

SOUTH CAROLINA JOURNAL  
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**ARTICLES**

INTERNATIONAL INVESTMENT AND ARBITRATION IN SOUTH  
CAROLINA

*Michael S. Cashman and J. Conlan Lynch*

NON-REFOULEMENT UNDER THREAT:  
THE CASE AGAINST CHINA

*Dr. Paul S. Hanley*

TARGET BOARDS AND THE COMMITTEE ON FOREIGN INVESTMENT  
IN THE U.S.

*Vivek Tata*

**CASE SUMMARY**

*UNITED STATES V. ODONI*, 782 F.3D 1226 (11TH CIR. 2015):  
THE INTERNATIONAL LOOPHOLE TO THE FOURTH AMENDMENT

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# INTERNATIONAL INVESTMENT AND ARBITRATION IN SOUTH CAROLINA

*Michael S. Cashman\* and J. Conlan Lynch\*\**

## INTRODUCTION

South Carolina is, and has been for the past several years, one of the most desired destinations for international investment in the United States. Such investment stimulates business and generates substantial jobs in the state. While foreign investment is largely beneficial, it can expose domestic companies to significant risks. As is the case with any business transaction, disputes may arise. Furthermore, many businesses new to this type of commerce lack familiarity with the laws and procedural rules of foreign courts. Navigating them can be perilous. Lack of experience with and knowledge of international legal systems dramatically increases the chances of domestic business' receiving unfavorable results in disputes with a foreign entity. To this inherent problem, this article proposes a solution of international arbitration: a dispute resolution process very familiar to foreign and larger domestic companies, and gaining greater acceptance within the United States.

The first section of this article describes South Carolina's international investment environment and discusses South Carolina's predominant foreign partners and products manufactured in the state, including South Carolina's primary export partners. The second section then illustrates some of the differences in those main trading partners' dispute resolution systems, as well as problems that arise when forced to operate within them. The third section then proposes international arbitration as a solution to these problems and discusses the benefits of using it as a dispute resolution mechanism. The fourth section identifies key considerations when drafting an arbitration agreement. Lastly, the final section discusses some of the major arbitration forums and their default rules to illustrate available options and important considerations for choosing a forum.

## I. INTERNATIONAL INVESTMENT AND EXPORT PARTNERS

Globalization is the tendency of businesses to spread beyond domestic markets to markets throughout the world as countries form a more interconnected marketplace.<sup>1</sup> As with any trend, it presents both opportunities and challenges; South Carolina is embracing these opportunities and meeting these challenges. As a result, it has experienced substantial foreign investment and parallel job growth. In order to put South Carolina's development into context, this section first will broadly look at foreign investment in North America and the United States, and then turn its focus specifically to South Carolina.

To better understand the statistics presented in this article, it is necessary first to identify the indicators used to gauge the presence and significance of foreign investment. This article uses Foreign Direct Investment (FDI), and the corresponding jobs created directly as a result of FDI, as indicators of foreign investment. FDI data is based on data announced by a company's press release and measures capital flow through measuring various forms of FDI, including mergers and acquisitions.<sup>2</sup> FDI is commonly used to measure the success of a geographic region, however, this measure can be misleading.<sup>3</sup> Flows such as mergers and acquisitions are driven more by the desirability of the target than by the desirability of the geographic location and, consequently, can misstate the investment in a region that results from attractiveness of the location.<sup>4</sup> Despite this risk, however, FDI often serves as a good, general indicator of foreign investment. Our second indicator, job creation, will be used

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<sup>1</sup> See *Globalization*, INVESTOPEDIA, <http://www.investopedia.com/terms/g/globalization.asp> (last visited Aug. 4, 2016).

<sup>2</sup> IBM GLOBAL BUSINESS SERVICES, GLOBAL LOCATION TRENDS 2015 REPORT: FACTS AND FIGURES 10 (Sep. 2015).

<sup>3</sup> *Id.*

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

to supplement the general indication provided by FDI. Jobs created by FDI is a great measure of foreign investment because job creation indicates whether a “clear decision on the investment location has been made.”<sup>5</sup> Accordingly, using these indicators together should provide a clear picture of foreign investment. With regard to South Carolina, this article will include a look at the state’s exports; the state’s top investing countries; the countries’ major companies operating in the state and their respective products; and the number of foreign companies operating in the state. These indices are designed to give a more complete picture of the current status of foreign investment in South Carolina.

Before examining these specific indicators, it is important to provide context by framing a current snapshot of global foreign investment: in 2014 the top five countries experiencing foreign-created growth were, in order, Asia, Europe, Latin America & Caribbean, North America, and Africa.<sup>6</sup> Since 2005, North America in particular has seen steady growth in foreign investment projects and foreign jobs created.<sup>7</sup> As a top foreign-investment destination in 2014, North America is responsible for 13% of foreign-created jobs, or approximately 133,500.<sup>8</sup> These statistics show an increase, from 2013 to 2014, of over 30,000 foreign-created jobs and an increase of over 500 foreign-investment projects.<sup>9</sup> In light of the global labor market average of 144 new jobs per one million inhabitants, North America’s growth is staggering: in 2015, the average was more than doubled, with 377 jobs per one million inhabitants.<sup>10</sup>

Although North America is ranked fourth in terms of foreign-created jobs, within North America the United States is, and has been for years, the top recipient of foreign-created jobs.<sup>11</sup> The United States hosts 11.6% of the world’s foreign-created jobs, totaling 120,500.<sup>12</sup> The U.S.’ closest rival, China, created only 107,000;

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<sup>5</sup> *Id.* (It is worth noting that the IBM Global Location Trends 2015 Report, which determines and analyzes trends and recent developments in corporate location selection, focuses on job creation as an indicator of foreign investment).

<sup>6</sup> *Id.* at 13.

<sup>7</sup> *Id.* at 64.

<sup>8</sup> *Id.* at 13-14.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 64.

<sup>11</sup> *Id.* at 16.

<sup>12</sup> *Id.* at 16-17.

India comes in next but represents a significant drop with a mere 86,700 foreign-created jobs.<sup>13</sup> Additionally, the U.S. creates 378 jobs per 1 million inhabitants, which is well above the global average.<sup>14</sup>

As this data demonstrates, the United States is one of the top locations globally for foreign investment. Leading the U.S., as well as all of North America, as a destination for foreign investment is South Carolina. South Carolina has 1,653 jobs created per one million inhabitants, well exceeding the next closest states, Tennessee, by almost 400 additional jobs and Kentucky, by over 600 jobs per million.<sup>15</sup> Significantly, South Carolina more than doubled its foreign-created jobs between 2013 and 2014.<sup>16</sup> As of 2015, South Carolina has ranked first in job creation as a result of foreign investment for three of the previous four years.<sup>17</sup> Further, in 2015, South Carolina was deemed the winner of the inaugural FDI championship.<sup>18</sup> This championship evaluates which states attract the most FDI projects and “interstate investment on a per-capita basis.”<sup>19</sup>

Shifting from the examination of how South Carolina compares to other FDI players, this next section breaks down the international activity of South Carolina independent of those other players. As noted above, FDI is the investment of a company based in one country into a company based in another country.<sup>20</sup> FDI can be accomplished in many ways, including through an associate company, a subsidiary, a merger, or a stock acquisition.<sup>21</sup> Over the last five years, South Carolina has had a total of \$11.8 billion of FDI,

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<sup>13</sup> *Id.* at 16.

<sup>14</sup> *Id.* at 68.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See Cathy Mullan, *US National Championship: The Winner*, FDI MAGAZINE, (Feb. 15, 2016, 9:00 AM), <http://www.fdiintelligence.com/Locations/Americas/USA/fDi-National-Championship-the-winner?ct=true>.

<sup>19</sup> *Id.*

<sup>20</sup> See *Foreign Direct Investment*, INVESTOPEDIA, <http://www.investopedia.com/terms/f/fdi.asp> (last visited Aug. 4, 2016).

<sup>21</sup> See *id.*

with \$2.2 billion of that coming in 2015.<sup>22</sup> The FDI of 2015 represents an incredible 2,000% increase in FDI since 2010.<sup>23</sup> Supporting the data that demonstrates a strong foreign presence in South Carolina is the growth in FDI-created jobs; to reiterate the point made above, job creation is a strong indicator of foreign commitment to a region. In 2015, there were 7,308 FDI-created jobs.<sup>24</sup> This is almost a 40% increase from the previous year and more than a 200% increase from 2013.<sup>25</sup>

South Carolina has steadily attracted interest from a variety of countries and companies. Since 2011, South Carolina has had 31 different countries and 186 different businesses invest in the state.<sup>26</sup> In 2015 alone, South Carolina had seventeen different countries and forty-one different foreign businesses actively investing in the state.<sup>27</sup> These statistics represent over 50% growth since 2005 and over a 20% increase from 2010.<sup>28</sup> Of these different investing countries, Germany is the leading investor followed by Japan, France, Canada, and Sweden.<sup>29</sup>

Germany, as the leading investor, invested over \$4.1 billion in South Carolina in 2015 and is responsible for 35% of the foreign-created jobs in the state.<sup>30</sup> Its largest corporations in the state are Daimler, an automobile manufacturer, and the Schaffler Group, a roller bearing and ball bearing manufacturer.<sup>31</sup>

Japan invested over \$2.8 billion in South Carolina in 2015 and is responsible for 24% of South Carolina's foreign-created jobs.<sup>32</sup> Japan has several large companies operating in South Carolina, including Mitsubishi Polyester Film, a plastic manufacturing company; Honda, in its ATV manufacturer capacity; Kobelco

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<sup>22</sup> See E-mail from S.C. Dep't of Commerce to co-author Conlan Lynch, jmslynch13@gmail.com (Apr. 4, 2016, 4:34 PM) (on file with author).

<sup>23</sup> *See id.*

<sup>24</sup> *Id.*

<sup>25</sup> *See id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *See id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

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

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

Construction Machinery, a manufacturer of construction and construction transportation machinery; and Akebono, a brake corporation.<sup>33</sup>

France invested over \$1.2 billion in 2015 and is responsible for 11% of South Carolina's foreign-created jobs.<sup>34</sup> The major French companies operating in South Carolina are Michelin, a tire manufacturer, and Scheider Electric, which manufactures switchgears and breakers.<sup>35</sup>

Next largest is Canada, which invested nearly \$700 million in South Carolina and is responsible for 6% of the state's foreign-created jobs.<sup>36</sup> The largest Canadian companies are Magna International, Gildan, and Domtar.<sup>37</sup> Magna manufactures exterior automobile parts, Gildan makes activewear, and Domtar makes paper products.<sup>38</sup>

Rounding out the top five is Sweden, with investment of nearly \$600 million and the creation of 5% of South Carolina's foreign-created jobs.<sup>39</sup> Sweden's largest companies in South Carolina are Volvo, a car manufacturer; Husqvarna, a lawn and garden equipment supplier; and Electrolux, a refrigerator and freezer supplier.<sup>40</sup>

Commensurate with the rise of foreign investment into the state of South Carolina has been a significant rise in exports out of the state.<sup>41</sup> For example, between 2014 and 2015 South Carolina exports increased by \$1.2 billion.<sup>42</sup> South Carolina's largest export partners, in order, are China, Germany, Canada, the United Kingdom, and Mexico;<sup>43</sup> and its top exports, in descending order, are transportation equipment, machinery (excluding electrical), chemicals, and plastics and rubber products.<sup>44</sup> Transportation equipment is an enormous industry in the state: in 2015, transportation equipment was a \$15.5

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

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

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

<sup>37</sup> *Id.*

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

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

<sup>40</sup> *Id.*

<sup>41</sup> *See id.*

<sup>42</sup> *See id.*

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

<sup>44</sup> *Id.*

billion export industry, comprising about 50% of the state's exports.<sup>45</sup> Machinery and chemicals each totaled about \$2.7 billion in 2015, making up about 9% of South Carolina's exports.<sup>46</sup> Finally, plastics are comparable to machinery and chemicals combined, encompassing a \$2.4 billion industry in 2015, making up almost 8% of South Carolina's exports.

China is South Carolina's leading export partner; in 2015, an overall value of \$4.4 billion was exported to China.<sup>47</sup> The leading export to China is transportation equipment, which constitutes 68.4% of the state's exports to China and is valued at \$3 billion.<sup>48</sup> The state's next largest exports to China are, in order, chemicals, computer and electronic products, and waste and scrap.<sup>49</sup>

Close behind China is Germany, to which South Carolina exported goods with a total value of \$3.9 billion in 2015.<sup>50</sup> Similar to China, South Carolina's main export to Germany is transportation equipment, which totaled \$3.6 billion dollars and 86% of the State's exports to Germany in 2015.<sup>51</sup> Other products exported to Germany are computer and electronic products, machinery, and paper.<sup>52</sup>

Next in order of South Carolina's exports is Canada, to which South Carolina exported \$3.7 billion in products in 2015.<sup>53</sup> Of those exports, 30% was transportation equipment, 16.1% was plastics and rubber products, 10.9% was machinery, and 8.8% was electrical equipment, appliances and components.<sup>54</sup>

Next, South Carolina exported \$2.8 billion to the United Kingdom in 2015.<sup>55</sup> The majority of exports to the U.K. was transportation equipment, totaling 86.4% and \$2.6 billion, followed by chemicals, machinery (except electrical), and paper.<sup>56</sup>

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<sup>45</sup> *Id.*

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

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

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

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

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

Finally, in 2015, South Carolina exported \$2.4 billion in products to Mexico.<sup>57</sup> The make up of exports to Mexico are slightly different than South Carolina's exports to other countries: 32% of the exports were chemicals, 23.7% were plastics and rubber products, 23.6% were transportation equipment, and 10.5% were machinery.<sup>58</sup>

Overall, South Carolina has become a major player in international business with a diverse and growing portfolio. As detailed above, the state is involved in a variety of markets, the result of which demonstrated job creation and growing FDI.

