] Peter Bamford et al., MERGERS: A FRAMEWORK FOR THE DESIGN AND IMPLEMENTATION OF COMPETITION LAW AND POLICY, at 42 (visited Dec. 17, 2020), http://www.oecd.org/daf/competition/prosecutionandlawenforcement/27122278.pdf.

[108] Sanjarbek Abdukhalilov et al., *Overview of Public Merger & Acquisition Regulations of the Kingdom of Saudi Arabia*, SHEARMAN & STERLING IN ASSOCIATION WITH DR. SULTAN ALMASOUD & PARTNERS, (Feb. 2018), https://www.shearman.com/-/media/Files/Perspectives/2018/04/Overview-of-Public-Merger--Acquisition-Regulations-in-the-Kingdom-of-Saudi-Arabia-MA-081418.pdf?la=en&hash=367B270C63DC65C1F82818C05386595E1748AC5A.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] World Law Group, *2020 Merger Control Guide* (2019), https://www.theworldlawgroup.com/writable/documents/news/2020-MERGER-CONTROL-GUIDE-Online-Version.pdf.

an interest in the merger will then have fifteen days to object.[116] Until the objection is settled, the merger must be placed on hold.[117] The competition authority will make the final decision and will notify the parties of its decision within fifteen days of making one.[118]

In Qatar, notice must be given to the competition committee if a merger will result in market domination.[119] Notification is required once there is an intention to become involved in a merger.[120] When notification is given, the competition committee is required to decide within ninety days of receipt.[121] However, the time does not necessarily start to run until the committee is satisfied that it has received all the necessary data for adequately reviewing the intended merger.[122] Yet, if the Committee fails to issue a decision within the time fixed for doing so, the merger will be regarded as approved.[123]

In the UAE, the merger must be at risk of creating concentration. When such a risk exists, an economic concentration application is required.[124] The application must be completed within one month of the agreement.[125] The Ministry of Economy has ninety days, which can be extended to a further forty-five, days to decide on the application.[126] If the Ministry fails to respond to the application within the time stipulated for doing so, the application is deemed approved.[127]

Unlike the GCC states discussed so far, Bahrain requires all proposed mergers to be reported and examined for anticompetitive effects.[128] The GCC states discussed so far require that the parties involved determine for themselves whether the merger is a threat to competition prior to reporting it. In Bahrain,[129] the merger must be reported, and the authority will decide about its effect in terms of its risk of creating a dominant market position.[130] The parties to the merger are required to apply for approval from the authority, who has ninety days to decide.[131] Unlike the GCC states discussed so far, there is no provision as to what happens when the authority fails to plan within the requisite timeframe.[132]

Oman's laws on mergers are very similar to the other GCC states in that there is a local authority to which applications must be submitted for approval. The local authority is the Oman Capital Market Authority.[133] In addition to the Oman Capital Market Authority, the parties to a merger must hire the services of an adviser who is licensed by the Capital Market Authority for the duration of the merger process.[134]

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[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] Al Alwai & Co. Advocates & Legal Consultants, *Oman Take-over, and Acquisition Regulation* (April 23, 2015), https://www.slideshare.net/AlAlawiCoAdvocatesLe/oman-take-over-and-acquisition-regulation.

It is therefore reasonable to conclude that merger control is not fully developed in GCC state because the methods for identifying and preventing horizontal, vertical, and conglomerate effects are not detailed enough to stand out. Given that mergers in the GCC states are not common transactions at this point, the lack of merger control activity by legislators is not surprising. Still, in order to make recommendations for GCC states on how best to orchestrate and enforce merger control, it is necessary to understand what the different types of mergers are.

2.1 Horizontal Mergers

Horizontal mergers take place within the same sector. To this end, the merger occurs between "potential" or "actual" competitors or rivals.[135] Therefore, the question of harm to competition is more serious. For example, in the communication sector, where telephone production is limited to only five companies and two of the largest firms within the sector merge, there is no doubt that competition is harmed. The three remaining smaller firms are now competing with a giant firm while competing with one another. However, if the three smaller firms merged instead, competition may have been fairer.

The horizontal effects require close monitoring. The OECD's definition of horizontal mergers bears this out. According to the OECD, "[t]he term horizontal signifies that the two enterprises are at the identical level in the chain of production – for example, two manufacturers of steel, two distributors of beer, or two retailers of electronics equipment competing for customers within a given geographic area."[136] Therefore, a horizontal merger can have deleterious impacts on competition since it reduces the number of suppliers or manufacturers of a given set of products or services. At the same time, horizontal mergers may improve competition in terms of the quality of goods and services.

The larger the firm, however, the greater the risk that competition will be harmed. Farrell and Shapiro point out that "mergers between large firms in the same industry have long been a public policy concern."[137] In the US, for example, large firms are required to report any intended mergers of significant proportions to the Department of Justice and the Federal Trade Commission for review.[138] The authorities to whom the intended merger is reported are required to analyze the "likely effect on competition and can chose to permit it or oppose it."[139]

When evaluating an intended merger, government authorities are required to follow the guidelines submitted for doing so. Those guidelines will help the authorities determine whether the merger will lead to concentration in the market. In the US guidelines the authorities are required to closely evaluate the "initial level of concentration in the industry and the predicted change in concentration due to the merger."[140]

There are no such authorities nor guidance in the GCC for safeguarding against the potential anticompetitive effects of horizontal mergers. However, each member state regulates mergers within the context of anticompetition laws. Saudi Arabia was the first of the member states

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[135] Peter Bamford et al., *supra* note 100, at 42.
[136] *Id.* at 42.
[137] Joseph Farell & Carl Shapiro, *Horizontal Mergers: An Equilibrium Analysis*, THE AM. ECONO. REV. 107, 107 (1990).
[138] *Id.*
[139] *Id.*
[140] *Id.*

to organize anticompetition laws which only started in 2004. As Attorneys Asad Abedi and Hatem Abbas Ghazzawi & Co. explain, the merger laws in Saudi Arabia remains "underdeveloped."[141]

Since the amendment of its 2004 Competition Law in 2007 and until 2013, Saudi Arabia only confronted one public merger. The merger in question was the acquisition of Hail Agriculture Development Company by Almarai.[142] Unless a merger is between publicly listed companies, it appears that they are not covered by the CMA. The CMA is the government authority that manages and enforces competition laws and therefore, merger control laws.[143] Just because countries like the US have well-developed merger control laws does not mean that they can prevent all harmful horizontal mergers. The law in the US, for example, permits those in favor of the merger to mount a case in favor of the merger by illustrating that the merger will not harm competition.[144]

2.1. A. Non-coordinated Effects

When authorities examine a proposed or intended horizontal merger, one of the most important aspects of review is the non-coordinated effects of the merger. The literature focuses primarily on coordinated and unilateral effects of all mergers. Non-coordinated or uncoordinated mergers are left out of consideration and usually mentioned in passing without further explanation.

Non-coordinated effects will be those that did not occur by overt collusion between the merging companies. Collusion takes place when the merging companies plan and actuate market dominance and other sorts of behavior that ultimately restrains competition.[145] In a typical case, each company involved in the merger will use their respective market power against competition. For instance, should two dominant computer market players merge, the resulting entity could further entrench its market dominance, posing significant risks to competitive conditions. Prior to the merger, the fact that the two dominant and powerful companies were in competition with one another established some form of market equilibrium. However, when the two companies merge there is uncoordinated collusion to dominate the market together. It therefore makes sense that authorities are expected to evaluate the risk of non-coordinated collusion and effects among companies involved in a horizontal merger prior to approving it.

2.1. B. Coordinated Effects

Coordinated effects occur when the parties to a merger cooperate and coordinate their resources and efforts for their benefits. Thus, coordinated effects is one of the main motivations for mergers.[146] Coordinated effects are described by the US Merger Guidelines as "comprised of actions by a group of firms that is profitable for each of them only as a result of the accommodating reactions of the others. This behavior includes tacit or express collusion."[147]

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[141] Asad Abedi, Hatem Abbas Ghazzawi & Co., *Public Mergers and Acquisitions in Saudi Arabia: Overview*, THOMSON REUTERS PRACTICAL LAW (2013). https://content.next.westlaw.com/5-505-9771?__lrTS=20200930211111640&transitionType=Default&contextData=(sc.Default)&firstPage=true

[142] *Id.*

[143] *Id.*

[144] Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof,* YALE L. J., 1742, 1996 (2018).

[145] *Id.*

[146] Wayne-Roy Gayle et al, *Coordinated Effects in the 2010 Horizontal Merger Guidelines*, SPRINGER SCIENCE + BUSINESS MEDIA LLC. 1, 4 (2011) https://faculty.fuqua.duke.edu/~marx/bio/papers/GayleMarshallMarxRichardRIO2011.pdf (17 December 2020).

[147] HORIZONTAL MERGER GUIDELINES §2.1. (ANTITRUST DIVISION U.S DEP. OF JUSTICE) https://www.justice.gov/atr/horizontal-merger-guidelines-0#21 (17 December 2020).

The EU describes horizontal merger coordinated effects as a concentrated merger which, "may significantly impede effective competition, through the creation or the strengthening of a collective dominant position, because it increases the likelihood that firms are able to coordinate their behavior in this way and raise prices even without entering into an agreement."[148] It would therefore appear that actual coordination is not required to establish collusion and anticompetitive behavior. Once the circumstances reveal that there is a risk of an informal effort to collude and bring about coordinated effects on competition, it will be an implied outcome.[149]

Tacit collusion will be applied in situations where firms have engaged in express collusion previously but failed.[150] The merger can be seen as a formal attempt to bring about coordinated effects since express collusion failed prior to the merger.[151] There is empirical evidence proving that firms that failed at collusion in the past will attempt to do so in the future.[152] Therefore, when firms get together in the past and collude to undermine competition and to promote market dominance, it will be implied that they intend to achieve the coordinated effects that they failed to achieve before by engaging in a merger. It can be assumed that where parties have colluded in the past, they will face significant opposition to an attempt to merge. It can also be assumed that where only one party expressly colluded in the past, any attempt at a merger will be opposed due to the risk of unsatisfactory coordinated effects.