## II. COUNTRY COMPARISON: BUSINESS DISPUTES AND RESOLUTION

With South Carolina's substantial growth and exposure in international business there naturally comes an increased amount of international disputes. It is an ordinary and predictable consequence in any transaction that, despite the parties' best intentions, conflicts arise. Furthermore, cultural differences can and often do exacerbate potential disputes, and foreign legal systems frequently diverge significantly from the United States' system in both procedural and substantive law—inexperience with such systems can lead to expensive and unfavorable results. These differences combined with the uncertainty of dispute resolution processes in foreign courts creates increased risk. Obviously, this situation is problematic since businesses prefer to minimize their risk. To illustrate some of these legal and cultural differences and to point to potential conflict resolution problems that may arise, this section will highlight the legal systems of several countries that have been previously discussed in this article as either foreign investors or as export partners with South Carolina.

### A. GERMANY

Within Germany, South Carolina's leading investor, traditional litigation in the court system remains the most common method of dispute resolution. While litigation is most commonly used, arbitration—one form of conflict resolution that is commonly referred to as "alternative dispute resolution"—is growing in

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

popularity,<sup>59</sup> particularly in instances of cross-border disputes.<sup>60</sup> Despite this growth, arbitration has yet to play a predominant role in dispute adjudication in Germany.<sup>61</sup> Although Germany largely utilizes the litigation model in its court system, German courts contrast with the United States' civil system and other countries that follow the common law tradition because German judges play a more active role in litigation proceedings.<sup>62</sup> Under the common law tradition, the parties present facts to the judge and the court does no independent investigation.<sup>63</sup> Germany's civil law system, on the other hand, is based on the Roman law tradition where the judges will question the witnesses, select and retain experts, and structure the proceedings.<sup>64</sup> Additionally, the standard of proof in Germany differs from the U.S., with the latter generally following more structured evidentiary procedures and a preponderance of the evidence standard.<sup>65</sup> In Germany, however, courts will review the entire content of the file and hearings, and, taking into account all of the evidence, must then reach a subjective conviction.<sup>66</sup>

In addition to both the different standard of review and role played by the judges, time limitations on bringing a claim may also cause a problem for those unfamiliar with the German legal system. The limit to bring a claim in Germany, generally, is three years, subject to some variance.<sup>67</sup> The limitations period begins at the end of the year in which the claim arises, rather than the specific date the claim arises or the date of knowledge of the claim.<sup>68</sup> This time period can be suspended or paused for a number of reasons including the filing of a claim or the beginning of negotiations between the parties.<sup>69</sup>

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<sup>59</sup> Stefan Rützel, et al., *Litigation and Enforcement in Germany: Overview*, PRACTICAL LAW (Mar. 1, 2016), <http://global.practicallaw.com/1-502-0728>.

<sup>60</sup> *Id.*

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

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

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

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

The structure of the German court system can have serious business implications, as well. “The local . . . and the regional civil courts [of Germany] have jurisdiction as courts of first instance,” and the value in dispute will determine which court has proper jurisdiction over the claim.<sup>70</sup> If the claim is worth more than €5,000, then the appropriate court would be the regional civil court.<sup>71</sup> While the court structure alone does not appear to have an impact on foreigners navigating the German court system, the consequences of court placement does yield such an impact. If the case is brought before a regional court, then litigation parties can “only [be represented by] attorneys admitted to the German bar.”<sup>72</sup> Significantly, there is no exception for foreign lawyers.<sup>73</sup> Accordingly, if a South Carolinian business were to find itself a party to litigation in a German regional court, it would have to put its fate in the hands of local legal counsel who may know little about its business.<sup>74</sup>

Similar to the United States, the German system requires “each party to bear the burden of proof for the facts [it plans to assert].”<sup>75</sup> Dissimilar to the U.S. system, however, “[litigation] parties . . . are free [to choose what information] and documents” they produce in the case in order to meet this burden, and the German system places no obligation on either party to share specific documents, “even if [the documents] are relevant to the case.”<sup>76</sup> In other words, “[t]he German legal system does not provide for procedures such as pre-trial discovery or full-disclosure.”<sup>77</sup> Such a rule is in clear contrast with the U.S. legal system where the discovery process tends to be very open; obviously, in German litigation, this rule could make the availability of relevant documents difficult, if not impossible, to obtain. Additionally, because there is no obligation of production, the assertion of any discovery privileges is rare.<sup>78</sup>

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

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *See id.*

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

<sup>76</sup> *Id.*

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

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

Another notable difference between U.S. and German courts are the rules regarding summary judgment: “There is no specific rule in German law providing for a summary judgment.”<sup>79</sup> Parties are allowed to move for summary judgment, but such a motion is limited to evidence already provided and “can be overturned at a later stage with additional evidence.”<sup>80</sup> Consequently, the German legal system can result in cases being adjudicated less efficiently and at additional costs to inexperienced litigants.<sup>81</sup> Also in regard to efficiency, the German legal system does not allow class actions.<sup>82</sup> Multiple parties are allowed to “join in one civil action . . . [but the] parties are still treated individually and each party’s claim [will be judged] on its own merits.”<sup>83</sup> Parties may only join together if their “asserted claims are legally or factually related.”<sup>84</sup> Furthermore, under the German legal system, each party bears its own litigation costs; the costs “are allocated between the parties on a *pro rata* basis according to the outcome of the case.”<sup>85</sup> This is unlike the U.S. system where, absent a statute or contractual agreement, each party bears its own litigation costs.

Choice of law decisions can also be complex.<sup>86</sup> While the general rule in Germany is that the parties to a contract may agree to use a certain set of laws, this rule is subject to some exceptions, including “certain mandatory provisions of German law.”<sup>87</sup> Additionally, choice of law clauses will also not apply if the contract violates the Recast Brussels Regulation, which relates to jurisdiction for insurance matters, consumer contracts, and employment contracts.<sup>88</sup> Service of legal documents may also present a challenge to a party that wishes to file suit.<sup>89</sup> For an action pending outside of Germany, a party must to adhere to Regulation (EC) 1393/2007 to serve a German company or individual.<sup>90</sup> Under this regulation,

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

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

<sup>81</sup> *See id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

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

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

<sup>86</sup> *See id.*

<sup>87</sup> *See id.*

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

<sup>89</sup> *See id.*

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

“there are mainly two methods of service available: Service through designated agencies [and] [s]ervice by mail.”<sup>91</sup> For actions pending in Germany, the designated service agency is the court.<sup>92</sup> “Therefore, the transmitting agency in the state where the proceedings are pending must address the request for service directly to the . . . German court, which then effects service.”<sup>93</sup>

Lastly, and perhaps most significantly, is how a foreign party, such as a U.S. company, may enforce a foreign judgment against a German entity that was granted by a court outside of Germany. “The enforcement of foreign judgments [in German courts] is governed by the European Union [EU], multilateral and bilateral treaties, and domestic procedural rules.”<sup>94</sup> According to Regulation (EC) 1215/2012, if a judgment is rendered within the EU, then it is “usually enforceable in Germany without any declaration of enforceability.”<sup>95</sup> On the other hand, enforcement of other foreign judgments outside of the EU, such as by the U.S., is more complicated. Recognition of the judgment is not automatic and “[t]he U.S. judgment must be final and unappealable.”<sup>96</sup> The party seeking to enforce the judgment in Germany must comply with The Hague Convention, but, even so, the German party will then have an opportunity to argue that the ruling should not be recognized.<sup>97</sup> This effectively adds a second layer of litigation to any suit against a German party when the other party is located outside of Germany, giving the German party a second chance to avoid or reduce an adverse ruling.

#### B. JAPAN

In Japan, South Carolina’s second leading foreign investment partner, “litigation is the most frequently used dispute resolution

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

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

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

<sup>94</sup> *Id.*

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

<sup>96</sup> Dr. Klaus U. Eyber, *Recognition and Enforcement of US Rulings in Germany*, LEXOLOGY (Oct. 25, 2012), <http://www.lexology.com/library/detail.aspx?g=f41d3414-a8c9-4455-8e90-751170672efe>.

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

method to settle large commercial disputes.”<sup>98</sup> Procedurally, the subject matter of the claim will determine both the statute of limitations (e.g., three years for product liability claims and ten years for contract claims) and the jurisdiction of the court.<sup>99</sup> Aside from litigation, arbitration is the most frequently used alternative dispute resolution method that Japan utilizes.<sup>100</sup> Japan’s arbitration law, “which is based on the [United Nations Commission on International Trade Law] Model Law on International Commercial Arbitration 1985, became effective in 2004.”<sup>101</sup> Since then, “arbitration has become more popular, particularly in relation to large international commercial disputes.”<sup>102</sup> Despite this growth, arbitration is still uncommon with litigation remaining the dominant dispute resolution method.<sup>103</sup> Also, similar to the German system, foreign attorneys cannot appear in Japanese courts.<sup>104</sup> This remains true even if the foreign attorney is licensed in Japan.<sup>105</sup>

A departure from U.S. civil law is Japan’s unique summary judgment procedures. While summary judgment is wholly not an option, “the [Japanese] court can, at its discretion, give an interim judgment on a part of the dispute,” while the remainder of the case is still being adjudicated.<sup>106</sup> The availability of this interim judgment is contingent on whether “that part [of the judgment] is independent from the remaining parts” and whether a separate judgment is feasible.<sup>107</sup> While an interim judgment may be helpful in making proceedings in Japan more efficient, such judgments are quite rare and unlikely to carry the same significant benefit as complete disposal of the matter.<sup>108</sup>

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<sup>98</sup> Craig I. Celniker, et al., *Litigation and Enforcement in Japan: Overview*, PRACTICAL LAW (Nov. 1, 2016), <http://uk.practicallaw.com/9-502-0319>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

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

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

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* (Noting this prohibition does not apply to foreign attorneys licensed in Japan who are conducting international arbitrations).

<sup>106</sup> *Id.*

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

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

Similar to Germany, discovery in Japan is very limited, especially when compared to discovery in the United States.<sup>109</sup> Specifically, broad requests for documents are not permitted.<sup>110</sup> Japan requires great specificity when requesting a document; a discovery request must include: (1) the document title, (2) a summary of the document, (3) the name of the holder of the document, (4) the fact(s) to be proved, and (5) grounds for the document holder to submit the document.<sup>111</sup> If the requester cannot provide this specificity, “other information that is sufficient for the document holder to identify the requested document must be provided.”<sup>112</sup> Typically, Japanese courts request that the parties voluntarily produce documents, using the discovery request as a last resort.<sup>113</sup>

Regarding remedies given in Japanese courts, “remedies available in commercial disputes” typically fall into three different categories.<sup>114</sup> First, a judgment will “order a defendant to do or not do a certain act . . . [and will typically] include payment of damages, specific performance, permanent injunction, eviction and restitution” as a remedy.<sup>115</sup> Second, a declaratory judgment will declare a certain right or legal relationship, and will also declare which party has liability to the other.<sup>116</sup> Third, a formative judgment creates a new right or legal relationship between the parties but is only available if the law specifically allows for it.<sup>117</sup> One additional, significant difference from the U.S. civil system worth noting is that Japan does not grant punitive damages and will not enforce punitive damages granted elsewhere.<sup>118</sup> This difference can lead to a substantially lower monetary judgment than if a judgment is rendered within the U.S.

Similar to the U.S. system, litigated matters in Japan are not considered final and are appealable to both the High Court and the

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

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

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

<sup>113</sup> *See id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

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

<sup>117</sup> *Id.*

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

Supreme Court of Japan.<sup>119</sup> The grounds for an appeal to the High Court are broad and include error of fact or law, or both.<sup>120</sup> In contrast with the U.S. system, grounds for an appeal to the Japanese Supreme Court are limited to a list of particular reasons (e.g., reasons given for a judgment are inconsistent, contravention to the Japanese Constitution, etc.).<sup>121</sup> If a party wishes to appeal to the Japanese Supreme Court based on a reason not specifically listed, it may file a petition for certiorari.<sup>122</sup>

In further contrast to the U.S. common law system, Japan's system does not allow certain class action suits.<sup>123</sup> However, if multiple claimants have common rights or obligations, or have the same factual basis or cause of action, they may file a claim jointly.<sup>124</sup> Additionally, a party to litigation (party must be eligible to file jointly)<sup>125</sup> may authorize others, on the party's behalf, to proceed with the litigation and will be bound by the outcome, even without being substantially involved.<sup>126</sup> In 2007, a "consumer class action system" was introduced into the Japanese legal system and allows an accredited consumer entity to seek an injunction to prevent "certain acts harmful to consumers."<sup>127</sup> This consumer class action is limited to injunctions as a remedy and, consistent with the Japanese legal system generally, cannot receive damages.<sup>128</sup> The first injunction granted under this system occurred in 2009.<sup>129</sup>

Generally, the Japanese system does not require the unsuccessful party to completely reimburse the successful party.<sup>130</sup> Each party is required to pay its own attorney's fees, unless those fees are claimed as damages in certain types of actions.<sup>131</sup> Other litigation costs such as filing fees and witness travel expenses will be paid by the unsuccessful party, unless each party is considered partially at fault;

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<sup>119</sup> *Id.*

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

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

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

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

<sup>125</sup> *See id.*

<sup>126</sup> *Id.*

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

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

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

in these instances, the costs will be apportioned accordingly.<sup>132</sup>

With regard to disputes with foreign entities, Japanese courts will typically honor express or implied choice of law provisions between two parties.<sup>133</sup> Thus, a parties' agreement to a jurisdiction, even if not in Japan, will typically be respected.<sup>134</sup> However, the choice of law provision will be found valid only if law specifically requires it.<sup>135</sup> The only time when the jurisdiction-selecting clause will not be honored is when the foreign court is prevented from hearing the case by law or if Japanese law requires a Japanese court to hear the case.<sup>136</sup> Obviously, conflict of law analysis in Japanese litigation would require specific knowledge of the Japanese legal system, which may not be readily ascertainable to a U.S. company.