2.2. A. Vertical Mergers

Vertical mergers occur between firms at that are not at the same place in the production chain.[153] For example, a vertical merger occurs when a brewer merges with a distributor or brewed beverages regardless of their relationship in practice. Another example of a vertical merger is where an electricity company merges with a coal company.[154] Unlike horizontal mergers, a vertical merger is not likely to be an anticompetitive merger because it is "less likely to" result in less competition on the market.[155] In fact, it has been argued that vertical mergers can improve the quality of goods and services and can be good for the firm itself.[156] For instance, vertical mergers may improve investments in the long-term, improve produces, and facilitate the entry of new businesses on the market.[157]

Still, there are concerns that vertical mergers can harm competition. This is because vertical mergers can improve and strengthen the dominance of a firm because it can increase the "difficulty of entering its market."[158] Take, for example, the situation in which a large and dominant business manufactures a specific product, and a smaller business is attempting to expand by creating a new manufacturing system and will need to purchase material for the project. If the dominant business merges with suppliers of the material, it can take steps to ensure that the material is difficult for

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[148] Miguel de la Mano, Chief Economist Team, European Commission, Coordinated Effects (Dec. 17, 2020), https://ec.europa.eu/dgs/competition/economist/delamano2.pdf.
[149] *Id.*
[150] *Id.* at 47.
[151] *Id.*
[152] *Id.*
[153] *Supra* note 100.
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.* at 44.

new entrants or other businesses to acquire.[159] Therefore, when only one party to a vertical merger occupies a dominant position, the anticompetitive effects of the merger can be challenged successfully.

2.2.B Conglomerate Mergers

Conglomerate mergers are "neither horizontal nor vertical."[160] In other words, the parties to the merger "neither produce competing products nor are in an actual or potential buyer-seller relationship."[161] Most of the time, states are not concerned about the consequences of the conglomerate mergers because they do not threaten horizontal nor vertical effects.[162] Moreover, "by definition these mergers involve firms operating in unrelated markets" although there are some exceptions.[163]

The general concern with conglomerates is its size. The concern is that these firms may become so large that "they have an advantage over other firms in the competitive process: they will be able to finance larger advertising campaigns," or they may survive "longer periods of intense price competition, even to the point of predation, because of the deep pockets they have accumulated."[164] But, for the most part, the conglomerate is a firm that expands its products and services. An example of a competitive and fair conglomerate is the supermarket chain that merges with financial companies and oil providers.[165] These kinds of companies may be a threat to smaller businesses, but rather than stifle competition, they may improve competition by encouraging their rivals to expand their products and services.

For the most part, mergers are generally good for competition. In fact, "most mergers do not harm competition seriously and are themselves part of the competitive process."[166] Therefore, when we analyze GCC states and the actions they have taken so far to control mergers we must consider that the volume of mergers in the region are low, and these states are at a stage in their economic development where mergers may signify successful growth and development.

At this stage, the UAE is the most active GCC state with completed mergers and acquisitions.[167] Over the last ten years, the UAE announced 1042 mergers, of which 82% were completed.[168] This may sound like a lot but, to put this in its proper perspective, the US's announcements of mergers are higher on a monthly basis. When the US produced an announcement of mergers just over one thousand for one month, it was considered to be a 15% decrease.[169] In other words, the most active state in the GCC, in terms of mergers and acquisitions, is very low and cannot compare to the number of mergers that have prompted serious actions against risky mergers in more active states. Where active states like the US may question and

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[159] *Id.*
[160] *Id.* at 42.
[161] *Id.*
[162] *Id.*
[163] *Id.* at 45.
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] Farhan Ahmed ET AL., *Mergers and Acquisitions (M&A) in Selected States of Gulf Cooperation Council (GCC),* 12 PAC. BUS. REV. INT'L 132, 132 (2020).
[168] *Id.* at 131.
[169] IMAA. *United States – M&A Statistics.* (2020). https://imaa-institute.org/m-and-a-us-united-states/ (18 December 2020).

review a proposed conglomerate, emerging economies like GCC states, may be more inclined to welcome them.

2.3 Entry Power

Mergers are commonly used as a means of entering a new market.[170] For example, a restaurant chain may be having success in a Chinese market. An American chain may want to enter the Chinese market and the easiest way to do so may be to merge with the restaurant currently operating in China with significant success. This entry strategy is safe compared to the risky sole entry into an unknown market for the first time.

According to Berger, Bonime, Goldberg, and White, mergers and acquisitions generally facilitate new entries.[171] Mergers act as a symbol that the market is lucrative and as a result, both smaller and larger businesses will be motivated to enter the market.[172] It would therefore appear that mergers will generally improve competition unless they turn out to be anticompetitive. However, when a proposed merger has all the characteristic of anticompetitive behavior it will generally be disapproved by the appropriate authorities. The anticompetitive characteristics will include market dominance, monopolistic traits and other variables that will likely undermine competition.[173]

2.3.A Barriers to Entry

There is an ongoing debate on what amounts to a barrier to entry to a given market.[174] The ongoing debate involves an argument that barriers to entry are not anticompetitive if incumbent firms faced the same barriers prior to their entry to the market. On the other side of the debate, it is argued that any form of barrier to entry is indeed anticompetitive.[175] Still, for the purposes of anticompetition laws and policies, what amounts to anticompetitive barriers to entry is not important. Because when regulating competition, it "is not whether an impediment satisfies this or that definition, but rather the more practical questions of whether, when, and to what extent entry is likely to occur."[176]

When considering mergers, barriers to entry are important because if the merger created effects that look like market dominance, other firms may consider entry infertile.[177] In other words if a merger is monopolistic, other firms may not be motivated to attempt to share the market with a company apparently owning 100% of the market. Such a firm will also be reluctant to give up any part of its share of the market and may go out of its way to dissuade others from entering the market.

Authorities that review proposed mergers may also establish entry barriers for new firms wishing to merge with an incumbent firm.[178] If the review reveals that the merger will threaten

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[170] Kosuke Uetake & Yasutora Watanabe, *Entry by Merger: Estimates from a Two-Sided Matching Model with Externalities,* YALE EDUCATION (2012), https://economics.yale.edu/sites/default/files/watanabe-120920.pdf.
[171] Allen N. Berger ET AL., *The Dynamics of Market Entry: The Effects of Mergers and Acquisitions on Entry in the Banking Industry*, 77 THE J. BUS., 797, 797 (2004).
[172] *Id.* at 797.
[173] *Id.*
[174] OECD Policy Brief, "Competition and Barriers to Entry.", at 1, (2007), https://www.oecd.org/competition/mergers/37921908.pdf (19 December 2020).
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*

competition, the merger will be denied.[179] It would therefore appear that when authorities perform due diligence, the likelihood of a merger impeding new entries is low. In GCC states, the main barrier to new entrants is restrictions on foreign ownership rather than mergers.

2.3. B. Potential Competition

As previously discussed, an approved merger is expected to improve competition. When mergers are genuine, and not in pursuit of market dominance at the exclusion of competition, they are good for competition.[180] A conglomerate has the potential to invite similar expansions and improvements in customer services and goods offered by competitors.[181] For example, an incumbent supermarket may merge with an appliance company that offers washers, dishwashers, stoves, and other household appliances.[182] Instantly, the supermarket has expanded its product lines and is now offering consumers a new line of products. Therefore, a customer who is out shopping for an appliance will decide to purchase his or her food products at the same store.[183] This may act as an incentive for competitors to expand their product line to acquire a new market share and to maintain current customers fearing that they may lose them to their newly expanded rival.[184]

When legitimate vertical and horizontal mergers occur, competition is also improved.[185]This is because when mergers occur, it typically results in the merger of assets and resources.[186] These assets and services will improve the merged company's ability to produce and provide goods and services.[187] Rival firms will therefore take action to improve their resources, products, and services.[188] These actions may include mergers, or they may just include the expansion of a line of credit.[189] Either way, firms will improve their goods and services in order to compete with the newly merged business.[190]

No doubt, in the GCC states where mergers and merger control are recent developments, the prospect of competition enablement is perhaps the most appealing aspect of mergers. The urgency to find ways to discourage mergers that can create monopolies is not yet a priority. For the time being, GCC states are not viewing mergers suspiciously. Perhaps restrictions on foreign ownership have lowered expectations of hostile takeovers and anticompetitive behavior.

2.4 Buyer Power

In mergers, buyer power can make a significant difference in the effects on competition. In mergers, buyer power refers to a situation in which the purchasing firm has greater power than the selling firm and intends to use that purchasing power to an advantage over the less powerful

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[179] M. de la Mano, *Entry Barriers*, Chief Economist Team, Eur. Comm'n. (n.d.). https://ec.europa.eu/dgs/competition/economist/delamano3.pdf (19 Dec. 2020).
[180] Herbert Hovenkamp, *Approaising Merger Efficiencies*, 24 GEO MASON L. REV, 703 (2017).
[181] John M Kuhlman & Richard M Duke, *A Concept of the Conglomerate Form*, 44 ST JOHN'S L. REV, 62 (1970).
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] Annika Stohr et al., *Happily Ever After? Vertical and Horizontal Mergers in the US Media Industry*, 43(1) WORLD COMP., 135 (2020).
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*

firm.[191] The risk of such an outcome is heightened when the purchasing firm is larger than the selling firm. When buyer power is exploited, it goes beyond the concept of one firm taking advantage of a lesser firm. It also speaks to the "intensification of beliefs about superiority and inferiority."[192]

The imbalance of power within the firm, however, is bad for fair and equal market competition. The smaller firms on the market are threatened by a merger that suggests smaller firms must kowtow to larger firms. In addition, trust within the merged firm is eroded because the smaller firm will conclude that they are subordinates while the larger firm does not think it needs the trust of the smaller firm since it has so much more power.[193]

The greatest concern about buyer power is the ability of that merging with another firm may increase the power of both firms to the point where a monopoly is more likely as opposed to the time and circumstances prior to the merger.[194] Due to the threat of buyer power turning into a merger with deleterious effects on trade, authorities will look at the effects of the merger on buyer power and the likelihood of the merger becoming an anticompetitive vessel such as a monopoly.[195]

2.5 Efficiency Assessment

When two or more firms merge, the standard expectation is that the amalgamation of human and capital resources will improve input and therefore output will be improved.[196] In other words, the pooling of resources in mergers is generally expected to improve the efficiency and productivity of the firms. In fact, Odeck carried out a study on the efficiency and productivity of a transportation merger after a merger took place.[197] The results of the study revealed that the merger firms outperformed the single firms after the merger was complete.[198]

When assessing the efficiency gains, authorities will look at the efficiency gains in the relevant market. Authorities are not concerned with how much greater the firms will perform after the merger.[199] Authorities are only concerned with how the firms' merger reflects on and affects the relevant market.[200] In other words, if the merger improves the efficiency of the firms so much that the firms have established such dominance on the market that new entrants and incumbent firms are scared off, authorities will consider the efficiency of the firm bad for fair competition. The efficiency assessment is made prior to the merger of the firms and will determine whether the firms' merger will be approved at all.