Service on Japanese entities or individuals may also be problematic to U.S. companies involved in litigation in Japan. Japan is a party to The Hague Convention, so service of a party in Japan will be governed accordingly by the Convention's provisions.<sup>137</sup> The serving party must send the document to the Ministry of Foreign Affairs, who will review it and, if deemed acceptable, send it to the Supreme Court of Japan.<sup>138</sup> Once the Supreme Court has reviewed the document, it is sent to the District Court, which ultimately has jurisdiction over the addressee.<sup>139</sup>

Lastly, Japan will enforce a foreign judgment if the "successful party [obtains] an enforcement judgment in the court in Japan which has jurisdiction over the unsuccessful party or its assets."<sup>140</sup> The judgment will be considered final if the following factors are satisfied: (1) The foreign court had jurisdiction over the case based on Japanese law or a treaty to which Japan is a party; (2) the process was duly served on the unsuccessful party, or the unsuccessful party voluntarily answered the complaint; (3) the foreign judgment and the foreign court proceedings are not incompatible with public policy in

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<sup>132</sup> *Id.* (citing MINJI SOSHŌHŌ [MINOSHŌ] [C. CIV. PRO.] 1996, arts. 61, 64 (Japan)).

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

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

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

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

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

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

<sup>140</sup> *Id.*

Japan; and (4) the foreign country recognizes a similar judgment rendered in Japan.<sup>141</sup> Like Germany, this procedure creates an additional hurdle for a U.S. business to enforce a judgment and may prove difficult to enforce a foreign judgment against a Japanese company.

### C. FRANCE

France, South Carolina's third leading foreign investment partner, also predominantly uses litigation and arbitration as its primary dispute resolution mechanisms in settling large commercial disputes.<sup>142</sup> Mediation is not currently a major dispute resolution method in France, but it is growing.<sup>143</sup> The French litigation system is not characterized as either adversarial or inquisitorial but rather borrows aspects from both systems.<sup>144</sup> Which characteristic predominates is contingent on the stage of the litigation and the matter at hand.<sup>145</sup> The supervising judge typically begins in a managerial role because the parties before him or her are mainly inquisitorial.<sup>146</sup> However, during the trial, the judge's role transforms more into that of a "referee" because the parties have become more adversarial.<sup>147</sup>

As with foreign legal systems previously discussed, one potentially major issue that may arise with a foreign party trying to litigate in France is attorney appointment. To litigate in France, parties must have a French qualified attorney registered with the French bar.<sup>148</sup> Foreign attorneys have no "rights of audience" in France unless there exists reciprocity with that foreign nation.<sup>149</sup> In that case, foreign lawyers are allowed to take a special examination

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<sup>141</sup> *Id.*

<sup>142</sup> Elizabeth Oger-Gross, et al., *Litigation and Enforcement in France: Overview*, PRACTICAL LAW (Jan. 1, 2016), <http://us.practicallaw.com/9-502-0121>.

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

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

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

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

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

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

in order to qualify as lawyers in France.<sup>150</sup> Additionally, attorneys from an EU member state “who have [practiced] law on the basis of their EU qualification for more than three years can be deemed qualified lawyers in France.”<sup>151</sup> Like the German rule, this rule forces foreign parties to find a foreign attorney that they are likely unfamiliar with, and who may have limited knowledge of their business. Another facet of the French system that may be problematic, and that is similar to the Japanese procedural rules, is that French procedural rules do not provide for any discovery or pre-trial disclosure procedures.<sup>152</sup> Thus, unlike the U.S. legal system, neither party is required to produce documents that could be damaging to its case.<sup>153</sup> The only exception to this rule is if a party obtains a production order from a judge.<sup>154</sup> To do so, the party’s request must be specific or it will be denied.<sup>155</sup>

Unlike other systems previously discussed, the French system allows for collective redress in “group actions.”<sup>156</sup> A French law passed on March 17, 2014, permits a national association “whose explicit purpose is the [defense] of consumers [to] bring an action before a court of first instance in major civil matters.”<sup>157</sup> This association is responsible for funding any case it brings, and the claim brought can only seek compensation for economic loss.<sup>158</sup> This system follows the opt-in model, meaning a consumer must explicitly choose to join and make a claim.<sup>159</sup> Furthermore, France will generally respect parties’ decisions as to the applicable choice of law in their transactions.<sup>160</sup> This decision needs to be express or demonstrated with reasonable certainty by the contract or the circumstances.<sup>161</sup> If no choice has been made, then the law of the

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

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

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

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* (citing CODE DE PROCÉDURE CIVILE [C.P.C.][CIVIL PROCEDURE CODE] art. 24 (Fr.)).

<sup>155</sup> *Id.*

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

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

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

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

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

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

country that the contract is most closely connected to will apply.<sup>162</sup> However, French rules do place some limitations on a party's choice of applicable law.<sup>163</sup> For example, if all other elements relevant to the situation are located in a country different than the one whose law was chosen, the court can apply that country's law.<sup>164</sup> Also, when a mandatory law applies, it can override a party's choice of law.<sup>165</sup>

Service on a French party is determined by the serving party's country of origin.<sup>166</sup> If the serving party is from the EU, for example, then the party will serve an agency that has been designated as a receiving agency on behalf of the EU.<sup>167</sup> For non-EU members, the filing procedure will depend on whether or not the country has signed the Hague Conference Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.<sup>168</sup> Since the U.S. is a signatory to this Convention, a U.S. company wishing to sue in France would designate a central authority, which would send service to the French designated authority to affect service on the party in question.<sup>169</sup>

In regards to recognition of judgments, if there is no specific treaty between nations to govern, then the Recast Brussels Regulation and the New Lugano Convention apply to enforce a foreign judgment in France.<sup>170</sup> The Recast Brussels Regulation "applies to judgments rendered in EU member states" and in foreign states.<sup>171</sup> A judgment from a member-state must be recognized in another member-state without any special procedure.<sup>172</sup> The only exception to this rule is if certain requirements are met (e.g., a judgment contrary to public policy).<sup>173</sup> If the country is a foreign state, like the U.S., a person who wishes to have his or her judgment recognized in France must submit an application which states "that the decision is a judgment in civil and commercial matters that is

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *See id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

enforceable in the country where it has been rendered without any further conditions, as well as a short description of the subject matter of the judgment.”<sup>174</sup> The New Lugano Convention, on the other hand, will not apply to the U.S. because it is meant to expand the applicability of the Brussels Regulation to the EU member states Norway, Iceland, and Switzerland.<sup>175</sup> Judgments in these countries will be enforced with limited exceptions.<sup>176</sup>

#### D. CHINA

Dispute resolution with a Chinese party, South Carolina’s fourth leading foreign investment partner, creates different concerns than with any other country previously discussed. While China’s system involves similar differences as those aforementioned countries (e.g., service, rights of appearance, and enforcement issues), those differences are not the main concern when dealing with a Chinese party. Rather, Chinese dispute resolution mechanisms have many external influences that permeate each mechanism and affect the outcome.<sup>177</sup> Commercial disputes between Chinese parties will typically be resolved by either political or commercial pressure, and litigation and arbitration are used only as a bargaining tool, or not at all.<sup>178</sup> These external influences also complicate the analysis of dispute resolution in China and make it more difficult to study the prevalence of different resolution mechanisms. While collecting information on dispute resolutions in China is somewhat problematic because “[i]t is very hard to collect reliable statistics on the rates of litigation as the collection of such statistics and the flow of information in general is very strictly regulated[,]”<sup>179</sup> the information that is available suggests that litigation in China has increased over

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<sup>174</sup> *Id.* (citing Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters arts. 37 & 53, Sept. 27, 1968, 1262 U.N.T.S. 153).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Nicolas Groffman and Yu Simin, *Litigation and Enforcement in China: Overview*, formerly available at <http://us.practicallaw.com/8-502-1965?source=relatedcontent> (last visited August 20, 2016)(PDF on file with author).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

the last twenty years.<sup>180</sup> However, measuring the significance of this trend is limited by the external influences. In China, there are often court filings for appearances. A party will file with the court and settle the case, but the resulting settlement is likely due to commercial or political pressure rather than due process.<sup>181</sup> Consequently, while statistics could indicate an increased use of litigation, the litigation used may merely be for show and take the form of the litigation while not actually representing an increased use of litigation to resolve the dispute. This process appears to skirt the court almost entirely and does not change when foreign parties are involved in the litigation.<sup>182</sup> When foreign parties are involved, commercial and political forces still play a major role, but the foreign party is unlikely to be aware of these influences, which may make a favorable outcome for those foreign parties less likely.<sup>183</sup> Further, it is typically not possible to enforce any foreign award in China, including judgments obtained in U.S. or United Kingdom courts.<sup>184</sup> However, Hong Kong and certain Communist countries (like Bulgaria or Vietnam) that have a bilateral treaty with China are able to enforce judgments.<sup>185</sup>

Therefore, foreign parties resolving issues with a Chinese party will often be referred to arbitration instead of litigation.<sup>186</sup> While arbitration may create the hope that the political and commercial influences of litigation can be avoided, the result may nevertheless be similar to that of litigation.<sup>187</sup> These commercial and political influences still play a role in the resolution of the issues; significantly, enforcement of the arbitral award, if favorable to the foreign party, is an issue because it is referred to the Chinese court and will likely be subject to similar problems.<sup>188</sup>

Mediation is another dispute mechanism used in China.<sup>189</sup> It can be, but is not necessarily, administered by judges.<sup>190</sup> The Communist

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

Party has promoted mediation as being a “harmonious” dispute resolution method.<sup>191</sup> However, in practice, mediation is a method for judges to prevent their superiors from reviewing their decisions.<sup>192</sup> Additionally, mediation depends on the cooperation of each party and is not necessarily based on any law.

The Chinese system does provide an alternative from these three flawed systems (litigation, arbitration, and mediation), however: reconciliation.<sup>193</sup> The parties can voluntarily reach reconciliation without sponsored mediation.<sup>194</sup> Reconciliation is limited because both parties need to be willing to cooperate. Further, the result would be treated as a contract and, if breached, would likely circle back to one of the original three dispute resolution mechanisms discussed above.

Within the Chinese court system, “there is no equivalent [to] discovery or disclosure [in China].”<sup>195</sup> Parties to litigation are “prohibited” from withholding evidence; however, there is no sanction for doing so, which runs the risk of rendering this prohibition meaningless.<sup>196</sup> The court is permitted to conduct its own evidence collection, or a party may request the court to do so.<sup>197</sup> In practice, the court will rarely abide by this request and will have the parties do their own evidence collection.

Like many of the other countries previously discussed, class actions do not exist in the Chinese system.<sup>198</sup> The only thing comparable to a class action in China is “collective litigation.”<sup>199</sup> Similar to the Japanese system, in China’s collective litigation process, “persons can elect a representative to participate in the proceedings.”<sup>200</sup>

The Chinese system does not have rules dictating how the costs of the litigation will be paid.<sup>201</sup> Generally, the unsuccessful party will

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191 *Id.*  
 192 *Id.*  
 193 *Id.*  
 194 *Id.*  
 195 *Id.*  
 196 *Id.*  
 197 *Id.*  
 198 *Id.*  
 199 *Id.*  
 200 *Id.*  
 201 *Id.*

pay the court fees, but those fees are insignificant in relation to the overall costs.<sup>202</sup>

As summarized above and depicted in the chart below, navigating the legal systems of foreign countries can be perilous. Not only does the substantive law that would govern a parties' claims and defense likely differ than what many domestic entities are accustomed to, but the procedural rules are diverse. U.S. companies and their agents are thus confronted with puzzling and complex questions, such as how do I serve a party to commence litigation? What documents and evidence would I be entitled to prove my claims or to defend my case? What restrictions apply to my choice of legal counsel? Even if I am successful in the litigation, will I be able to recover on the judgment? In response to these questions, many companies, both foreign and domestic, are turning to international arbitration.

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<sup>202</sup> *Id.*

# NON-REFOULEMENT UNDER THREAT: THE CASE AGAINST CHINA

*Dr. Paul Hanley\**

## INTRODUCTION

*No human being is illegal.*

-Elie Wiesel<sup>1</sup>

While international attention is currently focused on the migration crisis in Europe, another long-standing migration crisis continues to unfold in China, where thousands of North Koreans are repatriated back to the Democratic People's Republic of North Korea (DPRK) in violation of international law. Due to North Korea's recent nuclear tests and its deplorable record of human rights abuses, the global community's condemnation of North Korea is resounding.<sup>2</sup> The United Nations (UN) Security Council convened on December 10, 2015—Human Rights Day—to discuss human rights in the DPRK as a formal agenda item.<sup>3</sup> Many human rights advocates are particularly concerned with the Chinese practice of forcibly returning North Koreans to the DPRK to face

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<sup>1</sup> Elie Wiesel, Acceptance Speech on the Occasion of the Award of the Nobel Peace Prize (Dec. 10, 1986) (transcript available at [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/1986/wiesel-acceptaece\\_en.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/1986/wiesel-acceptaece_en.html)).

<sup>2</sup> See Richard Fontaine, *Time to Confront North Korean Repression*, CNN (Dec. 21, 2015, 12:06 PM), <http://www.cnn.com/2015/12/21/opinions/fontaine-north-korea-repression/> (stating “[t]he U.N. General Assembly. . . asked the Security Council to consider referring cases to the International Criminal Court for prosecution”).

<sup>3</sup> *North Korea: UN Security Council Probing Systematic Abuses*, HUMAN RIGHTS WATCH (Dec. 9, 2015), <https://www.hrw.org/news/2015/12/09/north-korea-un-security-council-probing-systematic-abuses>.

imprisonment, torture, and death.<sup>4</sup> Furthermore, chronic food shortages have afflicted North Korea since the early 1990s, which has forced tens of thousands of people to flee into China.<sup>5</sup> China classifies “all North Koreans in China as illegal ‘economic migrants’ and routinely repatriates them” back to North Korea.<sup>6</sup> However, China’s belief that North Koreans flee the DPRK for economic reasons, rather than political reasons, does not take into consideration the DPRK’s political caste system, which guides the distribution of public goods and the extreme persecution defectors face upon repatriation.<sup>7</sup> For example, a 2014 report issued by The Commission of Inquiry on Human Rights in the DPRK found those who manage to escape the DPRK were:

[I] argeted as part of the DPRK’s systematic and widespread attack against populations considered to pose a threat to the political system and leadership of the DPRK, because the system of isolation, information control, and indoctrination imposed by the DPRK stands and falls with its ability to isolate the population from contact with the outside world.<sup>8</sup>

There are countless cases of Chinese authorities repatriating North Koreans back to the DPRK,<sup>9</sup> including transferring North

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<sup>4</sup> Fontaine, *supra* note 2.

<sup>5</sup> T. Kumar, Testimony on *China’s Repatriation of North Korean Refugees Before the Congressional-Executive Committee on China*, AMNESTY INTERNATIONAL (Mar. 5, 2012), <http://www.amnestyusa.org/news/news-item/china-s-repatriation-of-north-korean-refugees>. See also Joel R. Charny, *North Koreans in China: A Human Rights Analysis*, 13 INT’L J. OF KOREAN UNIFICATION STUD. 75, 76 (2004), <http://www.refworld.org/pdfid/47a6eba20.pdf> (citing estimates that there are 100 to 300,000 North Koreans residing in China).

<sup>6</sup> *China: Don’t Return Nine North Korean Refugees*, HUMAN RIGHTS WATCH (Nov. 21, 2015, 5:29 PM), <https://www.hrw.org/news/2015/11/21/china-dont-return-nine-north-korean-refugees>.

<sup>7</sup> Dianna Bai, *Unwelcome Migrants: The Plight of North Korean Migrants in China*, in 2012 SAIS U.S.-KOREA YEARBOOK 105 (2012), [http://uskoreainstitute.org/wp-content/uploads/2014/04/Bai\\_YB2012.pdf](http://uskoreainstitute.org/wp-content/uploads/2014/04/Bai_YB2012.pdf).

<sup>8</sup> *China: Don’t Return Nine North Korean Refugees*, *supra* note 6.

<sup>9</sup> See Robert Park, *Robert Park: North Korean refugees face*

Koreans from other countries, such as Vietnam, back to China for repatriation to the DPRK.<sup>10</sup> For example, in October of 2015, Vietnamese authorities apprehended nine North Koreans traveling from Northeastern China during a random check on a bus near the Chinese border.<sup>11</sup> The North Koreans were subsequently returned to China; Human Rights Watch reported there was “no indication the nine were given the opportunity in Vietnam to lodge asylum claims.”<sup>12</sup> The fate of these people is unknown, but based on Chinese policy and practice, they were most likely returned to North Korea to face punishment for the “crime” of defection.

There have been thousands of repatriations since the 1990s.<sup>13</sup> The high number of repatriations is largely due to the official Chinese policy of repatriating North Korean defectors.<sup>14</sup> In 1986, “China signed a border security agreement with North Korea, the ‘Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order and the Border Areas’ in which China agreed to apprehend and automatically deport defectors to North Korea.”<sup>15</sup> Amnesty International reported “China regularly returns North Koreans back to their country of origin without giving them the opportunity to make a claim for asylum and without making an objective and informed decision that the North Koreans would be protected against serious human rights abuses in North Korea.”<sup>16</sup> These repatriations violate international law,

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*slaughter when China repatriates them*, THE MERCURY NEWS (Feb. 28, 2012, 10:06 AM), [http://www.mercurynews.com/ci\\_20065029](http://www.mercurynews.com/ci_20065029) (estimating that China repatriates approximately 5,000 refugees to the DPRK every year).

<sup>10</sup> *China: Don’t Return Nine North Korean Refugees*, *supra* note 6.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *See* Park, *supra* note 9.

<sup>14</sup> Olivia Enos & Bruce Klingner, *Next Steps for Human Rights in North Korea*, THE HERITAGE FOUNDATION (Jan. 12, 2016), <http://www.heritage.org/research/reports/2016/01/next-steps-for-human-rights-in-north-korea>.

<sup>15</sup> *Id.* *See also* Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order in the Border Areas, N. Kor.-China, Aug. 12, 1986, [http://www.nkfreedom.org/UploadedDocuments/NK-China-bilateral\\_treaty.pdf](http://www.nkfreedom.org/UploadedDocuments/NK-China-bilateral_treaty.pdf).

<sup>16</sup> Kumar, *supra* note 5. *See also* Charny, *supra* note 5 (discussing China distinguishing North Koreans from other refugees in order to placate

including a number of treaties adopted by China: namely, the Convention Relating to the Status of Refugees (CRSR); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>17</sup>

Part I of this paper provides an overview of the current human rights conditions in North Korea, which necessitates its citizens to flee across the border into China. Part II analyzes the various human rights treaties that bind China to refrain from deporting refugees to North Korea. Part III of this paper concludes with a number of recommended actions China must take in order to fulfill its international obligations.

## I. BACKGROUND

In terms of human rights, North Korea is, by all accounts, truly hell on earth. In 2014, the U.N. Commission of Inquiry on Human Rights in the DPRK presented evidence of widespread and systematic abuse by North Korean authorities, including: “[E]xtermination, murder, enslavement, torture, imprisonment, rape, forced abortions and other sexual violence, [and] persecution on political, religious, racial and gender grounds . . . .”<sup>18</sup> The Commission also reported the scale and nature of these violations “do[] not have any parallel in the contemporary world.”<sup>19</sup> North Koreans are subject to restrictions of their basic civil and political freedoms including freedom of speech, thought, expression, assembly, movement, and religion.<sup>20</sup> Most of North Korea’s population is also denied access to food and medical care.<sup>21</sup>

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Pyeongyang and to preserve its prestige in the region).

<sup>17</sup> See Kumar, *supra* note 5.

<sup>18</sup> UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, *North Korea: UN Commission documents wide-ranging and ongoing crimes against humanity, urges referral to ICC* (Feb. 17, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14255&LangID=E>.

<sup>19</sup> Fontaine, *supra* note 2.

<sup>20</sup> See Charny, *supra* note 5, at 79–80.

<sup>21</sup> See *id.*

According to the U.N., these human rights violations amount to crimes against humanity, defined by the International Criminal Court as any enumerated act (such as murder, torture and enslavement), “when committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack.”<sup>22</sup>

Surveys of North Korean defectors report the primary motivation for North Koreans to leave their country is survival.<sup>23</sup> Other defectors testified that their motivation for defecting was political.<sup>24</sup> For example, a twenty-eight-year-old woman said one reason she left was because her family was part of the “hostile class,” the lowest and least privileged of the three strata in the North Korean political caste system.<sup>25</sup> In another case, a forty-four-year-old woman said her parents were considered suspect by the regime because her father, a businessman, had defected to South Korea and her mother had studied abroad.<sup>26</sup> As a result of her parents’ actions, her background was deemed “suspect” and because she did not want to pass this stigma to her children, she decided to leave for China.<sup>27</sup> China regards all North Koreans entering the country as “economic migrants.”<sup>28</sup> China ignores what precipitates North Korean migration into its territory, thereby minimizing the level of suffering, deprivation, and extreme circumstances caused by North Korea’s discriminatory caste system.<sup>29</sup> China also fails to acknowledge the punishment defectors face when they are returned to North Korea due to China’s classification of North Koreans as economic migrants.<sup>30</sup>

North Korea deems citizens who flee the country without official permission to be traitors.<sup>31</sup> Article 47 of the 1987 North

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<sup>22</sup> Rome Statute of the International Criminal Court, art. 7.1, U.N. Doc. A/CONF. (1998).

<sup>23</sup> Charny, *supra* note 5, at 79.

<sup>24</sup> *Id.* at 80.

<sup>25</sup> *See id.* at 80 (the other two classes are loyal/core and wavering). *See infra* note 73.

<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

<sup>28</sup> *See* Bai, *supra* note 7, at 102.

<sup>29</sup> *See* Charny, *supra* note 5, at 80.

<sup>30</sup> Bai, *supra* note 7, at 105.

<sup>31</sup> *See* Enos & Klingner, *supra* note 14.

Korean Criminal Code states:

A citizen of the Republic who defects to a foreign country or to the enemy in betrayal of the country and the people . . . shall be committed to a reform institution for not less than seven years. In cases where the person commits an extremely grave concern, he or she shall be given the death penalty . . . ”<sup>32</sup>

Article 117 provides: “A person who crosses a frontier of the Republic without permission shall be committed to a reform institution for up to three years” in a political prison camp.<sup>33</sup> Therefore, a North Korean who leaves the country with the intent of defecting may receive a minimum of seven years in prison (unless, of course, they make contact with a South Korean non- governmental organization or Christian groups, the penalty for which could be death), whereas merely crossing the Chinese border in search of food or work carries a minimum three-year term.<sup>34</sup> These North Korean laws are in clear violation of international law and the reason why North Koreans are indeed refugees under the CRSR.<sup>35</sup>

The motivation behind North Korea’s governmental restrictions is to impose total control over the population; the regime deems lack of control over its populace as a threat to its power. The 2014 Commission of Inquiry on Human Rights in the DPRK report found that:

[P]ersons who flee the DPRK are targeted as

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<sup>32</sup> See Kumar, *supra* note 5.

<sup>33</sup> See *id.* See also Fontaine, *supra* note 2 (“Amnesty International reported on the testimony of former detainees at the Yodok political prison camp, stating that ‘prisoners are forced to work in conditions approaching slavery and are frequently subjected to torture and other cruel, inhuman, or degrading treatment. All those interviewed had witnessed public executions.’”).

<sup>34</sup> See Kumar, *supra* note 5.

<sup>35</sup> See *e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1996, S. Treaty Doc. No. 95–20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, at art. 12(2) (North Korea adopted the covenant in 1981, which states, “Everyone shall be free to leave any country, including his own”).

part of the DPRK's systematic and widespread attack against populations considered to pose a threat to the political system and leadership of the DPRK, because the system of isolation, information control, and indoctrination imposed by the DPRK stands and falls with its ability to isolate the population from contact with the outside world.<sup>36</sup>

Reports have surfaced that the persecution of defectors and their families has worsened since Kim Jong-un succeeded Kim Jong-Il, as evidenced by the government imposing stricter anti-defection measures.<sup>37</sup> As a result, to cross the border, river-crossing guides need to pay larger bribes to border guards along the Chinese border.<sup>38</sup> To deter this behavior, the government issued an order in Hoeryeong City of North Hamgyong Province, stating border guards who accept bribes from river-crossing guides will not be penalized if they self-report accepting the bribe and provide information about the defector.<sup>39</sup> There are even reports of North Korean authorities crossing the border to abduct refugees and bring them back to North Korea.<sup>40</sup> The increase in the number of whistle-blowing brokers, including border guards, has made defecting from North Korea more dangerous.<sup>41</sup> Even if a North Korean manages to escape, once they cross the North Korean border, they are in constant danger of forced return.<sup>42</sup>

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<sup>36</sup> *China: Don't Return Nine North Korean Refugees*, *supra* note 6.

<sup>37</sup> CHO JUNG-HYUN, KIM SOO-AM, SON GI-WOONG, LEE KYU-CHANG, LEE KEUM-SOON, LIM SOON-HEE, HAN DONG-HO, WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA 464-65 (Korea Institute for National Unification ed., Aug. 13, 2013).

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

<sup>39</sup> *Id.* See generally Charny, *supra* note 5, at 80 (stating that a significant number of defectors came from the North Hamgyong province, one of the poorest provinces in the country. The government of North Korea deliberately cut this province off from national and international food distribution to preserve food resources).

<sup>40</sup> Kumar, *supra* note 5.

<sup>41</sup> See CHO ET. AL., *supra* note 37, at 465.

<sup>42</sup> Václav Havel, Kjell Magne Bondevik & Elie Wiesel, *Failure to Protect: A Call for the UN Security Council to Act in North Korea* 59 (Oct 30, 2006), <http://www.responsibilitytoprotect.org/files/NorthKorea%20report%20offi>

North Korean defectors are not given the status of “refugees” by neighboring countries despite overwhelming evidence of the threat of imprisonment, torture, and even death upon their return to the DPRK.<sup>43</sup> The major violator in this regard is China. In order to maintain good relations with North Korea and to deter future migration, China regularly returns North Koreans found within its borders.<sup>44</sup> Recognizing the seriousness of the situation, the United Nations Commission of Inquiry Report made a number of recommendations and called upon China to take the following actions:

(1) Stop forcible repatriations of North Koreans “unless the treatment there, as verified by international human rights monitors markedly improves;”

(2) Cease providing information about North Koreans in China to North Korean security agents, and take steps to prevent their carrying out abductions from Chinese territory;

(3) “Caution” its officials that their conduct concerning forced repatriations “could amount to the aiding and abetting crimes against humanity;”

(4) Extend asylum and other means of protection to North Koreans, recognize that they are refugees or refugees *sur place*[.] and give them “free access to diplomatic and consular representations of any state that may be willing to extend nationality or other forms of protection to them;”

(5) Provide North Korean victims of trafficking in China with the right to stay in the country and access legal protection and basic services, such as medical treatment,

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cial%2030.10.06.pdf (report prepared by DLA Piper & U.S. Comm. For Human Rights in N. Kor.).

<sup>43</sup> See *China: Don't Return Nine North Korean Refugees*, *supra* note 6.

<sup>44</sup> Havel, Bondevik & Wiesel, *supra* note 42, at 60.

education[,] and employment opportunities;

(6) Regularize the status of North Korean women and men who marry or have a child with a Chinese citizen and ensure that such children are registered at birth, and given Chinese nationality and access to education and health care; and

(7) Raise with the Supreme Leader of the DPRK and other high-level North Korean authorities abductions from Chinese soil, infanticide of children entitled to Chinese nationality, and forced abortions imposed on repatriated women impregnated by Chinese men.<sup>45</sup>

To date, China continues these forced returns, which are in direct violation of international law and prohibited by a number of treaties adopted by China.<sup>46</sup>

## II. GOVERNING INTERNATIONAL LAW

### A. CONVENTION RELATING TO THE STATUS OF REFUGEES

The Convention Relating to the Status of Refugees (CRSR), adopted by China in 1982, defines “refugee” as an individual who:

. . . [O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable

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<sup>45</sup> Roberta Cohen, *China’s Forced Repatriation of North Korean Refugees Incurs United Nations Censure*, 18 INT’L J. OF KOR. STUD. 59, 68–69 (2014).