2.6 Failing Firm Defense

The failing firm defense refers to a situation in which an anticompetitive merger may not be challenged because the firm's only other option would be closure.[201] The failing firm defense

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[191] G. K. Stahl & M.E. Mendenhall, *Mergers and Acquisitions: Managing Culture and Human Resources*, 88 (Stanford University Press, 2005).
[192] *Id.* at 88.
[193] *Id.*
[194] J. Parker & A. Majumdar, *UK Merger Control*, 527 (Hart Publishing, 2016).
[195] *Id.*
[196] James Odeck, *The Effect of Mergers on Efficiency and Productivity of Public Transport Services*, 42-4 Transportation Research Part A: Policy and Practice 696, 696 (2008).
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] Lars-Hendrik Röller ET AL., *Efficiency Gains from Mergers, in* European Merger Control Ch. 3, 5 (Fabienne Ilzkovitz & Roderick Meiklejohn eds., Edward Elgar, 2006).
[201] OECD. *The Failing Firm Defense: Policy Roundtables* (2009), https://www.oecd.org/competition/mergers/45810821.pdf (last visited 19 December 2020).

requires documented proof of the firm's failing position.[202] The failing firm defense is more popular during financial and economic crises where firms hit the hardest will seek to merge with firms that are doing better during the difficult times.[203]

Assessment concepts take the position that when a merger occurs in circumstances where one of the firms is failing, there is no real anticipating that anticompetitive outcomes will occur.[204] In fact, when a stronger firm merges with a failing firm, one might argue that the merger is consistent with the idea of fair competition. Rather than having a firm exit the market, the stronger firm is essentially bailing it out and keeping it active.[205] Therefore, when authorities examine the failing firm defense, they will assume that the merger is pro-competitive.[206] However, the failing firm must prove its failure and authorities will always want to assure that the merger is not anticompetitive. anti-competitive.[207]

2.7 Remedies

The US Department of Justice states that the vast majority of mergers are fair and harmless to competition and actually end up benefitting consumers by improving the quality and quantity of goods and services.[208] Therefore, remedies should not be granted lightly. Prior to awarding remedies, authorities should make sure that there are sufficient economic and legal grounds for doing so.[209]

Remedies in response to anticompetitive mergers can be divestures, structural or behavioral.[210] In other words, the authorities can make orders for restructuring the firm, divesting it of some assets via fines, or issuing injunctions. The remedies can be offered singularly or in combination with other remedies.[211] Regardless of the path taken, the OECD cautions against taking unfair actions and that all remedies should be aimed at fixing competition.[212]

Some remedies that were carried out in the EU included divestiture of a controlling stake in the company purchased when it was a profitable stand-alone business and the purchaser arguably constrained competition.[213] Another divestiture remedy was the carving out "extensively from a greater company structure."[214] Divestiture of assets and divestiture of a license as remedies. Other remedies included a commitment to surrender joint control of the business and to allow other firms entry to the market.[215]

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[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] U.S. Dep't. of Just. Antitrust Div., Merger Remedies Manual (2020), https://www.justice.gov/atr/page/file/1312416/download (Dec. 19, 2020).
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] OECD. Policy Roundtables, Merger Remedies (2003), https://www.oecd.org/competition/mergers/34305995.pdf (Dec. 19, 2020).
[213] DG Competition Eur., Comm'n, Merger Remedies Study, 18 (Oct. 2005), https://op.europa.eu/en/publication-detail/-/publication/f7587298-1d1f-4396-8cca-4735b7efab97/language-en (Dec. 19, 2020).
[214] DG Comp. "Merger Remedies Study." (October 2005). *European Commission.*
[215] *Id.* at 18-19.

2.8 Summary and Conclusion

One of the main findings in Chapter 2 is that merger control in the GCC states is lagging behind the merger control laws of developed states. Moreover, the laws and policies on mergers in GCC states are general so that the only specific laws are those that deal with the method for applying and the time one can expect to receive a decision from the relevant authorities. As a result, the types of mergers like all other areas of merger disciplines in GCC states are underdeveloped. Thus, it can be concluded that while procedural laws are well-developed in terms of merger control in GCC states, the substantive law remains lacking despite the fact that the GCC council is in a political and legal position to develop competition laws including merger control.

Conclusion

Recap of the Research

The aim of this research was achieved in that the main challenge confronting GCC states is the development of merger laws, policies, and practices in general. Merger law and merger control are underdeveloped areas of competition law in GCC states This research study also discovered that one of the main reasons for the underdevelopment of merger control and merger laws and policies in general is the fact that foreign ownership is restricted. Therefore, GCC states are not altogether open to the receipt of ownership from foreign firms. At the same time, family ownership appears to be the main form of ownership in GCC firms. Families are not usually amenable to merging with other businesses. For the most part, families are creating and maintaining a family legacy and will strive to hold onto autonomy over their firms.

Moreover, GCC states are Muslim states and as such, they are required to comply with Shariah law, policies, and standards. While this may be attractive to Muslim firms, it is difficult for non-Muslim firms to comply with Shariah laws, policies, and standards such as the prohibition against interests and the sale of alcohol and so on. These cultural and legal gaps together with the reality of restrictions on foreign ownership, and the large number of family-owned businesses, have stifled the growth and development of mergers in GCC states.

It can therefore be concluded that the challenges confronting GCC states regarding the control of mergers are related to the fact that this area of law and practice is underdeveloped in the region. The reason for the underdevelopment is due to the fact that mergers are slow and relatively few. With so few mergers compared to the US, GCC states have not had a real reason for developing laws and policies for merger control.

In identifying its importance, merger control was found to prevent anticompetitive behavior. The merging of two large firms could be bad for fair and equal competition goals of the free and open market. There are risks that the combination of market shares, power, assets, and resources could create monopolies, cartels and so on in restraint of trade. Therefore, the purpose of merger control is to maintain equilibrium in the market. At the same time, merger control policies, laws and practices recognize and accept that most mergers are actually good for the market because they promote competition and provide consumers with better quality and a larger quantity of goods and services. Merger control is therefore important to ensure that the mergers that are good for the market and competition are not hindered and that mergers that are bad for competition and the market are prevented.

Shedding light on the history and development of merger control with an emphasis on the GCC states traced the history of merger control back to the 19th century although the common law's restraint of trade goes back to the Middle Ages. Unfortunately, the history of merger control

in the GCC states is very recent with the first statute addressing competitive issues beginning only in 2004 in Saudi Arabia. Therefore, the history and development of merger control in the GCC states is currently in its infancy.

As the history and origins of merger control in the GCC states indicate, this area of practice and law is only just starting out. Mergers are rare compared to developed countries such as the US and the EU member states. As discovered in the literature, the current status of merger control in the GCC states is best described as underdeveloped.

Mergers are controlled in order to promote and maintain market equilibrium. The ideal market is free, fair, and open so that new entrants are encouraged to join the market and compete. Competition is also fair in an open market and consumers benefit from this competition by the offering of various quality products. Demand and supply are matched in markets where mergers are controlled. Mergers are therefore controlled because while most mergers are good for fair competition, mergers can be extremely anticompetitive. Therefore, mergers are controlled to prevent the formation and operation of anticompetitive businesses.

It is difficult to draw any conclusions on the effectiveness of merger control in GCC states because activities in this area are new and relatively rare. Only time will tell if merger control is effective. At this point it appears that if there was a problem with the effectiveness of merger control in the GCC it involves the low activities. Perhaps it is time for GCC states to consider merger control laws, practices and policies that will attract mergers as a means and method of improving competition in the GCC states.

It is advisable for GCC states to take actions that will improve the number of mergers occurring in the region. Right now, the problem in GCC states is not the effectiveness of its merger control laws and practices, but the barriers to mergers instead. Only after some of these barriers are removed or relaxed will it be possible to determine the effectiveness of merger control laws, policies, and practices in the GCC states.

Recommendations

As discovered in this research study, merger laws, policies, and practices in the GCC states are underdeveloped.[216] The laws do appear to be consistent with the laws and regulations of developed countries although the laws are new and have not been practiced for as long.[217] The opportunity for practicing merger laws and regulations in GCC states is also sparse as merger activity in the region is extremely rare compared to developed countries.[218] Therefore, the challenge for GCC states at this point in time is to address the lack of merger activities in the region. As discovered in the literature, the majority of mergers are good for competition because they tend to benefit consumers by increasing and improving the range of products and services available for consumers. In addition, mergers also improve the market by forcing other firms to compete and thus improve production and quality ratios.

This study identified the main challenges to mergers in the GCC region. The barriers are the prominence of family-owned businesses, Shariah requirements, restrictions on foreign ownership, and underdeveloped laws and practices. In order to address these challenges in GCC states, some recommendations are necessary. To start with, the GCC states can adopt a relaxation of foreign ownership. At this time, the permissible share of foreign ownership should be increased.

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[216] Maria Casoria, *Competition Law om te GCC Countries: The Tale of a Blurry enforcement*, 16(3) CHINESE BUS. REV. 141 (2017).

[217] *Id.*

[218] Staff Writer, *GCC Bank Mergers: Still Rare Despite Tougher Environment*, ARAB NEWS (Oct. 30, 2016).

This will improve the chances of a smaller company in the GCC expanding and improving when it merges with a larger foreign company. For example, a small, local retailer can improve its market share, technology, products, services, and brand if it merges with a foreign brand retailer with connections in the international market. In such a case, the larger, foreign brand retailer will be able to merge because its investment and reputation is larger than the local retailer's. However, the local retailer is rooted in the local market and will have control over the daily operations. This kind of merger can improve competition and will benefit consumers.

With regards to Shariah compliant laws, standards and practices, the relaxation of foreign ownership restrictions should help in this area of concern as well. GCC states should encourage structural accommodations in mergers involving Muslim and non-Muslim firms. In other words, Shariah restrictions can result in the division of operations where, those practices that are no compliant with Shariah laws and standards and practices are not a part of the merger. In other words, mergers between non-Muslim and Muslim states can be facilitated by the government through laws and regulations that allow for the acceptance of non-Shariah practices provided they are restructured in the merger affects. It is also possible for the firms to negotiate some sort of agreement for how Shariah compliant issues will be dealt with fairly and objectively.

As for family-ownership, the government can offer tax incentives for family-owned businesses that merge with other companies. The literature revealed that the life expectancy of family-owned businesses is short compared to other companies. Therefore, government policies should encourage family-owned businesses to merge to increase the life cycle of the firm. In this regard, tax incentives for family firms that take actions such as mergers to improve and strengthening the life cycle of the firm should be implemented.

The underdevelopment of mergers and resulting laws and practices is unfortunate. However, this may be interpreted in two different ways. It may be argued that the law of mergers is underdeveloped in GCC states because mergers are rare due to a stable and perpetually growing economy and market. Mergers are common and more likely to take place during financial and economic crises. Therefore, it is possible that the lack of merger activities in the GCC region is due to a lack of financial and economic crises. However, it may also be argued that the main problem is the underdeveloped laws and practices. As previously pointed out, the restriction on foreign ownership is a barrier to merger control and mergers in general in GCC states.

It is therefore recommended that GCC states pay closer attention to merger control laws and practices and improve the landscape of the laws. As noticed in the literature, there is a lack of detail in definitions of mergers and requirements for approval. Once these issues are sorted out together with the preceding three recommendations it is very likely that merger control in the GCC states will improve because the number of mergers will likewise improve.

No doubt attempts have been made.[219] There is a draft of competition law that has yet to be approved by the General Council.[220] However, there is veto power in relation to substantive issues.[221] The issue of merger control is a substantive issue which means that even if six states agree on a harmonious merger control law and regulation, it only takes one vote against it to qualify as a veto. It would, therefore, make sense for the GCC to consider changing its voting format and instead allowing for a two-third's majority at the very least so that the draft competition law can be passed. Although mergers and merger control are underdeveloped in GCC states, it is scattered and diverse so that uncertainty and unpredictability may have an impact on the decision to merge

[219] *Supra*, note 135.
[220] *Id.*
[221] *Id.*

with a company located in one GCC state. This may be especially cumbersome for a business that wants to be able to carry out business throughout the GCC. With knowledge that merger control laws and competition laws differ from state to state can be a barrier to merging with a GCC state.

It is therefore recommended that in addition to changing the veto power of ministers in various institutions of the GCC, it will be necessary to pass the draft competition law. In addition, the GCC should issue guidelines for review of mergers and for the relevant authorities to follow when investigating a merger and deciding about its effect on competition.

A review of the literature also revealed that the law on assessment of mergers in GCC states is not specific enough. Unless and until the GCC passes a law that harmonizes the competition and merger control laws and regulations, each state should improve their merger control laws. There is a need for greater details on what qualifies as an anticompetitive merger and how these elements should be assessed and determined by the relevant authorities. For the time being, the laws so far are rich in details about how to procedurally apply for and receive approval for mergers, but the laws are virtually silent on the substantive issues.

Areas for Further Research

It would be very instructive to learn more about how restrictions on foreign ownership affect merger activity in the GCC region. Therefore, further research should be carried out on the restrictions on foreign ownership. Knowing exactly what those restrictions are in each state, why they are enforced and what can be done to reduce those restrictions to improve merger control in the GCC area.

Further research should also be carried out on family-owned business in the region. This kind of research should involve the collection of qualitative data from family owners and operators who can express their views on mergers and the possibilities for family owners agreeing to or even considering a merger at some point in the future. In other words, this kind of research will collect information directly from the sources as a means of identifying what the government should do in order to encourage family-owned businesses to participate in mergers.

Another form of research would be to interview foreigners with business ties in the GCC states. Such a study would also involve the collection of rich and detailed qualitative data. This data will be designed to determine why and how foreigners are affected by foreign ownership restrictions and how this might impact a decision to merge with a smaller company in the GCC area. The purpose of this kind of research is to help to identify areas where restrictions on foreign ownership can be improved so that mergers can become more developed in the GCC area.

At this stage, any research into mergers and merger control in GCC states will improve the literature on the subject. Perhaps further studies on the comparison of GCC states and other developing countries and their progress in terms of merger control and mergers in general will provide better insight into the status of merger control in GCC states.

To gain an even better perspective on merger control and mergers in GCC states further research on one GCC state will help. Such a study will allow for a deeper focus on the circumstances and facts surrounding the slow and rather vague adaptation of merger control laws. At some point, further individual research on GCC states will improve our understanding of the development of merger control laws in the region. A collective study like this one only revealed that there is a region-wide challenge. If we can learn how and why each state struggles with the development of merger control laws and practices, we can then gain an understanding of why the GCC has failed to harmonize competition and merger laws for all states under its purview.

What does it mean to create art? Intellectual Property rights for Artificial Intelligence generated artworks

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I. Introduction

In April 2016, a new piece of art was introduced to the world in Amsterdam, Netherlands.[1] This artistic portrait of an unknown man showcased a masterful understanding of light and shadow and appeared to have been pulled right out of the seventeenth century. The piece would likely have left some of the greatest artists in the history of art to be impressed. In fact, one famous artist would likely have high praise for the work, or at least noticed some similarities. The painting was created by the Next Rembrandt project.[2] The painting was not crafted by human hands and the man in the portrait never existed.[3] The 3D printed painting was created by a team of programmers and art historians by gathering all the data they could on the beloved painter Rembrandt.[4] The team used an algorithm of data taken from Rembrandt's body of work and then trained an artificial

[1] Erin Blakemore, *"New" Rembrandt Created, 347 Years After the Dutch Master's Death*, Smithsonian Magazine (Apr. 5, 2016), https://www.smithsonianmag.com/smart-news/new-rembrandt-created-347-years-after-the-dutch-masters-death-180958664/.
[2] *Id.*
[3] *Id.*
[4] *Id.*

intelligence (AI) program to create a work inspired by the Dutch artist.[5] Some might consider the project incredible for showcasing the advanced capabilities of artificial intelligence, while others terrifying for the programs ability to mimic a skill that is commonly considered a human endeavor, but it serves as proof that AI technology has evolved to the point that it can imitate some of the best artists to ever live.

This type of technology is finding great popularity with the average person for obvious reasons. AI art technologies decentralizes art, allowing regular people to bypass the skill and time requirements for most art pieces.[6] Users can also complete their desired art pieces in what would normally take human artist hours to create. AI art generator users have found their creations sprawled all over the internet as clever memes,[7] winning state fair art competitions,[8] and even ending up in comic books.[9]

Unfortunately, AI technology may be making big strides in advancement and evolution, but that is not the case for the copyright laws in the United States. AI technology is moving at the speed of innovation, while copyright laws are moving at the speed of legislation. The advancements in AI art generation technology bring with it many questions that the U.S. copyright system may not be prepared to handle. Traditional U.S. copyright law may possibly grant AI generated art copyright protections because of a policy tradition of promoting the welfare of the country, through economic means, over the individual, but the incentives for the market and the inherent nature of the technology makes it difficult for human artists to target such AI programs for copyright infringement.

Multiple individuals and entities are involved in the art generation process making it unclear who in the process has authorship over the output of works, and therefore deserves ownership of the copyrighted work. Even if copyright protections can be established, human artists are looking to protect their own copyright protected rights by challenging AI companies, the users, and the works with copyright infringement claims. While some of the copyright laws in the United States provide a solid foundation for handling these issues, the unique and unforeseen potential of AI technology is causing U.S. courts to consider whether to expand previous precedent and scholarly frames of thought in order to combat the growing demand for answers about AI generative use.

In this article, the first section will provide a basic overview of AI generative technology and how it is used to create art. The second section will provide a background of current copyright laws in the United States. The third section will analyze whether AI generative can satisfy the fixation and originality requirements to gain copyright protection in the U.S. The fourth section will look to see if AI art generators, programmers, and users can be held liable for copyright infringement in the U.S. The fifth section looks at current public policy responses to cases involving questions about AI art generation while examining the public policy through the lens of

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[5] John McCarthy, *How a Microsoft machine learning AI created this entirely new Rembrandt*, The Drum (Apr. 7, 2016), https://www.thedrum.com/news/2016/04/07/how-microsoft-machine-learning-ai-created-entirely-new-rembrandt.

[6] Sean Michael Kerner, *AI art (artificial intelligence art)*, TechTarget (May 2023), https://www.techtarget.com/searchenterpriseai/definition/AI-art-artificial-intelligence-art.

[7] Laurie Clark, *When AI can make art – what does it mean for creativity?*, The Guardian (Nov. 12, 2022, 11:00 AM), https://www.theguardian.com/technology/2022/nov/12/when-ai-can-make-art-what-does-it-mean-for-creativity-dall-e-midjourney.

[8] Kevin Roose, *An A.I.-Generated Picture Won an Art Prize. Artists Aren't Happy*, NY Times (Sept. 2, 2022), https://www.nytimes.com/2022/09/02/technology/ai-artificial-intelligence-artists.html.

[9] *Id.*

traditional copyright law theories. Section six will take a look at how other countries throughout the world are handling questions about AI art generation within their own copyright laws. The seventh section will provide conclusions.

II. What is AI Art?

Artificial intelligence art creation programs have come a long way with many recently introduced programs finding themselves heavily used thanks to social media trends and growing popularity on the internet. These programs are becoming more and more popular, and they include Midjourney, Stable Diffusion, Dall-E, and many more. While the programs come from different companies, many of the newest programs operate in a similar fashion, through a process known as machine learning.

Machine learning is a subsection of artificial intelligence that features training machines to replicate human thinking by inputting large quantities of data.[10] A series of algorithms are made and combined into a base data set that forms the machine's base learning. The AI then runs repeated tests using this data and new data inputs to over time build up the machine's understanding of the given subject. Through trial and error with additional data added when needed, the AI program can achieve a sizable understanding of its chosen field of understanding. This understanding comes in the form of associating certain data with specific patterns, and by result matching these patterns to ideas.

In the context of art creation, AI programs are trained by large datasets of man-made artworks that creates a base date set for the program, and once the data set becomes understood by the program, then the AI model can begin creating its own art pieces that are similar to the art in the data sets, but not the same.[11] The algorithms within the program would begin with simple task such as learning what a given color may look like, or what does dog look like by analyzing several pictures of a dog. The machine can continue to expand its repository of knowledge so long as new data sets are provided for the AI to learn. The programs can even be specially trained on a specific artist's art in an attempt to mimic their style.[12] With these data sets established, people can then use programs like Stable Diffusion to simply input a text prompt requesting some piece of art. These prompts can be as simple as wanting a picture of a basketball, or as complicated as requesting Darth Vader play a game of ping pong against the Terminator, as long as the data set is large enough to understand the context of the text prompt.