<sup>46</sup> *Id.* at 69.

or, owing to such fear, is unwilling to return to it.<sup>47</sup>

CRSR Article 33(1) contains a prohibition against the repatriation of refugees: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>48</sup> International law, therefore, prohibits the forcible return, either directly or indirectly, of any defector to North Korea if they have a well-founded fear they will face persecution on the basis of being a member of any of the protected classes listed above. For the defectors from North Korea, the categories of protection that are most likely applicable are religion, political opinion, and/or member of a particular social group.

North Korea’s repression of political and religious freedom is well documented.<sup>49</sup> In 2015, Human Rights Watch stated in its annual report that “[p]olitical and civil rights are nonexistent since the government quashes all forms of disfavored expression and opinion and totally prohibits any organized political opposition, independent media, free trade unions, or civil society organizations.”<sup>50</sup> According to Open Doors, a nonprofit organization that documents the persecution of Christians worldwide, North Korea is the “world’s most restrictive nation in which to practice Christianity.”<sup>51</sup> The CEO of Open Doors

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<sup>47</sup> Convention Relating to the Status of Refugees, art. 1(A)(2), Apr. 22, 1954, 189 U.N.T.S.

<sup>48</sup> See *id.* at art. 33(1).

<sup>49</sup> See, e.g., Fontaine, *supra* note 2 (“There is no independent media, no civil society, no freedom of religion.”).

<sup>50</sup> *World Report 2015: North Korea*, HUMAN RIGHTS WATCH (2015), <https://www.hrw.org/world-report/2015/country-chapters/north-korea>.

<sup>51</sup> See Christopher Snyder, *Report: North Korea Worst for Christian Persecution*, FOX NEWS WORLD (Jan. 8, 2014), <http://www.foxnews.com/world/2014/01/08/report-north-korea-worst-for-christian-persecution.html> (reporting that North Korea has been ranked as the most repressive country for Christians for the last twelve years); see also *North Korea: End Persecution of Christians after Reports US Tourist Detained*, AMNESTY INTERNATIONAL (Jun. 6, 2014), <https://www.amnesty.org/en/latest/news/2014/06/north-korea-end->

describes the treatment of Christians in North Korea as “absolutely inhumane.”<sup>52</sup> Defectors who are returned to North Korea face “[h]arsher penalties . . . [if they are] known to have met with foreigners or converted to Christianity with the intention of becoming missionaries themselves inside North Korea.”<sup>53</sup> Repatriated North Koreans who are discovered to have been in contact with Christian groups are “scrutinized, tortured[,] and imprisoned.”<sup>54</sup> For example, one defector reported that “for meeting with foreigners a person could be sentenced to death. If someone gets caught with Bibles he or she will be sentenced to death.”<sup>55</sup>

With regard to the third category, social groups, the CRSR does not define the meaning of “member of particular social group.” The United Nations High Commissioner for Refugees (UNHCR), however, provides guidance on the matter.<sup>56</sup> According to UNHCR Guidelines, there is no “closed list” within the meaning of CRSR’s Article 1A(2) of those who could be classified as being a “member of a particular social group.”<sup>57</sup> There is also no specific list of social groups included in the language of the Convention or in its ratifying history.<sup>58</sup> According to the UNHCR, the term “membership of a particular social group” should be read in an “evolutionary manner,” adaptable to developing international human rights norms.<sup>59</sup> The Guidelines stipulate that “a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are

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persecution-christians-after-reports-us-tourist-detained/ (describing North Korea’s persecution of Christians and Amnesty International’s demanding the release of an American who was arrested for leaving a bible at his hotel).

<sup>52</sup> Snyder, *supra* note 52.

<sup>53</sup> See Charny, *supra* note 5, at 89.

<sup>54</sup> Enos & Klingner, *supra* note 14.

<sup>55</sup> Charny, *supra* note 5, at 89.

<sup>56</sup> See generally U.N. High Comm’r for Refugees, *Guidelines on International Protection No. 2* (May 7, 2002) (this document discusses “membership of a particular social group” within the context of Article 1A(2) of the 1951 CRSR and/or its 1967 Protocol relating to the Status of Refugees.).

<sup>57</sup> *Id.* at pt. I(3).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

perceived as a group by society.”<sup>60</sup> The Guidelines further provide: “The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience[, or the exercise of one’s human rights.”<sup>61</sup>

According to Human Rights Watch, North Korea’s Ministry of People’s Security declared in 2010 that defection from the DPRK would now constitute a crime of “treachery against the nation, punishable by death.”<sup>62</sup> Immediately upon repatriation, individuals suspected of defecting are subject to brutality.<sup>63</sup> The 2014 Commission of Inquiry on Human Rights in the DPRK found that “almost all of the repatriated people are subjected to inhumane acts . . . [, such as] torture, sexual violence and inhumane conditions of detention” during the search and initial interrogation phase.”<sup>64</sup> The report further stated that this appears to be based on standard procedure.<sup>65</sup> According to Human Rights Watch, most of the people who repatriated from China ultimately face “incarceration and mistreatment in political prison camps (or *kwanliso*), operated by the State Security Ministry.”<sup>66</sup> The conditions of the camps are deplorable, “characterized by systematic abuses and often deadly conditions, including meager rations that lead to near-starvation, virtually no medical care, lack of proper housing . . . sexual assault and torture by guards, and executions.”<sup>67</sup> Not surprisingly, “death rates in these camps are reportedly extremely high.”<sup>68</sup>

China disregards the persecution that defectors face upon return and does not recognize North Korean defectors as refugees; instead, China classifies them as “economic migrants” who are not protected by the CRSR.<sup>69</sup> In March 2004, China’s Foreign Minister Li Zhaoxing spoke regarding North Koreans who crossed the

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<sup>60</sup> *Id.* at pt. II(B)(11).

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

<sup>62</sup> *China: Don’t Return Nine North Korean Refugees*, *supra* note 6.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*; *see also* Bai, *supra* at note 7, at 105 (North Koreans risk punishment if they repatriate to North Korea).

<sup>65</sup> *See China: Don’t Return Nine North Korean Refugees*, *supra* note 6.

<sup>66</sup> *See id.*

<sup>67</sup> *See id.*

<sup>68</sup> *See id.*

<sup>69</sup> Enos & Klingner, *supra* note 14.

Chinese border, stating “[they] are not refugees, but they are illegal immigrants.”<sup>70</sup> China’s position, however, is untenable because North Korea controls the distribution of public goods, criminalizes the act of leaving the DPRK without permission, and metes out harsh treatment to those repatriated from China.<sup>71</sup> Thus, North Korean defectors are refugees, and China should classify these individuals as such under the CRSR and not as economic migrants or illegal immigrants.<sup>72</sup>

### 1. NORTH KOREA’S POLITICAL CASTE SYSTEM

North Korean society is divided into three political classes: (1) loyal/core; (2) wavering; and (3) hostile, based on a perceived loyalty to the regime.<sup>73</sup> The class status is assigned to each family for life and passes from generation to generation.<sup>74</sup> A 2012 report published by the Committee for Human Rights in North Korea analyzed the North Korean political caste system, known as *songbun*.<sup>75</sup> For example, “[d]escendants of those who fought Japanese colonial rule, those who fought in the Korean War, and peasants and laborers belong to the loyal [or core] class.”<sup>76</sup> Additionally, “[f]amilies of artisans, small shopkeepers, traders and intellectuals educated under Japanese rule comprise the wavering class.”<sup>77</sup> The lowest class, hostile, includes relatives of Japanese collaborators, those who opposed Kim Il-sung, families of businessmen, religious leaders, landlords, and those who have fled

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<sup>70</sup> See Bai, *supra* note 7, at 105 (“China often compares North Koreans who flee to China to illegal immigrants from Mexico who cross the border into the United States in search of jobs and better opportunities.”).

<sup>71</sup> Charny, *supra* note 5, at 95.

<sup>72</sup> *Id.* at 91–92 (the hostile class consists of 27% of the population, with more than 50 sub-categories). See also Bai, *supra* note 7, at 106 (arguing that even if the primary motivation for fleeing North Korea is economic, North Korea’s economic policies amount to political persecution).

<sup>73</sup> See Charny, *supra* note 5, at 92 (this classification of all citizens was originally conducted in 1947).

<sup>74</sup> *Id.*; see also Bai, *supra* note 7, at 106.

<sup>75</sup> See Bai, *supra* note 7, at 106.

<sup>76</sup> *Id.*

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

North Korea.<sup>78</sup>

The authorities allocate access to food, healthcare, housing, education, and employment on the basis of which class a particular citizen or family belongs.<sup>79</sup> The Public Distribution System favors the loyal class and discriminates against the hostile and wavering classes.<sup>80</sup> Citizens who are members of the hostile class are last to receive entitlements, if they receive any at all.<sup>81</sup> This has a devastating impact on the wavering and hostile classes, condemning generations to lives of misery. For example, the authorities deny those belonging to lower *songbun* classes any education beyond secondary school, which stunts career advancement and thus “relegate[s] them to poor food security, housing, and medical care for the rest of their lives.”<sup>82</sup> The effect on the hostile class has been catastrophic when the North Korean comprehensive welfare scheme collapsed in the 1990s.<sup>83</sup> The discriminatory manner of the allocation of public goods means that North Korea’s political system persecutes an entire class of individuals, approximately 27% of the population.<sup>84</sup> According to Joel Charny, an expert on North Korean affairs, “there is no meaningful way to separate economic deprivation from political persecution.”<sup>85</sup> Additionally, a 2005 survey conducted by Yoonuk Chang found that the vast majority of North Korean refugees are from the wavering and hostile classes.<sup>86</sup>

As to the Chinese assertion that North Koreans crossing into China are merely “economic migrants,” akin to Mexicans crossing into the United States, there are vast differences between the two situations.<sup>87</sup> Mexican people, who cross the border illegally into the United States, do so for economic reasons. Moreover, the act of leaving Mexico is neither a violation of Mexican law nor do Mexican authorities punish these migrants upon their return. On

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<sup>78</sup>

*Id.*

<sup>79</sup>

*Id.*

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*Id.*

<sup>81</sup>

See Charny, *supra* note 5, at 92.

<sup>82</sup>

Bai, *supra* note 7, at 106.

<sup>83</sup>

*Id.*

<sup>84</sup>

*Id.*

<sup>85</sup>

Charny, *supra* note 5, at 92.

<sup>86</sup>

See Bai, *supra* note 7, at 106.

<sup>87</sup>

See Bai, *supra* note 7.

the other hand, North Koreans flee the DPRK to avoid political persecution; they are deemed traitors upon defection and face imprisonment, torture, and even death by North Korean authorities upon their return. Thus, one cannot say the North Koreans who flee to China to escape North Korea's unjust political caste system are economic migrants like those entering the U.S. from Mexico.<sup>88</sup>

Chinese law provides that foreigners applying for refugee status during the screening period may temporarily stay in Chinese territory by provisional identity cards signed and issued by public security bodies.<sup>89</sup> Despite applying this law to other groups within its territory, China has not applied this law to North Koreans found within its borders.<sup>90</sup> It has defended this practice, stating: "Chinese public security and border guard authorities have seized some DPRK citizens who have repeatedly entered China illegally," asserting that China must defend its "national sovereignty and fundamental interests, bearing in mind the stability of the Korean Peninsula."<sup>91</sup> China's position prioritizes stability on the Korean Peninsula over its obligations under refugee and other human rights law.<sup>92</sup> Essentially, Beijing is afraid that if it were to comply with international law and grant North Koreans refugee status in China, more North Koreans would flee and destabilize the North Korean regime.<sup>93</sup> A destabilized North Korea could collapse, leading to a unified Korea, which would threaten China's prestige in the

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<sup>88</sup> Charny, *supra* note 5, at 92.

<sup>89</sup> Cohen, *supra* note 45, at 70 (citing Chinese Law).

<sup>90</sup> *Id.* at 71-72 ("Toward most other refugee populations, China's policy is markedly different. The Chinese government for example has cooperated with UNHCR in the resettlement in China of ethnic Han Chinese or ethnic minorities from Vietnam and Laos, residing there since the Vietnam War, and it is currently considering granting citizenship to them and their children. China also has allowed UNHCR access to asylum seekers from Pakistan, Iraq, Somalia and Eritrea") (citing Wu Haitao, "With North Koreans, however, China has insisted that the UN not make the issue of forced repatriations 'a refugee one' and 'internationalize it' and has regularly repeated what is now its well-worn mantra: North Koreans who cross illegally 'do it for economic reasons . . . they are not refugees.'").

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

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

region.<sup>94</sup>

## 2. PERSECUTION UPON REPATRIATION

The second reason that China should recognize North Korean defectors as refugees is due to the certain persecution they face when they return to North Korea, since defection is a crime against the state.<sup>95</sup> However, under CRSR, there is no requirement that an individual suffer persecution prior to leaving their home country; rather, there is only a requirement that they left on account of a well-founded fear or that their departure was a violation of law.<sup>96</sup> Moreover, an individual who was not a refugee when he left his country may, in fact, become a refugee at a later date.<sup>97</sup> They are refugees *sur place*, one whose need for protection arises after departing their home country, and thus, should receive the same protection as any person protected under the CRSR.<sup>98</sup>

North Koreans who are repatriated from China are held in detention centers near the border where they are questioned about their reasons for leaving the country and whom they were in contact with while within China.<sup>99</sup> If North Korean authorities discover that defectors had political reasons for leaving or were in contact with Christian missionaries or South Korean NGOs, then they are often confined in North Korea's gulag where life consists

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<sup>94</sup> See *id.* (describing the Chinese concern as a “domino theory” that “refugee flows will lead to unrest inside the DPRK, followed by collapse and reunification under South Korea’s leadership, and the expansion of US political and military influence on the Peninsula”).