III. Copyright Protection in the United States

Copyright laws in the United States were established early on in the United States Constitution.[13] There are two requirements for copyright protection in the United States and those are originality and fixation.[14]

For the purposes of this paper, fixation will be assumed for AI generated art. Fixation is defined as when a work, "in a tangible medium of expression when its embodiment in a copy or

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[10] *What is machine learning?*, IBM, https://www.ibm.com/topics/machine-learning.
[11] Sean Michael Kerner, *AI art (artificial intelligence art)*, TechTarget (May 2023), https://www.techtarget.com/searchenterpriseai/definition/AI-art-artificial-intelligence-art.
[12] Shanti Escaleante-De Mattei, *Artists Are Suing Artificial Intelligence Companies and the Lawsuit Could Upend Legal Precedents Around Art*, Art in America (May 5, 2023, 10:37 AM), https://www.artnews.com/art-in-america/features/midjourney-ai-art-image-generators-lawsuit-1234665579/.
[13] U.S. Const. art. I, § 8, cl. 8.
[14] 17 U.S.C.A. § 102.

phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[15] Sufficiently permanent and of a transitory duration are not the clearest of standards for fixation, but fixation has been given a fairly broad interpretation that allows for fixation in in electronic devices like computers.[16] The standard use of AI generated art programs allows for the created pieces to be easily saved online or on a computer making it sufficiently permanent for more than a transitory period, so for the remainder of this discussion, fixation will be assumed satisfied.

A. Originality

U.S. courts often view the requirement of originality to be straightforward, requiring an original work of authorship. The work must be independently created by an author with a minimal degree of creativity.[17] This requirement can be broken down into three specific questions for this article. What is the minimal degree of creativity needed for originality? What does it mean to be independently created? What does U.S. copyright law recognize as an author?

Originality can be broken down into creativity, independent creation, and authorship. While the bar for creativity is low for AI art, independent creation by an author is required and the court has a history of denying non-human authorship for copyright protection.

In *Feist Publications v. Rural Services Telephone Co.*, Rural Services published a telephone directory that was filled with information from their subscribers.[18] After denying Feist a license to use said directory in their own publications, Feist took the pieces of information that they needed without Rural's permission.[19] They altered the way some of the information was presented, but some listings in the publication were identical to that of Rural's directory.[20] The court held that the parts of Rural's directory that were copied by Feist was factual information that was not copyrightable.[21] Rural's directory failed to satisfy the requirement for originality even with the court setting the bar for creativity so low because the parts of the directory they were seeking to protect were the facts that were not copyrightable. However, compilations could be copyrighted, if the choices made in selecting which facts to show and how to arrange such facts for their readers could show the minimal creativity needed for copyright.[22] As the court explained, "[t]he distinction is one between creation and discovery."[23] Compilations could be copyrightable because in the work the author was capable of making choices like selection and arrangement that demonstrated creative thought. The court only required that an original work come from an author and that the work had, "the requisite level of creativity," which is "extremely low; even a slight amount will suffice."[24] The vast majority of works make the grade quite easily, as they possess "some creative spark."[25] Feist's publication could not copyright those same facts taken from Rural, but the design and layout and all decisions outside of the facts being displayed could be

[15] 17 U.S.C.A. § 101.
[16] Williams Elecs., Inc. v. Artic Int'l, Inc., 685 F.2d 870, 877 (3d Cir. 1982).
[17] Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 361.
[22] *Id.* at 348.
[23] *Id.* at 347.

[25] *Id.* at 345.

copyrighted if they so chose. If the creative spark standard is low, then what mainly needs to be shown is that an author had the ability to make creative choices within the work.

How can creativity be shown in human thought? In *Meshwerks*, the plaintiff took data and measurements of the defendants' cars and then used modeling software to create a digital modeled wire frame of the cars.[26] Humans were then used to digitally sculpt the wire frames to more accurately depict the vehicles.[27] The lines and data that the modeling program copied were facts of the cars, and facts are not copyrightable.[28] The court explained that when copying images already out in the world that the court will look at other aspects of the image to determine expression, such as "the backgrounds, lighting, angles, and colors."[29] Those creative decisions were made before and after the plaintiff was a part in the process.[30] The court focused on the aspects that demonstrated the author's decision-making to explain that the originality requirement looked at the author's state of mind.[31] The court held that the digital wire frame models were not copyrightable because they lacked the independent creation and creativity required for originality.[32] It is where human thought makes specific creative decisions that go beyond the realm of facts that the court identifies as independent creation leading to creativity.

One of the most famous copyright cases on authorship occurred in 1884 in *Burrow-Giles v. Sarony*, in which Sarony sought copyright protection for a photograph taken of Oscar Wilde against the lithography company.[33] The court defined author as "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature."[34] It is the focus on this definition that begins the court's long-running precedent that an author must be human, as shown by the beginning of the definition "he to whom."[35]

However, courts and the U.S. Copyright Office have denied copyright protection for plants, animals, nature, divine beings, and supernatural beings for being unoriginal.[36] The U.S. Copyright Office also provides that no "machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author" shall be registered as a copyrighted work.[37]

B. What should Originality be with AI?

AI art generating technology has become so advanced that the process would not be described as "random or automatic."[38] Programs are not random because they are based on set data

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[26] *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1260 (10th Cir. 2008).
[27] *Id.*
[28] *See id.*at 1264
[29] *Id.* at 1266.
[30] *See id.*
[31] *See id.* at 1268.
[32] *Id.* at 1269.
[33] *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).
[34] *Id.*
[35] *See id.*
[36] U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.2 (3d ed. 20217); *see also* Naruto v. Slater, 888 F.3d 418 (9th Cir. 2018) (holding, the court held that a crested macaque monkey that took several photos of themselves using a photographer's camara lacked statutory standing under the Copyright Act for copyright protection); *and Kelley v. Chicago Park Dist.*, 635 F.3d 290, 294 (7th Cir. 2011) (holding the Seventh Circuit Court of Appeals held that a living garden display lacked both authorship and fixation for copyright protection).
[37] U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.2101 (3d ed. 20217).
[38] *Id.*

and patterns. Programs are not automatic in their results in the sense that machine will not produce the same artwork every instance even with the same text prompt. Is it the human computer user, the programmer, or the program that is providing the creative spark? This section will look at how the originality requirement should interact with AI art generation by looking, first, at the theories of copyright law to provide answers for who should be recognized as authors and, second, at how case law reasoning aligns with the reality of technological advancements.

a. Theories of Copyright Law

There are three different theories of copyright laws that advocate for different ownership decisions. These theories divide the reasoning behind why copyright law is even needed and in doing so explain the need for certain individuals to have ownership in the copyright process. These theories are welfare theory, personality theory, and fairness theory.[39]

The welfare theory of copyright law argues that the fundamental goal of copyright law should be to maximize social welfare.[40] This focus on the betterment for the greatest number of people in society is a utilitarian view of the operations of copyright law. This line of reasoning also aligns the most with the U.S Constitution which says the aim of copyright is to "promote the [p]rogress of [s]cience and useful [a]rts."[41] For this reason, welfare theory has found popularity in U.S. court decisions when it comes to questions of copyright.[42] Welfare theory takes a far more economical approach to copyright theory as the aim is on some goal for the future and not the philosophical desire to protect rights of authors.[43] The focus on the greater good for the most amount of people aligns well with AI art generators' abilities to decentralize and democratize art creation. Removing the skill gap and hours of necessary training that human artists must go through allows for more people to involve themselves in artistic creation.

Personality theory most directly points to the computer user in the AI art generation process as the deserving owner of copyright protections. Also known as the personhood theory, personality theory justifies copyright law in the sense that property is directly tied to the individual's self-expression and personal identity.[44] A person's sense of identity is directly tied to the resources that they own and the things that they create with such resources.[45] Personality theory has found most of its popularity in European civil law systems such as European Union member states.[46] Unlike the United States, which prefers a more welfare or fairness theory focus, the personality theory provides copyright owners with a moral right to be connected to their work.[47] In this theory, art serves as a materialization of the personal traits each individual is made of and, therefore, the art creative is a form containing a part of themselves.[48] By being an extension of their own persona,

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[39] Jessica Meindertsma, *Theories of Copyright*, OHIO STATE UNIV. LIBR. (May 9, 2014), https://library.osu.edu/site/copyright/2014/05/09/theories-of-copyright/.
[40] Christopher Buccafusco & Jonathan S. Masur, *Intellectual Property Law and the Promotion of Welfare*, COASE-SANDOR WORKING PAPER SERIES IN LAW AND ECON. 1, 1 (2017).
[41] U.S. CONST. art. I, § 8, cl. 8.
[42] *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1262–63 (10th Cir. 2008).
[43] *See* Buccafusco, *supra* note 40 at 2.
[44] Justin Hughes, *The Philosophy of Intellectual Property,* 77 Geo. L.J. 287, 330 (1988).
[45] *Id.*
[46] *See generally* Meindertsma, *supra* note 39.
[47] *Id.*
[48] Hughes, *supra* note 43, at 330.

the art in question is not necessarily classified as having been a result of labor, going against Lockean labor theory.[49]

Fairness theory would recognize a combination of both the computer user and the programmer as joint authorship in AI art generation. The fairness theory draws inspiration from scholars like John Locke, arguing that an individual has a right to ownership when they use effort to perform labor upon unowned and unvalued resources that then provides the resources with value.[50] Commonly backed by economic interest, fairness theory or labor theory, states that an individual is deserving of ownership because they have put in the work and effort to create the art.[51] The artist, having put in the effort, deserves a chance to monopolize their work and make a profit from the effort they put in..[52] The copyright is necessary because otherwise a person's art could be copied by others and the copier could make a profit from the efforts of the original author. This takes away the incentive from the original artist to create art because others could come in and use the original art while still taking away interest from the market for such art.[53] Fairness theory has a largely individualized approach, with a focus on the interest of the human effort put into the creation, and that effort deserves to be rewarded. Both the programmer and the computer user have demonstrated some form of effort in the creation of the art generated, whether in creation of the program or the text prompt. Therefore, it would reason that the fairness theory would see both individuals rewarded for the labor.

b. AI Machines – Originality

Even with such a low standard of creativity needed for copyright protection, critics of AI art generating technology still claim that such art does not rise to the standard. However, even that criticism is largely tied to how proficiently the AI program is used. A text prompt asking for a simple basketball may not rise to such creativity, although it may rise to the standard, as the bar set forth is extremely low, it remains unclear.[54] Criticism is mainly directed at scenarios that would see either human programmers or computer users as authors. However, the AI program may have already progressed enough to account for its own originality and bypass the precedent requiring a human author.

In *Feist*, the court recognized creativity in the selection and arrangement of the information, while barring facts from being copyrighted.[55] In the AI generation process, if the pictures downloaded to train the machine are considered the facts, then the AI program is making decisions of selection and arrangement with every work. The program determines what the computer user wants when they input the text prompt, but the program is making decisions on what works to pull from and how to arrange all of this information to create art that is unique. The bar for creativity is low for human artists, but AI programs are demonstrating the same level of decision making. In *Meshworks*, the court looked at lighting, angles, and background to determine creativity when the

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[49] *Id.* at 35.
[50] Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO STATE L.J. 517, 523 (1990).
[51] Jessica Meindertsma, *Theories of Copyright*, OHIO STATE UNIV. LIBR. (May 9, 2014), https://library.osu.edu/site/copyright/2014/05/09/theories-of-copyright/.
[52] *Id.*
[53] Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO STATE L.J. 517, 518 (1990).
[54] *Id.*
[55] *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, (1991).

primary focus of the creation of a work was just a copy of facts in the world.[56] The AI program makes determinations on backgrounds, lighting, angles, and various other aspects sometimes completely independent of the text prompt provided by the computer user. In this sense, the program demonstrates levels of independent decision-making in areas of art that have largely been considered the domain of human decision-making. With AI capable of providing minimum levels of creativity and independent creation, the only thing stopping AI from having copyright protections is the precedent of human authorship that was created during a time when the idea of technology being capable of human levels of thought and expression was seen as an impossibility. AI art generators are capable of satisfying the originality requirement for copyright protection, their only shortcoming being that they are not human.

Welfare theory is the only theory of copyright law that viably supports AI programs for having copyright protections. The societal benefits for all that come with the promotion and investment into AI technologies in all areas of life, not just art could be too good to ignore for some proponents of AI programs. However, in the U.S such an idea would still clash with the traditional precedent of requiring human authorship.

c. Programmers – Originality

The programmer of the AI machines is the first human interaction with the program that teaches the AI and provides the program with all the necessary data it uses to then make its decisions. It could be easily argued that without the programmer to provide the date then the AI program has no information to pull from into order to makes decisions of light, angle, background, and more. However, while the programmer provides AI with the ability to make those decisions, the programmer never really makes any such decisions directly related to the creation of the artwork only choosing what information to train the AI program on.

Welfare theory in the U.S. could see the computer programmers as the most likely candidate for copyright ownership as it provides an incentive for programmers to continue developing more advanced AI learning machines to generate art for the society as a whole, while still providing the necessary human component that the court looks for. In this instance, the more advanced the AI becomes then the more art can be produced and put out on the market driving a great economic impact. Such a position also encourages investment in other forms of AI which can have economic impacts on other sectors of the economy.

d. Computer User – Originality

Personality theory supports the computer user as the correct owner of copyright protections in regard to AI art generation. While the computer user may input either a small amount of text or a large descriptive text blurb, they serve as the main conduit for direct creative connection to the piece of art. While the programmers create the machine meant to identify pattern recognition for creation of the art, the spur of the moment creative nexus come from the computer user as they input the text prompt. Therefore, the art created from the AI generator would most likely be connected to the computer user under the personality theory.

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[56] *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1260 (10th Cir. 2008).

e. Co-Authorship – Originality

The fairness theory could support programmers, computer users, or both the programmer and the computer user as having joint ownership of a copyright, seeing as neither individual could create the art without the other. The programmer needs the computer user to input the text prompt and spur the AI into action by cyphering through its database, while the computer user needs the programmer to put in the effort of creating the AI and training the machine using several trials. Each one has put in their own form of work and without both then the art piece in question would not be created. Therefore, an ideal use of the fairness theory would see both contributors as authors.

IV. Copyright Infringement

Legal battles have been brewing inside the United States that involve AI art technology infringing on already established copyrights. Once the two requirements for a copyright, originality and fixation are satisfied, the copyright owner is given five exclusive rights to the work that include the right of reproduction, right to derivative works, right of distribution, right of public performance, and right to public display. Copyright infringement is the act of violating one of the rights of a copyright holder.[57] Copyright infringement can be divided into two categories, direct and contributory infringement.

Direct infringement is when one person exercises one of the copyright holders right without authorization to do so.[58] The infringer is held to strict liability as their no consideration of intent or any state of mind.[59] In the ninth circuit, the Court held that the act of designing or implementing a machine that is capable of creating copies that would be copyright infringement is not direct infringement on their part when the users of the machine could just as easily copy not infringing work.[60] In the case, Netcom created a system that automatically created temporary copies of all date sent through the machine, but it was one of the users that sent the infringing messages to a friend's computer that was then copied by Netcom's computer where it was accessible by other users of the server.[61] The court likened Netcom's involvement to that of the owner of a copying machine that lets others make copies on the machine, deciding their analysis for Netcom should be under contributory liability and not direct liability.[62]

A direct infringer against a copyright must first be identified before another contributorily infringes on a copyright because there can be no one contributory liable without someone first being directly liable.[63] A contributory infringer can still be held liable if it can be shown that they had "knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another."[64] For a contributory infringer to have knowledge of the infringing act, the court in *Netcom* held the defendant to whether they knew of the infringing use or should have known of the infringing use.[65] The defendant received notice before the infringing activity was complete, and therefore left a question of fact to where the defendant should have known. The court also stated that the contributory infringer's participation in the infringing action must be of

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[57] Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361, 1373 (N.D. Cal. 1995)
[58] *Id.* at 1367.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.* at 1369.
[63] *Id.* at 1374.
[64] *Id.* at 1376.
[65] *Id.*

a substantial nature, holding that providing a service that allowed for the distribution of the infringing material even after knowledge of the infringing action was enough for Netcom to be held contributory liable.[66]

The analysis in *Netcom* would leave only the computer user of the AI programs as the only potential individual to be held directly liable for any sort of copyright infringement when the AI generated art is produced as they were the ones using the AI program to create the art. The programmers would argue that they are like the owners of the copying machine that allowed others to use the service.

However, the programmers could still be contributory liable. Like in *Netcom*, the AI programmer maybe should have known about the computer user's infringing activity given the nature of what the AI generator does, but that could only be conceivable if it can be shown that any art the AI art generator creates is infringing on the right of derivative works. Otherwise, the AI programmers would simply argue that the AI program was capable of creating non-infringing works and therefore had no knowledge that the infringement was certainly taking place. If knowledge could somehow be proven that the programmer did know of the infringing action, then it could also be argued that the programmer substantially participated in the infringing action since their creation of AI program is what makes it possible for the infringing artwork to be created in the first place. In *Netcom*, the court held that providing the service and system that allowed for the violation of the right was enough to provide a question of fact in the question of substantial participation.[67] In this instance, the AI programmer is certainly creating the system to perform the infringing act. Of course, all this potential for infringement is based on several assumptions that the artist could show a direct infringement against one of their rights by the computer user using the AI program.

A. Instances of Infringement

For our purposes, the question of copyright infringement during the generative AI art process can be broken down into two instances, the scanning of art and the creation of art.

a. Scanning – Right of Reproduction

The first potential instances of copyright infringement come before any art is generated, but it occurs during the machine learning process. Artists are claiming that their copyright protected original pieces or being taken from the internet without their consent and then being used in the datasets that are created to train AI programs. To input the protected works into the datasets they first have to be turned into models for the AI program to scan and break down into data. Artists are claiming that this replication of a work into a model is copyright infringement. Even though the medium may change as the art is scanned, the scan is still a copy of the artwork. Since the human artists are going after programmers and AI companies for direct infringement, there is no consideration for intent as they are held strictly liable. However, the programmers are using the Fair Use Doctrine as a defense.

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[66] *Id.*

[67] *Id.* at 1382.

b. Creating Art – The Right to Derivative Works

The second instance comes when the art is generated, and the work looks similar to an already protected work that was used to train the AI program. In January 2023, a group of artists sued both Stable Diffusion and Midjourney in an alleged copyright infringement case.[68] The claim was simple, these AI art generation programs took thousands of copyrighted images from the internet without the author's consent and used them to train their AI models that then produce pieces of art similar to the human artist's own works.[69] The AI programs would then go on to mimic the style of substance of these learned from pieces of art by reconfiguring them and creating infringing pieces of art.[70] Some supporters of AI art technology defend it by pointing out that human made artworks are broken down into data points to train the AI machines, the technologies ability to learn is based on the design of breaking down patterns into mathematical representations and then being able to recognize those patterns again through data.[71] Data is recognized as a fact and therefore cannot be copyrighted. The Plaintiffs in the case are claiming that the AI machines are serving as a technologically advanced collage machine that is matching different patterns from the art used to teach the machines and then create infringing works.[72] More specifically, the lawsuit claims that AI art programs are infringing on the artist right to derivative works.

A derivative work is a work "based upon one or more preexisting works, such as a … art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."[73] However, the author does not have a right to all works that may simply include ideas from the previous work. For a work to be classified as a derivative work, it must have "substantially copied from a pre-existing work."[74] The court has held that a work is derivate if, to avoid copyright infringement, the artist would need to ask the original artist for permission.[75] Different circuits have their own substantial similarity test, but two of the most prominent come from the Second and Ninth Circuits. The Second Circuit, in *Williams v. Crichton*, laid out a test that focused on removing the *scenes a faire* or non-protectable elements from a work and then comparing only what remains of the two works to determine substantial similarity.[76] The Ninth Circuit broke the substantial similarity test down into two parts–an extrinsic and intrinsic test.[77] The extrinsic test is an objective test comparing things like themes, mood, setting, characters, and essentially all objective forms of expression.[78] The intrinsic test is subjective and looks to whether an "ordinary, reasonable audience" could find the two works substantially similar based on the

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[68] James Vincent, *AI art tools Stable Diffusion and Midjourney targeted with copyright lawsuit*, THE VERGE (Jan. 16, 2023, 6:28 AM), https://www.theverge.com/2023/1/16/23557098/generative-ai-art-copyright-legal-lawsuit-stable-diffusion-midjourney-deviantart.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] 17 U.S.C. § 101.