<sup>95</sup> See Bai, *supra* note 7, at 107.

<sup>96</sup> Cohen, *supra* note 45, at 69.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.* See also Bai, *supra* note 7, at 107 (citing pt. 92(b) of Chapter 2 of the UNHCR Guidelines: “The requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear. He may have decided to ask for recognition of his refugee status after having already been abroad for some time. A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee *sur place*”).

<sup>99</sup> Bai, *supra* note 7, at 107 (Human Rights Watch reported in 2014 there was systematic abuse of detainees at these centers).

of a daily grind of beatings, torture, and starvation.<sup>100</sup> Defectors who left for economic reasons typically receive a sentence of at least three to six months in a labor training camp where conditions may be slightly better than the political prison camps but where prisoners are still subject to beatings and malnourishment.<sup>101</sup> Moreover, North Korean women who are found to be pregnant by Chinese men are often forced to have an abortion or have their infant killed upon birth.<sup>102</sup>

Given that North Koreans who leave the country without permission face certain harsh punishment upon return, they are considered refugees *sur place*, individuals who become refugees as a result of fleeing the DPRK.<sup>103</sup> Accordingly, China should afford North Koreans found within its territory all the protections provided by the CRSR.

#### *B. CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT*

The principle of non-refoulement is also enshrined in the United Nations's Convention Against Torture (CAT). Article 3 provides: "No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."<sup>104</sup> The Committee Against Torture, which is the body that monitors implementation of CAT, called upon China in 2008 to

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<sup>100</sup> *See id.*

<sup>101</sup> *See id.*

<sup>102</sup> *See id.*

<sup>103</sup> *China: Don't Return Nine North Korean Refugees, supra* note 6.

<sup>104</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (defining torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions").

comply with Article 3 of the Convention.<sup>105</sup> Additionally, the Committee requested China establish a screening process for North Koreans and examine whether those individuals would face the risk of torture upon their return to the DPRK.<sup>106</sup> It also called on China to provide access to the UNHCR and to adopt legislation incorporating China's obligations under the torture convention concerning deportations.<sup>107</sup>

Based on the testimony of prior North Korean defectors, each defector who is forcibly returned by China is at grave risk of torture both during the detention and interrogation stage, as well as when they are sent to prison.<sup>108</sup> Former prison guard, Ahn Myong Chul, who fled to China in 1994, testified to the inhumane conditions of North Korea's prison camps.<sup>109</sup> Chul described witnessing daily beatings of prisoners with iron rods, rapes, forced abortions, the murder of prisoners (including children), and the existence of mass graves near the camps.<sup>110</sup>

There is overwhelming evidence that all repatriated North Koreans are in danger of being subjected to torture upon their return to the DPRK. Since all returnees to North Korea run a substantial risk of being tortured, even if one accepts China's position that the primary motivation for leaving North Korea is economic, this is irrelevant for analysis under CAT—Article 3 does

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<sup>105</sup> Cohen, *supra* note 45, at 62.

<sup>106</sup> *See id.*

<sup>107</sup> *See id.*

<sup>108</sup> *See, e.g.,* Bai, *supra* note 7, at 107.

<sup>109</sup> *See Former Guard: Ahn Myong Chol – North Korean Prison Guard Remembers Atrocities*, NBCNEWS.COM (Jan. 15, 2003) (relating the testimony of Ahn Myong Chol, a former prison guard at Hoeryong-Area prison in North Korea), [http://www.nbcnews.com/id/3071468/ns/us\\_news-only/t/former-guard-ahn-myong-chol/](http://www.nbcnews.com/id/3071468/ns/us_news-only/t/former-guard-ahn-myong-chol/) (relating the testimony of Ahn Myong Chol, a former prison guard at Hoeryong-Area prison in North Korea).

<sup>110</sup> *See id.* (Ahn testified: “Sometimes I used to drink alcohol together and chat together with the people in the division of torture, and when the officer in the division is in a good mood, the prisoners will be treated mildly. And when he had an argument with his wife at home, then the torture will be severe. And I heard many times that eyeballs were taken out by beating. And I saw that by beating the person, the muscle was damaged and the bone was exposed, outside, and they put salt on the wounded part.”)

not require that individuals run a substantial risk of torture prior to leaving their home country.<sup>111</sup> To the contrary, the only relevant factor is whether there are substantial grounds for believing one is in danger of being tortured upon return to one's country of origin.<sup>112</sup> China must fulfill its obligations under CAT by establishing a screening process to determine whether there are substantial grounds for believing an individual will be subject to torture upon repatriation. China must either cease forcible returns and provide refuge for North Koreans within their territory or facilitate travel to a third country such as South Korea.

*C. CONVENTION ON THE ELIMINATION OF ALL FORMS OF  
DISCRIMINATION AGAINST WOMEN*

The Convention for the Elimination of all Forms of Discrimination Against Women (CEDAW), ratified by China in 1980, has been described as an “international bill of rights for women.”<sup>113</sup> Article I defines discrimination against women as:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>114</sup>

CEDAW also mandates State Parties “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs[,] and practices which constitute discrimination against women.”<sup>115</sup> It also requires State Parties to

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<sup>111</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 104, at art. 3(2).

<sup>112</sup> *Id.* at art. 3(1).

<sup>113</sup> See e.g., Convention for the Elimination of all Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

<sup>114</sup> *Id.*

<sup>115</sup> See *id.* at art. 2(f) (mandating State Parties: “To take all appropriate measures, including legislation, to modify or abolish existing

take measures to protect women from sexual exploitation, including sex trafficking.<sup>116</sup>

Sixty to seventy percent of all North Korean refugees in China are women, many of whom become victims of sex trafficking.<sup>117</sup> The Committee on the Elimination of Discrimination against Women, recognizing the significance of the problem, called on China in 2006 “‘to review the situation of North Korean women refugees and asylum seekers’ and ‘ensure that they do not become victims of trafficking and marriage enslavement because of their status as illegal aliens.’”<sup>118</sup> There are many reports of sexual slavery of North Korean women in China.<sup>119</sup> Sex traffickers travel to North Korea to seek out attractive young women to offer them false employment opportunities, only to then force them into prostitution or marriage after they enter China.<sup>120</sup> North Korean women who cross the border on their own are also entrapped by traffickers, abducted or lured in with false promises of employment.<sup>121</sup> Furthermore, there are reports of Chinese border guards or police pretending to arrest North Korean women for illegally crossing the border only to sell them to human traffickers or to Chinese men looking for brides.<sup>122</sup> Once in the traffickers’ grasp, the women suffer both physical and psychological abuse; often the women are beaten, locked up, and repeatedly raped.<sup>123</sup> Moreover, some are forced to work in the sex industry as karaoke bar hostesses or prostitutes in brothels.<sup>124</sup> The majority, however,

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laws, regulations, customs and practices which constitute discrimination against women”).

<sup>116</sup> *See id.* at art. 6 (requiring State Parties to “take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”).

<sup>117</sup> *See* Park, *supra* note 9 (estimating that 70 to 80 percent of North Korean women fall victim to sex trafficking); *see also* Bai, *supra* note 7, at 108.

<sup>118</sup> Cohen, *supra* note 45, at 63.

<sup>119</sup> Bai, *supra* note 7, at 108.

<sup>120</sup> *See id.*

<sup>121</sup> *See id.*

<sup>122</sup> *See id.*

<sup>123</sup> *See id.*

<sup>124</sup> *See id.* *See also* Norma Kang Muico, *An Absence of Choice: The Sexual Exploitation of North Korean Women in China*, ANTI-SLAVERY INT’L (2005),

[http://www.antislavery.org/includes/documents/cm\\_docs/2009/f/full\\_korea](http://www.antislavery.org/includes/documents/cm_docs/2009/f/full_korea)

are sold as wives to Chinese men for anywhere from \$500 to \$1,000.<sup>125</sup>

In addition to the widespread instances of sexual slavery, there are numerous reports that babies of repatriated North Korean women are killed through forced abortions and infanticide for being part Chinese.<sup>126</sup> Defectors and even former guards report “instances of racially motivated forced abortion or infanticide occurring between 1998 and 2004 at five different kinds of detention and labor training facilities operated by two different police forces” and “[cases of] 273 forced abortions, mostly in police and detention facilities in North Hamgyong Province and North Pyongan Province, on women repatriated from China up through 2010.”<sup>127</sup> One of the most horrific accounts is from a 66-year-old grandmother who was detained in the Provincial Detention Center in South Sinuiju in January 2000.<sup>128</sup> She helped deliver seven babies from returned defectors who were killed soon after birth by being buried alive.<sup>129</sup> A doctor explained the killings were justified because North Korea was suffering food shortages and, therefore, “the country should not have to feed the children of foreign fathers.”<sup>130</sup>

China’s failure to take appropriate measures to protect North Korean women within its territory from sexual exploitation is in direct violation of its obligations under CEDAW. To fulfill its commitment under CEDAW, China should immediately follow the 2006 recommendation of CEDAW’s Committee and comply with

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\_report\_2005.pdf (describing the case of a 27-year-old woman from Onsong-gun, North Hamgyong Province who worked at a karaoke bar as a hostess: ‘I had to sleep with customers; otherwise, the owner threatened to report me. As a result, I got venereal disease. I gave my money to the owner, but he didn’t give me all my money back. He only gave me half of my money and dismissed me... Sometimes, I wished to die, but at other times, I think it is much better to be here than go back to North Korea and die from hunger’).

<sup>125</sup> See Bai, *supra* note 7 at 108.

<sup>126</sup> See Park, *supra* note 9 (citing 2012 reports by the Committee for Human Rights in North Korea (HRNK) in and Data Base Center for North Korean Human Rights White Paper).

<sup>127</sup> Cohen, *supra* note 45, at 64.

<sup>128</sup> See Charny, *supra* note 5, at 91.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

Article 2(f) by enacting laws to protect women from sexual exploitation.<sup>131</sup> Additionally, China is in violation of the CRSR, CAT, and CEDAW for repatriating pregnant North Korean women and allowing North Korea to continue its practice of forced abortions.<sup>132</sup> China should honor these commitments by ceasing further reparations.

#### *D. CONVENTION ON THE RIGHTS OF THE CHILD*

The Convention for the Rights of the Child, adopted by China in 1992, recognizes that children are particularly vulnerable and in need of special protection under the law.<sup>133</sup> It protects a child's civil and political rights, as well as their economic, social, and cultural rights.<sup>134</sup> Article 2 of the CRC provides:

(1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth[,] or other status.

(2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family

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<sup>131</sup> Convention for the Elimination of all Forms of Discrimination Against Women, *supra* note 113, at art 2(f).

<sup>132</sup> *Id.* at art. 12; *see* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *supra* note 104, at art. 16; *see also* Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, art. 33.

<sup>133</sup> Convention for the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (“the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”).

<sup>134</sup> *Id.*

members.<sup>135</sup>

Article 3 of the CRC sets forth that the “best interests of the child” shall be the guiding standard when dealing with children within a State’s jurisdiction, stating that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>136</sup>

North Korean children are also among the thousands who risk their lives to cross the Chinese border.<sup>137</sup> These children are mostly boys aged ten or older, some of whom have lost one or more parent(s) or have parents who are incapable of caring for them.<sup>138</sup> These children often become beggars in markets, train stations, airports, and karaoke bars throughout China.<sup>139</sup> Some take refuge in shelters established by missionary or humanitarian groups, but many end up homeless, victims of exploitation, and suffer serious psychological trauma.<sup>140</sup> Under these appalling conditions, these children are deprived of their right to housing, clothing, healthcare, and education.<sup>141</sup> They are often “the first to be rounded up in periodic crackdowns and returned to North Korea.”<sup>142</sup> Upon their forced return, children are put in prison with their families as punishment for their parents’ “crimes.”<sup>143</sup>

International child advocacy groups have criticized China’s practice with regard to North Korean child migrants.<sup>144</sup> For example, when reviewing China’s compliance with the Convention on the Rights of the Child, the Committee for the Rights of the Child called on the Chinese government in 2005 and in 2013 to ensure that no unaccompanied child from North Korea be returned to a country “where there is substantial grounds for believing that

<sup>135</sup> *Id.* at art. 2(1).

<sup>136</sup> *Id.* at art. 3(1).

<sup>137</sup> See Havel, Bondevik & Wiesel, *supra* note 42, at 60–61.

<sup>138</sup> *Id.* at 60.

<sup>139</sup> *Id.* at 61.

<sup>140</sup> *Id.* at 60-61 (many child beggars reported they had been confined, beaten and sexually abused).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 61.

<sup>143</sup> *Id.* at 91.

<sup>144</sup> See Cohen, *supra* note 45, at 62.

there is a real risk of irreparable harm to the child.”<sup>145</sup> Despite the Committee’s call for Chinese compliance with its obligations under the CRC, China has taken no action to protect North Korean migrant children to date.<sup>146</sup>

### III. CONCLUSION

China forcibly returns more than 5,000 North Korean refugees every year.<sup>147</sup> Tens of thousands have been imprisoned, tortured, and killed as a direct consequence of China's illegal policy of forced repatriations of North Korean defectors.<sup>148</sup> Further, China’s assertion that North Koreans who cross its borders do so for merely economic reasons fails to take into consideration North Korea’s political caste system, which widens the unequal distribution of food, shelter, education, and employment for generations.<sup>149</sup> This system is used by the regime as an instrument of persecution and control, thus distinguishing North Koreans in China as refugees, not merely migrants seeking a better life.<sup>150</sup> Moreover, because Pyongyang deems every citizen who defects to have committed the crime of treason, punishable by incarceration in one of North Korea’s notorious prison camps upon return, North Koreans in China are refugees *sur place*, and thus, should be protected from refoulement under the CRSR.<sup>151</sup>

In accordance with the customary norm of non-refoulement and its specific prohibition under the CRSR and CAT, as well as China’s obligations to women under CEDAW and to children under the CRC, China should immediately cease forcible returns of North Koreans back to the DPRK who are subject to serious human rights abuses for leaving the country without authorization.<sup>152</sup>

In order to determine whether a particular claimant has a well-

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

<sup>146</sup> *See id.* at 60.