[74] Pickett v. Prince, 52 F. Supp. 2d 893, 906 (N.D. Ill. 1999).

[75] *Id.*

[76] Williams v. Crichton, 84 F.3d 581, 588 (2d Cir. 1996),),) (, where the court held that Dinosaur World books were not substantially similar to the Jurassic Park works because nearly all similarities of the two works come from non-copyrightable elements..).

[77] Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002).

[78] *Id.*

concept and feel of the works.[79] The Ninth Circuit The ninth circuit test does integrate the Second Circuit test into their extrinsic test.[80]

Using either the Second Circuit or Ninth Circuit test, the same problem arises when it comes to analyzing AI art technologies used with derivative works. These tests assume a comparison of one or two art pieces, maybe one or two more to the extreme, but the process becomes nearly impossible when one looks at what opponents of AI art generators claim the technology does. AI programs are taking small pieces from thousands of pictures and paintings from the internet and putting them together. With such a large quantity of pieces to choose from, it becomes extremely difficult to find a substantial similarity with one specific artist because if pieces could be identified they would be too small to be substantial.

B. Infringement Defense - The Fair Use Doctrine

The AI companies' and programmers' first defense against claims of copyright infringement is the Fair Use Doctrine, although most actively finding use during the scanning stage where the AI machines are copying the copyrighted works.

A copy of a copyright-protected work is not considered infringing when it is "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[81] This test aligns with Congress's purpose for copyright which is "[t]o promote the Progress of Science and useful Arts."[82] The test for whether the use of a work is protected under Fair Use is based on four factors, including, the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work, and the effect of the use upon the potential market for the copyrighted work.[83] In our scenario, using the copyrighted works to create models that can be turned into data for the AI program would be argued to fall under the category of research. Machine learning is a necessary research process for developing AI technologies.

When it comes to the first of the four factors, the purpose and character of the use, courts have largely focused on whether the use of the copyrighted work is "transformative."[84] The court warned of the dangers of taking the word transformative too seriously, essentially boiling it down to the user of the fair use doctrine needing to have a justification for using the copyrighted work.[85] In *Authors Guild*, Google's[86] In *Authors Guild*, Googles transformative purpose was to provide unavailable information about original books by providing snippets about the books online and providing a search function for certain words found in the book.[87] This transformative purpose limited the amount of information to the public while still providing necessary search functions for the users, and was considered highly transformative by the court, outweighing considerations about Google's commercial nature.[88] The court determined that both the snippet viewing and word search uses were non-infringing uses of the copyrighted material.[89]

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[79] *Id.*
[80] *Id.* at 822-23.
[81] 17 U.S.C.A. § 107 (West).
[82] U.S. Const. art. I, § 8, cl. 8.
[83] 17 U.S.C.A. § 107 (West).
[84] Authors Guild v. Google, Inc., 804 F.3d 202, 214 (2d Cir. 2015).
[85] *Id.* at 215.
[86] *Id.* at 215.
[87] *Id.*
[88] *Id.* at 215-219.
[89] *Id.* at 207.

Advocates for AI art generators likely make an argument that the machine learning process is an educational purpose. As in *Authors Guild v. Google*, the use of copyrighted material is transformative in the sense that the use of the material is justified in that it is being used for teaching AI machines through the machine learning process. The copyrighted artwork is not getting shown to the public at all, even less than the snippet viewing that Google was allowing. At the time of scanning, the AI companies do not have any commercial interest in using the copyrighted works as it being used as a training tool with no profits being made. Under such an analysis, it is likely that AI programmers' use of copyrighted work during the scanning process is likely to satisfy the first factor of the Fair Use test.

The second factor, the nature of the copyrighted work does not necessarily support fair use in this instance. *Authors Guild* recognized that the second factor tends to have the least impact on fair use determinations.[90] However, the court mentioned that copyrighted works of a more factual nature have a need to spread more than fiction or fantasy.[91] While the copyrighted works are being broken down into factual data points for the machine learning process, it is converting the expression and ideas of the users into those facts. It would therefore be unlikely that it could be argued that the nature of the copyrighted work was more factual and susceptible to fair use.

The third factor is complicated because while the model made for the AI program from the copyright protected work is substantial in that the AI programmers are scanning the entire copyrighted work; the court has held that "unchanged copying has repeatedly been found justified as fair use when the copying was reasonably appropriate to achieve the copier's transformative purpose…"[92] For this analysis, the focus seems to fall more on factors one and four.

For the fourth factor, if the question was solely about AI art generators, then the fourth factor would detract from the AI advocates argument because the machine learning process is going to directly impact the market for the original work with an influx of other art pieces that can mimic the same style and aesthetics. While the scanning process itself may not have a direct market impact on the copyrighted authors work, the machine learning ultimately teaches the machine to produce a work that could impact the market, capable of mimicking style and subject matter that could subtract from the demand for the copyrighted authors' work.

The court could decide that machine learning is protected by fair use, but that means an extremely large population of artist and creators would have to accept that some of their rights are not protected in an ever-growing field of technological development. However, for the courts not to protect machine learning under fair use would drastically hamstring efforts to advance and develop AI technologies in the U.S. with the added risk of scaring potential AI development projects out of the country.

Artificial intelligence art generation may have the potential to earn copyright protections, but it is unlikely that human artists will be able to successfully sue AI art generation programmers or users with copyright infringement. U.S. copyright laws are not prepared to handle such a decentralized and evolving form of art creation.

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[90] *Id.* at 220.
[91] *Id.*
[92] *Id.* at 221.

V. Public Policy Responses to AI

The U.S. Copyright Office released a policy statement in March of 2023 stating their position going forward that copyright protection would only be for creations made by humans.[93] While humans may manipulate AI generated art with the sufficient degree to be considered copyrightable outright, and unchanged AI art would not be open for copyright registration.[94] The Office also wants all applications to list if an AI has been used in the making of works, along with already submitted applications amending their statements to include AI use.[95]

The U.S. Copyright Office policy statement comes during a time of public outcry against most forms of artificial intelligence in the artistic world. AI use in movies, publications, and music leaves many artistic professionals wanting protection and job security. This decision would mostly align with some form of labor theory that values the work and effort that goes into the production of human art so those artists should be able to profit from such work. The winners in this decision are those human artists who want to protect the years of effort they have put in to learning their craft, while the losers would be large companies backing the rise of innovative AI technologies who have something to gain monetarily or culturally for the advancement of such technologies. However, a lesser-known loser of this decision could be argued to be the masses of people that never had the resources to learn the time-consuming and resource heavy skills that are required for creating art. Those masses had AI art generators to thank for an easily used and acquired form of creating art.

Court cases involving AI art generation are relatively new and slow moving as they must be careful undertaking a path into an unknown landscape of legal questions. However, a federal district court in Washington, D.C. has affirmed the U.S. Copyright Office's position by declaring that only humans qualify as authors in regard to copyrights.[96] The Office's statement came in response to a comic book seeking copyright protection that had AI created art mixed with human text.[97] The Federal District court had a more extreme question to consider when the art in question was fully created by AI technology, but the plaintiff sought to register copyright protection under a theory of work-for-hire doctrine that he employed the AI program in question.[98] In a work-for-hire scenario "copyright law deems the employer to be the 'author' for purposes of copyright ownership."[99] Such an argument not only involves recognizing a machine as an employee, but if the plaintiff's argument had been accepted then it would have resulted in a massive break from contemporary copyright law precedent as the U.S. would have recognized non-human authorship for the first time in its history. Such a decision, while certainly extreme, does have an appeal for some advocates of welfare and theory as creating an incentive for technological advancement in the Artificial Intelligence sphere. Supporters of fairness and personality theories would disagree as it does not recognize the hard work of humans that goes into the creation of art, and removes

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[93] Shanti Escaleante-De Mattei, *Artists Are Suing Artificial Intelligence Companies and the Lawsuit Could Upend Legal Precedents Around Art*, ART inIN AMERICA (May 5, 2023, 10:37 AM), https://www.artnews.com/art-in-america/features/midjourney-ai-art-image-generators-lawsuit-1234665579/.

[94] *Id.*

[95] *Id.*

[96] Lauren Leipold and& Owen Wolfe, *No Human, No Way: D.C. Federal Court Denies Copyright Protection for AI-Generated Art*, JDSUPRA, https://www.jdsupra.com/legalnews/no-human-no-way-d-c-federal-court-3831962/; *see also* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884); Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc., 528 F.3d 1258, 1260 (10th Cir. 2008).

[97] Escaleante-De Mattei, *supra* note 56.

[98] Leipold & Wolfe, *supra* note 59.

[99] Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 137 (2d Cir. 2013))).

any sort of personal bond a human may have to the created art. The winners of such a decision would have been the companies that put more money into these AI programs with the hopes of earning a profit while seeing technology advance, leaving traditional artists disincentivized to create art at a drastically higher resource cost to what the AI programs could perform.

Human artists may not want AI art generation users to gain copyright protections in their works because it devalues their own art, but in the current climate they are far more concerned with preventing copyright infringement that they see occurring with the teaching of these AI programs.

A federal judge in a copyright infringement case against Stability Diffusion and AI programs has asked for plaintiffs to provide more evidence if they wish to assert claims of copyright infringement.[100] The plaintiffs are targeting the large dataset being used to train the AI programs, known as the LAION dataset, which consists of billions of images taken from the internet to train artificial intelligence programs.[101] The sheer number of images involved in the dataset make it extremely likely that art posted to the internet by plaintiff artists have found their way into the dataset. The sheer number of images found in the data set allows for the AI programs to extrapolate from so many sources that the likelihood of creating a substantial similarity to any one work created by a traditional artist seems unlikely.[102] An Artist's failure to attach copyright infringement to AI art generators may serve as a bigger devaluation in their work then even if the programs could gain copyright protection. What becomes the point of creating art to be sold when someone can take that art and use it to train AI to create a similar creation for almost no effort on the user's part? Such a decision certainly benefits the large companies involved in producing the AI programs because, while they might not be able to gain copyright protection, as long as they can avoid copyright infringement being tied to their programs then they still have economic incentives to develop these art generation AI and put them out into the world where the masses will still continue to use them, much like the current situation surrounding AI art generations.

Ultimately, the United States will have to make a decision on whose interests to protect. The United States' track record of following a line of reasoning that supports welfare theory by promoting economic interest and providing good for the most people would indicate that it is more likely that traditional artist will be unable to successfully bring a lawsuit against AI art generators copyright infringement in order to push advancements and investments in AI technology.

VI. Response to AI Art Generators Around the World

The United States may have its own unique set of copyright laws, but it is still helpful to examine how other countries are handling the question of AI copyright ownership, especially when no one seems to have all the answers.

A. United Kingdom

In the United Kingdom (UK), their copyright laws have historically protected human authorship in the copyright process. The 1988 Copyrights, Design, and Patent Act (CDPA) provides that, "In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the

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[100] Jose Antonio Lanz, *Human Artists Lose Ground in Legal Battle Against AI*, EMERGE (July 21, 2023), https://decrypt.co/149533/human-artists-lose-ground-in-legal-battle-against-ai.
[101] Escaleante-De Mattei, *supra* note 56.
[102] Lanz, *supra* note 62.

creation of the work are undertaken."[103] This leaves the UK with similar questions to the United States; without the AI having any chance of copyright ownership then the question of authorship still comes down to either the programmer, computer user, or leaving the art to the public domain. It also remains unclear if the AI learning process is considered copyright infringement. Courts in the UK are already attempting to answer some of these questions as Getty Images sued StabilityAI for copyright infringement.[104]

B. The European Union

The European Union (EU) is attempting to take the initiative on the international stage for writing up rules for AI technology. The EU is currently drafting the AI Act which would see AI technologies categorized into three risk levels, and also require companies that deploy AI technology to disclose any copyrighted material that is used in creating the AI technology, like any art used in the machine learning stage of an AI program.[105] The AI Act takes much of its inspiration for definitions and the like from the Berne Convention, which still has influence over much of the generative AI use in the European Union.[106]

The Berne Convention, along with the rest of EU copyright law, breaks the question of AI generated art copyright protection into four steps.[107] For an AI generated creation to be considered "work" it must be in the artistic domain, involve human intellectual effort, have originality, and have expression. AI generated art almost certainly falls within the artistic domain given its innate purpose, and the required human intellectual effort requirement can still be considered low without more dialogue. For the third criterion of originality, the Court of Justice of the European Union (CJEU) focuses on whether there was "sufficient creative space."[108] This means there was enough room in the creative process for the human author to demonstrate some form of creative choice. The CJEU broke down the creative process when being assisted by a machine into three stages: conception, execution, and redaction.[109]

The conception stage is the creation of the plan for the work where decisions are made about a work's style, format, and other design choices.[110] The second step, execution, is simply the act of morphing the design into an actual draft of the work.[111] In traditional art, this would be the actual act of painting a work. The third and final step, redaction, is the phase of the creative process where the draft created in the execution phase is refined by making corrective choices for the final product.[112]

There is a possibility for the program user to gain some form of copyright protection under EU copyright law, but the programmers are unlikely to gain protection. In the AI art generation

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[103] Copyright, Designs and Patents Act 1988, c. 49, § 9(3) (UK).
[104] Suzanne Bearne, *New AI systems collide with copyright law*, BBC NEWS (July 31, 2023), https://www.bbc.com/news/business-66231268.
[105] Supantha Mukherjee, Foo Yun Chee, & Martin Coulter, *EU proposes new copyright rules for generative AI*, REUTERS (Apr. 28, 2023, 2:51 AM), https://www.reuters.com/technology/eu-lawmakers-committee-reaches-deal-artificial-intelligence-act-2023-04-27/.
[106] P. Bernt Hugenholtz & João Pedro Quintais, *Copyright and Artificial Creation: Does EU Copyright Law Protect AI-Assisted Output?*, 52 IIC 1190, 1193-94 (2021).
[107] *Id.* at 1200.
[108] *Id.* at 1201.
[109] *Id.*
[110] *Id.* at 1202.
[111] *Id.*
[112] *Id.* at 1203.

process, the computer user has some of the most involvement in the conception stage. This is the stage when they have the opportunity to input the text prompt that can determine subject, style, genre, and other features that are largely considered during this phase of the process. The user then has relatively limited involvement in the execution phase because of how the artwork is created and put down onto the medium is largely chosen by the program itself. Finally, the computer user once again has some control during the redaction phase because they can choose to alter colors or request additional changes from the AI. However, there is a question of whether the computer user shows any involvement in the redaction phase if he makes no changes to the art, especially given the fact that some AI programs would produce a completely different piece of art if even a single word was changed in the text prompt that was input into the program. While the CJEU has indicated that creative choices made by a human during the conception phase are important factors in finding for originality,[113] it would require the CJEU to accept most of the creative choices made during the conception phase with hardly any choices in the other stages of the AI art generation process.

C. Australia

Australia's copyright laws point towards a more extreme solution to AI copyright issues that would have a cultural impact by recognizing AI as a joint owner or allowing much of the work of AI generators into the public domain. In Australia, in 2012, the court held that computer code could not be copyrighted that was not solely authored by a human or coauthored by a human.[114] While this case was focused on code text, if the court followed the same line of reasoning for AI art generator case, neither AI programmers nor the computer users could claim to have solely created the art without the AI. This would leave the court with two options, either they would have to recognize the computer users and programmers as joint owners, or the art created would receive no protection and would enter into the public domain.

AI companies are also encountering another challenge in Australia that directly involves the question of whether the technology is capable of copyright infringement. The simple answer for Australia is yes. Australian copyright laws heavily restrict data mining, leaving no exceptions for data mining processes that allow for artificial machine learning.[115] Specifically, the law requires authorization from a copyright owner if AI programmers want to use the work in their machine learning data sets. To put that into context, the LAION dataset contains billions of pieces of art; such a conglomeration of works likely features thousands, if not millions, of artists would require companies to receive authorization from every single author.[116] Australian copyright laws already indicate that are not catering to the needs to AI companies and there users, so it is no surprise that they show no interest in providing AI generated works with copyright protections.

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[113] *Id.* at 1202.

[114] *Acohs Pty. Ltd. v Ucorp Pty. Ltd.*, (2012) 201 FCR 173. (Austl.).

[115] *See* Rita Matulionyte, *Australian Copyright Law Impedes the Development of Artificial Intelligence: What Are the Options?*, SSRN ((, Dec. 30, 2020),),, http://dx.doi.org/10.2139/ssrn.3720289.

[116] *See* Romain Beaumont, *LAION-5B: A NEW ERA OF OPEN LARGE-SCALE MULTI-MODAL DATASETS*, LAION BLOG (Mar. 31, 2022), https://laion.ai/blog/laion-5b/.

D. India

India is the first country to allow an AI art generating program to be a co-author in copyright registration.[117] The AI painting application, Raghav, was listed as the co-author for the artwork *Suryast*.[118] It is important to note that an application was also sent in that listed Raghav as the sole author of the work and that was rejected, but it still marks the first time that an AI program has been accepted as any form of author for a copyrighted work.[119] While it may not be the full authorship that some supporters of artificial intelligence were looking for, the decision serves as a small first step towards AI technology receiving some form of copyright rights. It urges the question that although AI technology may only be so advanced as to serve as co-authors in a copyrighted work, what type of advancements would be needed to see full ownership as a possibility?

E. Singapore

Singapore serves as one of the leading innovative countries on the Asian continent with it continuously being ranked in both innovation and intellectual property systems.[120] Historically, Singapore copyright laws were based on UK copyright laws up until 1987 when the Copyright Bill was passed.[121] Hence, Singapore intellectual thought on generative AI art shares many similarities with the UK system. While authorship in Singapore's copyright laws is generally held to require a human involvement by Singapore courts, the Copyright Act strays from officially stating such.[122] The court has limited what is considered authorship specifically in ways that may hinder AI programmers' abilities to gain copyright protection for generated AI art. The court held that collecting facts about racehorses for a diagram about racehorses did not constitute authorship because the collector of the facts only demonstrated "preparatory efforts."[123] This would mean that AI programmers who gather data and information into order to train the AI through machine learning would be unlikely to gain copyright protections because their work would be merely preparatory. By process of elimination, this would leave only the computer user as the only potential candidate for gaining copyright protection in AI generated art. Otherwise, the art would be considered left to the public domain.

VII. Conclusion

AI art generation technology has challenged long held understandings about copyright protection and copyright infringement laws. Copyright protection laws are struggling to decide who in the AI art creation process should be endowed with authorship. Human artists are attempting to use copyright infringement claims against the machine learning process before AI

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[117] Shradha Prakash, *Copyright ownership of AI generated content in India*, SUJATA CHAUDHRI IP ATTORNEYS (Mar. 16, 2023), https://www.sc-ip.in/post/copyright-ownership-of-ai-generated-content-in-india?utm_campaign=article&utm_content=articleoriginal&utm_medium=syndication&utm_source=mondaq&utm_term=Intellectual-Property.

[118] *Id.*

[119] *Id.*

[120] Tal Dadia et al., *Can Ai Find Its Place Within the Broad Ambit of Copyright Law?*, 10 BERKELEY J. ENT. & SPORTS L. 37, 52 (2021).

[121] *Id.*

[122] *Id.* at 57.

[123] *Id.* at 59.

art creation has occurred, and against the actual AI art output that potentially may violate derivative work rights.

In matters of copyright protection, the long-held belief that only humans can have authorship in copyrighted works is standing strong, but that still leaves the potential for programmers of the AI or the computer users of the AI to be copyright owners, with the added possibility that neither gains copyright ownership. The United States has typically followed welfare theory in their understanding of copyright laws and therefore seems likely to grant the programmers or users copyright protection to stimulate economic incentives for more AI technology research and advancement.

AI companies and programmers are looking to use the Fair Use Doctrine to protect themselves against copyright infringement claims targeting machine learning. The U.S. must balance the already established rights of human artists with the potential investment and advancement opportunities that comes with artificial intelligence research residing in the country.

Human artists are also fighting an uphill battle to argue copyright infringement against the AI art pieces created because the large quantity of data that goes into teaching the AI programs make it difficult to identify any substantial similarity with one specific piece of art.

Ultimately, traditional U.S. copyright law may possibly grant AI generated art copyright protections given a track record of promoting the welfare of the country in order to promote economic interests, but the incentives for the market and the inherent nature of the AI generating technology makes it difficult for human artists to target such AI programs for copyright infringement.