<sup>147</sup> *See* Park, *supra* note 9.

<sup>148</sup> *See id.*

<sup>149</sup> *See* Charny, *supra* note 5, at 30.

<sup>150</sup> *See generally* Cohen, *supra* note 45, at 59 (challenging the claim that North Koreans entering China are economic migrants).

<sup>151</sup> *See id.* at 7.

<sup>152</sup> *See* Kumar, *supra* note 5.

founded fear of persecution, North Korean “asylum-seekers should have access to a fair, satisfactory, and individual refugee status determination procedure.”<sup>153</sup> As it has done with other refugees within its territory, China should lift restrictions on the UNHCR and grant it access to the border areas with North Korea.<sup>154</sup> Asylum-seekers from North Korea should be allowed access to the UNHCR in order for their claims for protection to be independently and impartially assessed.<sup>155</sup> To facilitate its compliance with its international obligations, China must rescind its border security agreement with North Korea, which currently denies asylum-seekers and refugees access to a fair assessment of their claims and ultimately protection from refoulement.<sup>156</sup>

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<sup>153</sup> *See id.*

<sup>154</sup> *See id.*

<sup>155</sup> *See id.*

<sup>156</sup> *See id.*

# TARGET BOARDS AND THE COMMITTEE ON FOREIGN INVESTMENT IN THE US

*Vivek Tata\**

*This article uses SEC filings, public reports, cases, and press reports to examine how companies involved in transactions for control approach review by the Committee on Foreign Investment in the United States (CFIUS). Due to the case-by-case nature of CFIUS review and the evolving and politicized nature of the review process, it can be difficult to assess how to approach interactions with CFIUS. In addition to examining how companies allocate risks related to CFIUS review, this article attempts to provide a short primer on how target boards might assess and analyze the CFIUS process.*

## I. INTRODUCTION

During a four-week period in early 2016, action by the Committee on Foreign Investment in the United States (“CFIUS” or “the Committee”) resulted in the termination or rejection of three cross-border deal proposals. All three involved investments from Chinese companies into the United States. In the first situation, CFIUS blocked an investment in Philips Lumileds, a U.S. subsidiary of Philips.<sup>1</sup> In the second case, out of fear of CFIUS action, U.S.-based Fairchild Semiconductor rejected a consortium’s acquisition proposal and accepted a lower bid from an American company.<sup>2</sup> In the third instance, a Chinese firm

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<sup>1</sup> Toby Sterling, *U.S. Blocks Philips' \$3.3 Billion Sale of Lumileds to Asian Buyers*, REUTERS (Jan. 22, 2016, 1:59 PM), <http://www.reuters.com/article/us-philips-lumileds-sale-idUSKCN0V02D4>.

<sup>2</sup> See Press Release, Fairchild Semiconductor, Fairchild Board of Directors Determines the Acquisition Proposal from China Resources and Hua Capital is Not a Superior Proposal, (Feb.

terminated its investment plan in a U.S. company after CFIUS began an investigation.<sup>3</sup> These cases are but a snapshot of the Committee's key role in cross-border mergers and acquisitions.

This article considers the impact of CFIUS review from the perspective of a U.S. corporate board involved in a transaction for control.<sup>4</sup> This article begins with a brief introduction into CFIUS, including its mechanisms for control and brief history. Next, the article addresses CFIUS concerns during the offer stage — how a target board should approach a hostile offer from a foreign acquirer or how a board might prepare itself for a friendly deal. Third, it looks at key deal terms, such as the price and deal protection measures a board should take to protect shareholders from the costs of a blocked deal. As might be expected from a committee focused on national security, CFIUS provides relatively little in the way of public disclosure. This article

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16, 2016), <https://www.fairchildsemi.com/about/press-releases/Press-Release.html?id=20160216-fairchild-board-of-directors>; Keith Bradsher & Paul Mozur, *Political Backlash Grows in Washington to Chinese Takeovers*, N.Y. TIMES (Feb. 16, 2016), <http://www.nytimes.com/2016/02/18/business/dealbook/china-fairchild-semiconductor-bid-rejected.html>.

<sup>3</sup> Arash Massoudi & James Fontanella-Khan, *Tsinghua kills \$3.8bn investment plan in Western Digital*, FINANCIAL TIMES (Feb. 23, 2016). Tsinghua sought an approximately 15% stake in Western Digital and requested a board seat. *Id.*

<sup>4</sup> The threshold at which a transaction may result in “control” of the corporation is dependent on the specific situation. For example, while shareholdings below 50% are not generally considered controlling, a plaintiff can demonstrate actual control through domination of corporate conduct by a minority shareholder. *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1114 (Del. 1994) (holding a 43.3% minority shareholder to have had control over business decisions). CFIUS, of course, is not bound by state corporation law definitions of control and may look beyond these shareholding thresholds. *See* 31 C.F.R. § 800.301(a) (2016) (delineating which transactions are covered transactions). CFIUS regulations are explicit that the “actual arrangements for control” are not important; what matters is whether the deal “results or could result in control of a U.S. business by a foreign person.” Thus, some deals which do not involve traditional “control” shareholding thresholds still trigger review.

relies on SEC filings, corporate releases, cases, and press reports to understand how boards have addressed CFIUS-related challenges.

## II. THE COMMITTEE’S EVOLVING ROLE

CFIUS is a U.S.-based, interagency committee comprised of key executive branch officials.<sup>5</sup> A transaction is covered by CFIUS if it “results or could result in control of a U.S. business by a foreign person.”<sup>6</sup> Notification is voluntarily, but if parties fail to notify the Committee, it may still take action, even after a deal is closed.<sup>7</sup> In general, CFIUS raises three concerns for parties to a potentially covered transaction. First, the review process takes a good deal of time, which can delay an agreement: thirty days for the initial review and forty-five days for the investigation, should one be necessary.<sup>8</sup> Regarding lengthy investigations, it is likely a covered transaction will be investigated – during the six-year period from 2009 to 2014, CFIUS reported it conducted investigations in nearly 40% of cases.<sup>9</sup> Second, the Committee may indicate that certain mitigation measures are necessary.<sup>10</sup> The Committee may also recommend that an approved deal be unwound due to failures to comply with mitigation requirements.<sup>11</sup> Third, the Committee can recommend that the President block or

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<sup>5</sup> SEE JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 1–7 (2016), <https://www.fas.org/sgp/crs/natsec/RL33388.pdf>.

<sup>6</sup> 31 C.F.R. § 800.301(a).

<sup>7</sup> 31 C.F.R. § 800.401(a), (b) (2016).

<sup>8</sup> 31 C.F.R. § 800.501–506 (2016). For example, in the Waldorf deal, CFIUS’s review lasted from October 2014 to February 2015. *China’s Anbang Insurance Gets U.S. Go-ahead for \$1.95 bln Waldorf Astoria Buy*, REUTERS (Feb. 1, 2015, 8:48 PM), <http://www.reuters.com/article/anbang-waldorf-idUSB9N0TO01420150202>.

<sup>9</sup> JACKSON, *supra* note 5, at 25.

<sup>10</sup> 31 C.F.R. § 800.501–506.

<sup>11</sup> *E.g.*, JACKSON, *supra* note 5, at 6.

suspend a transaction.<sup>12</sup> While it is extraordinarily rare for the President to block a deal, the threat of such sanction forces companies to submit to “voluntary review;” if they do not, CFIUS may recommend divestiture, even post-closing.<sup>13</sup>

A history of CFIUS is beyond the scope of this article; however, it is worth noting CFIUS has often been a lightning rod for those concerned about the influence or threat posed by particular foreign countries. The first major expansion of CFIUS’s power, through the 1988 Exon-Florio provision, was a reaction to concerns over Japanese takeovers of U.S. firms.<sup>14</sup> In 2007, concerns about Middle Eastern investors led to the Foreign Investment and Security Act, which expanded the Committee’s authority to include “critical infrastructure” and homeland security concerns.<sup>15</sup>

Over the past decade, observers conclude CFIUS has begun to focus more on Chinese investments.<sup>16</sup> One innocuous explanation is China is also the largest source of

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<sup>12</sup> 31 C.F.R. § 800.506(b).

<sup>13</sup> *E.g.*, MEREDITH M. BROWN, RALPH C. FERRARA & PAUL S. BIRD, TAKEOVERS: A STRATEGIC GUIDE TO MERGERS AND ACQUISITIONS SUPPLEMENT 1–16 (2010) (describing the Polaris Financial divestiture of IdenTrust and the Ralls case).

<sup>14</sup> One deal of note involved a potential sale of Fairchild Semiconductor to Fujitsu, which fell through in the face of political opposition. JACKSON, *supra* note 5, at 3–4. *See also* Margaret L. Merrill, *Overcoming CFIUS Jitters: A Practical Guide for Understanding the Committee on Foreign Investment in the United States*, 30 QUINNIPIAC L. REV. 1, 19 (2011). As described in the introduction, Fairchild recently rejected an offer partially out of concerns over CFIUS approval — perhaps due to experiencing *deja vu*.

<sup>15</sup> Foreign Investment and National Security Act of 2007, Pub. L. No. 110–49, § 4, 121 Stat. 246, 253–54 (2007).

<sup>16</sup> *See* Shawn Donnan, *US Reviews of Investments Made by China Increase*, FINANCIAL TIMES (Feb. 19, 2016), <http://www.ft.com/intl/cms/s/0/6ef4ffdc-d75b-11e5-969e-9d801cf5e15b.html#axzz45OCDI376>; *see also* Minxin Pei, *Washington Is Giving the Cold Shoulder to Chinese Investment*, FORTUNE (Feb. 23, 2016, 10:43 AM), <http://fortune.com/2016/02/23/chinese-company-acquisitions-us-companies/>.

covered transactions, comprising nearly 20% of the total covered transactions over the three-year period from 2012 through 2014.<sup>17</sup> However, members of Congress have raised explicit concerns about Chinese investment, including recommending publicly that CFIUS review specific deals.<sup>18</sup> Coupled with its record of investigation into Chinese acquisitions, it is reasonable to conclude CFIUS is particularly concerned about Chinese investment. It has scrutinized a Chinese company's acquisition of the Waldorf Astoria<sup>19</sup> and SAP's acquisition of an HR software company.<sup>20</sup>

The Committee will consider a range of threats in its review.<sup>21</sup> Of particular importance is the relationship between the target business and the acquiring country; for example, it is hard to imagine a U.K. acquirer facing the same in-depth investigation and public opposition as the Chinese firm Shuanghui International when it acquired Smithfield Foods.<sup>22</sup> Critics of the deal specifically focused

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<sup>17</sup> JACKSON, *supra* note 5, at 19.

<sup>18</sup> See Rebecca Spalding, *Affymetrix Bid's China Ties Spark National Security Talk*, BLOOMBERG (Mar. 21, 2016, 6:57 PM), <http://www.bloomberg.com/news/articles/2016-03-21/affymetrix-bid-s-china-ties-must-be-examined-congresswoman-says>; see also David McLaughlin, *Chinese Bid for Chicago Exchange Draws Congressional Concern*, BLOOMBERG (Feb. 17, 2016, 12:34 PM), <http://www.bloomberg.com/news/articles/2016-02-17/chinese-bid-for-chicago-exchange-draws-congressional-concern>.

<sup>19</sup> *China's Anbang Insurance Gets U.S. Go-ahead for \$1.95 bln Waldorf Astoria Buy*, *supra* note 8.

<sup>20</sup> SuccessFactors, Inc., Tender Offer Statement Amend. 7 (Schedule TO/A) (Dec. 16, 2011), <https://www.sec.gov/Archives/edgar/data/1402305/000119312512019895/d268167dscota.htm> (last visited Oct. 28, 2016).

<sup>21</sup> See generally THEODORE H. MORAN, THREE THREATS: AN ANALYTICAL FRAMEWORK FOR THE CFIUS PROCESS (2009) (categorizing CFIUS threats into three groups: The first threat is the foreign acquisition of key resources, such that the U.S. might become reliant on a foreign power for essential goods or services. The second threat involves the potential for transfer of technology or expertise to a foreign power. The third threat involves the risk of espionage or infiltration through acquisition of key assets.).

<sup>22</sup> See Michael J. de la Merced, *U.S. Security Panel Clears a Chinese Takeover of Smithfield Foods*, N.Y. TIMES (Sept. 6, 2013,

on concerns about Chinese food safety practices,<sup>23</sup> which might not have been relevant for an acquirer based in another country.

### III. CFIUS CONSIDERATIONS IN THE OFFER STAGE

When a U.S. board receives an offer from a foreign acquirer, it should include CFIUS considerations in planning its response. Whether or not the offer is solicited by the target, the uncertainties created by the CFIUS process create both opportunities and problems for target boards of directors.

#### A. HOSTILE OFFERS

For boards facing a hostile offer, the prospect of CFIUS review can help a target board resist the proposal. “Since 1990, nearly half of the transactions CFIUS investigated were terminated by the firms involved.”<sup>24</sup> Although this percentage has dropped to approximately 20% over the past six years,<sup>25</sup> it is still quite high. A target board could, therefore, argue that such transactions do not warrant

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6:25 PM), <http://dealbook.nytimes.com/2013/09/06/national-security-panel-approves-smithfield-sale-to-chinese-company/>.

<sup>23</sup> Press Release, Debbie Stabenow, Bipartisan Group of Senators Urge Appropriate Oversight of Proposed Smithfield Purchase (June 20, 2013), <http://www.stabenow.senate.gov/news/bipartisan-group-of-senators-urge-appropriate-oversight-of-proposed-smithfield-purchase> (last visited Oct. 28, 2016); Letter from Senators Max Baucus and Orrin Hatch, U.S. Sen. Comm. on Fin., to the Hon. Michael Froman, U.S. Trade Rep., and the Hon. Jacob Lew, U.S. Sec. of the Treasury (June 21, 2013), <http://www.finance.senate.gov/imo/media/doc/062113%20Smithfield%20Letter.pdf>.

<sup>24</sup> JACKSON, *supra* note 5, at 9.

<sup>25</sup> *Id.* at 6. Note the percentage of withdrawn notices per year fluctuates significantly — in 2012, it was close to 44%, but in 2014, it was only 18%.

serious consideration without a prohibitive premium and onerous deal protection measures.

In the antitrust context, it is well established that an informed board can decline an offer that is higher in nominal terms but that creates real regulatory risk.<sup>26</sup> Given these cases, it seems likely that a board which informs itself about the risks involved with CFIUS review — mandatory divestitures, delays, or even a blocked deal — would be protected by the business judgment rule.<sup>27</sup> Indeed, this is what Fairchild Semiconductor recently concluded when it found a nominally higher offer from a Chinese consortium did not constitute a “superior proposal” compared to its agreement with an American company.<sup>28</sup> The board did not change its recommendation, even after it secured a “hell-or-high-water commitment” from the consortium, since it felt that there was still a “non-negligible risk” of CFIUS blocking a deal.<sup>29</sup>

Courts are also likely to draw a parallel with antitrust case law regarding a board’s willingness to consider potential mitigation measures in evaluating an offer. In *In*

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<sup>26</sup> See *In re BJ's Wholesale Club, Inc. S'holders Litig.*, No. CIV.A. 6623- VCN, 2013 WL 396202 at \*9 (Del. Ch. Jan. 31, 2013) (informed and legitimate concerns about antitrust risk are sufficient to presume the board’s good-faith business judgment); *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 512 (Del. Ch. 2010) (“potential regulatory approvals relating to antitrust considerations presents a legitimate risk factor for the Board to consider ”); *In re J.P. Stevens & Co., Inc. S'holders Litig.*, 542 A.2d 770, 781 n.6 (Del. Ch.1988) (“the Special Committee was entirely justified in considering any legitimate threat that the antitrust laws posed to the consummation of any West Point proposal.”).

<sup>27</sup> The business judgment rule is the presumption that “in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company.” *In re the Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 52 (Del. 2006) (citing *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)).

<sup>28</sup> Fairchild Semiconductor Int’l, Recommendation Statement (Schedule 14D-9A) (Feb. 4, 2016), <https://www.sec.gov/Archives/edgar/data/1036960/000119312516463934/d22910dsc14d9a.htm> at 5.

<sup>29</sup> *Id.*

*re BJ's Wholesale Club, Inc.*, the court refused to find an implication of bad faith when the plaintiff asserted the board could have done more to mitigate the antitrust concerns in a rejected offer.<sup>30</sup> Therefore, a board could, for example, reasonably conclude selling off a lucrative government contracting business in order to permit the sale of other assets to a foreign investor would be too risky.

However, targets of hostile offers can use political pressure to wear down a hostile bidder. The board may even be able to rely on a preferred-domestic acquirer to carry out the dirty work of lobbying for CFIUS scrutiny. In its battle with the Chinese company China National Offshore Oil Corporation (CNOOC) over Unocal, Chevron issued a statement pointing to CNOOC's ties to the Chinese government<sup>31</sup> and also lobbied politicians, resulting in members of Congress urging a CFIUS investigation into the competing offer.<sup>32</sup> CNOOC also hired lobbyists<sup>33</sup> and invited review by CFIUS, but it was ultimately unsuccessful in its attempts to fight back.<sup>34</sup>

## B. BOARDS SEEKING FRIENDLY DEALS

A board seeking a friendly deal with a foreign investor will need to plan ahead to increase the probability of CFIUS approval. As a preliminary step, the company should identify any ways in which its own business might trigger

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<sup>30</sup> In re BJ's Wholesale Club Inc. S'holders Litig., No. CIV.A. 6623-VCN, 2013 WL 396202 at \*9.

<sup>31</sup> Press Release, Chevron Corp., Chevron Corporation Statement on Unocal Transaction (June 22, 2005), <https://www.sec.gov/Archives/edgar/data/93410/000095014905000441/f10205ae425.htm>.

<sup>32</sup> Matt Pottinger, Russell Gold, et al., *Cnooc Drops Offer for Unocal, Exposing U.S.-Chinese Tensions*, WALL ST. J. (Aug. 3, 2005), <http://www.wsj.com/articles/SB112295744495102393>.

<sup>33</sup> *Id.*

<sup>34</sup> Justin Blum, *CNOOC Requests U.S. Security Scrutiny*, WASH. POST (June 28, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/27/AR2005062701501.html>.

CFIUS review. This has become harder to predict, and it should encompass not only obvious triggers such as government contracts but also particular assets such as potentially sensitive real estate.<sup>35</sup>

After reviewing its own business, the target board should evaluate its potential acquirers.<sup>36</sup> As much as possible, the target should seek out information on the acquiring company, such as its sources of financing and connections to foreign governments.<sup>37</sup> Some foreign companies, such as sovereign wealth funds or companies known to have close ties to foreign governments, appear to be more likely to trigger U.S. scrutiny. For example, the House Intelligence Committee recommended the Obama administration block acquisitions by the Chinese companies Huawei and ZTE.<sup>38</sup>

Additionally, transparency is a major concern for both CFIUS and Congress. In Chongqing Casin Enterprise Group's ongoing efforts to acquire the Chicago Stock Exchange, opponents of the deal cited the lack of transparency in the acquirer's ownership structure and relationship to the Chinese government.<sup>39</sup> Even the CEO of the exchange has stated that he does not know who owns the company and that it is unclear whether the Chinese government has a minority stake.<sup>40</sup> A target board seeking a

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<sup>35</sup> See Press Release, The White House Office of the Press Secretary, Order Signed by the President Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation (Sept. 28, 2012) (wind farms were located near U.S. naval facilities).

<sup>36</sup> See, e.g., JACKSON, *supra* note 5, at 27–28 (listing risk-mitigating factors that CFIUS considers during investigation of transactions).

<sup>37</sup> See, e.g., *id.*

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

<sup>39</sup> Letter from 47 Members of Congress to the Hon. Marisa Lao, Assistant Secretary, Dep't of the Treasury (Feb. 16, 2016), <https://lynnjenkins.house.gov/uploads/Letter%20To%20CFIUS%20Re%20Chicago%20Stock%20Exchange%20Purchase.pdf>.

<sup>40</sup> Josh Rogin, *Congress Wary of National Security Implications of Chinese Deal for Chicago Stock Exchange*, CHI. TRIB. (Feb. 17, 2016, 8:29 AM),

foreign investor should therefore encourage a potential acquirer to disclose this sort of information, rather than permitting opponents to create costly regulatory hurdles due to a lack of disclosure.<sup>41</sup>

The target should also consider how to structure its sale to best avoid CFIUS scrutiny.<sup>42</sup> A target may make itself more attractive to foreign suitors by preemptively selling any CFIUS-triggering aspect of the business, then selling the remaining portion of the business to a foreign buyer.<sup>43</sup> To maximize sale value, the parties will want to choreograph the acquisition process carefully so the companies' additions remain separate.<sup>44</sup> In the bankruptcy auction for A123 Systems, for example, the bankers running the auction contacted a U.S. company to bid for sensitive security assets, while a Chinese company bid on the larger remainder.<sup>45</sup> Pairing these bids enabled the deal to proceed without scrutiny.<sup>46</sup>

#### IV. DURING THE DEAL

##### A. DEAL PRICE

Once a deal is in process, a target board should work to ensure that its shareholders are adequately compensated for the regulatory risks posed by a foreign acquisition. This

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<http://www.chicagotribune.com/business/ct-congress-chicago-stock-exchange-sale-20160217-story.html>.

<sup>41</sup> See Merrill, *supra* note 14, at 36-40.

<sup>42</sup> See, e.g., Julie Wernau, *Navitas Key to Sale of A123 to Chinese Firm*, CHI. TRIB. (Jan. 30, 2013), [http://articles.chicagotribune.com/2013-01-30/business/ct-biz-0130-navitas-20130130\\_1\\_navitas-systems-wanxiang-group-microsun-technologies](http://articles.chicagotribune.com/2013-01-30/business/ct-biz-0130-navitas-20130130_1_navitas-systems-wanxiang-group-microsun-technologies).

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

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

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

may require a significant premium: Unocal's board concluded that CNOOC's offer was not "sufficient to compensate [] stockholders for the higher risk"<sup>47</sup> despite an approximately \$1.5 billion premium over Chevron's offer.<sup>48</sup> Even Institutional Shareholder Services, a leading advisory firm, supported the Chevron bid, agreeing that CNOOC's offer did not adequately compensate for the regulatory risk.<sup>49</sup> Fairchild's board recently made a similar decision, as described above.<sup>50</sup>

Chinese buyers use cash as consideration more than half of the time, which may be attractive to stockholders.<sup>51</sup> However, a target board should inquire about the origin of the acquirer's financing. In the Chevron-CNOOC battle, Chevron claimed CNOOC's access to low-interest loans gave it an unfair advantage, a claim echoed by political opponents of the CNOOC bid.<sup>52</sup> In another recent case, the

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<sup>47</sup> Shareholder Presentation, Unocal Corp., Unocal and Chevron (Rule 425 Filing) (Aug. 3, 2005), <https://www.sec.gov/Archives/edgar/data/93410/000095014905000521/f10205ce425.htm>.

<sup>48</sup> David Barboza & Andrew Ross Sorkin, *Chinese Oil Giant in Takeover Bid for U.S. Corporation*, N.Y. TIMES (June 23, 2005) <http://www.nytimes.com/2005/06/23/business/worldbusiness/chinese-oil-giant-in-takeover-bid-for-us-corporation.html>.

<sup>49</sup> Press Release, Unocal Corp., Unocal Wins ISS Support for Merger with Chevron (Aug. 1, 2005), <https://www.sec.gov/Archives/edgar/containers/fix014/716039/000089882205000892/aug1pr.txt>.

<sup>50</sup> Fairchild Semiconductor Int'l, *supra* note 28.

<sup>51</sup> See Nisha Gopalan & Christopher Langner, *Deal or No Deal?*, BLOOMBERG (Apr. 1, 2016, 2:11 AM), <http://www.bloomberg.com/gadfly/articles/2016-04-01/deal-or-no-deal> (noting 62% of Chinese buyers were to pay cash in failed or withdrawn deals); see also Alfred Rappaport & Mark L. Sirower, *Stock or Cash? The Trade-Offs for Buyers and Sellers in Mergers and Acquisitions*, HARV. BUS. REV. (Nov.-Dec. 1999), <https://hbr.org/1999/11/stock-or-cash-the-trade-offs-for-buyers-and-sellers-in-mergers-and-acquisitions> (stating shareholders of acquiring companies fare worse in stock transactions than they do in cash transactions).

<sup>52</sup> See Allen Sloan, *Parent's Help Puts Cnooc Bid in Different Light*, WASH. POST (July 26, 2005) (stating that Chevron

fact that the foreign offeror, Origin Technology Corporation, was a shell entity with unclear financing, was a reason for the U.S. target, Affymetrix Incorporated, to choose a domestic acquirer, notwithstanding a nominally higher bid.<sup>53</sup>

### *B. TERMINATION FEES AND CFIUS-RELATED COVENANTS*

Aside from the pricing negotiation, the parties will need to determine how to address the CFIUS process in the merger agreement. There are three related decisions: the choice of whether to notify the Committee, the value of any CFIUS-related reverse termination fee, and the standard to which the parties will be held in addressing the Committee's concerns — the “efforts” covenant.

#### 1. NOTIFICATION

In most cases, parties who think they may fall within the Committee's purview should include a covenant binding

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has raised doubts about CNOOC's bid and that it would receive \$4.5 billion from its parent company as a 30-year loan carrying a 3.5% interest rate); *see also* Press Release, Richard Pombo, Pombo Statement on CNOOC Bid Withdrawal (Aug. 2, 2005), <https://votesmart.org/public-statement/119861/pombo-statement-on-cnooc-bid-withdrawal#.VwWjlxMrLeQ> (arguing CNOOC's bid withdrawal is good news for the free market); *but see* Kate Linebaugh, *How Favorable Is Oil Bid's Financing?*, WALL ST. J. (June 30, 2005, 12:01 AM), <https://www.wsj.com/articles/SB112007688254773231> (arguing the loans terms were not significantly advantageous to CNOOC).

<sup>53</sup> *See* Kevin Miller & Megan Durisin, *Affymetrix Rejects \$1.5 Billion Origin Bid, Favors Thermo*, BLOOMBERG (Mar. 20, 2016, 5:31 PM), <http://www.bloomberg.com/news/articles/2016-03-20/affymetrix-rejects-1-5-bid-billion-origin-bid-favors-fisher> (stating Affymetrix rejected Origin's offer of \$16.10 per share and instead continues to recommend Thermo Fisher for its planned merger who offers \$14 per share).

them to work together in notifying CFIUS.<sup>54</sup> On the other hand, the parties may not want to work together because they want to communicate confidence that the deal does not raise any CFIUS issues. As described in greater detail below, there is some evidence of such a signaling effect in the antitrust context. In the ongoing Tianjin-Ingram Micro deal, for example, the parties publicly decided not to notify, based on the parties' belief that they would not be blocked by the Committee.<sup>55</sup> A few months later, however, they reversed course "after consultation" with CFIUS.<sup>56</sup> In general, parties involved in most of the major deals discussed in this article did notify the Committee. Furthermore, many of those parties had joint covenants, which required them to work together on the CFIUS notification.

## 2. TERMINATION FEES & EFFORTS CLAUSES

A target board involved in a transaction likely to trigger CFIUS scrutiny should require inclusion of a reverse

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<sup>54</sup> See Merrill, *supra* note 14, at 37-38 (explaining the Committee has required joint-filings).

<sup>55</sup> See generally Press Release, Ingram Micro Inc., Ingram Micro Deal FAQs (Feb. 17, 2016), <http://phx.corporate-ir.net/phoenix.zhtml?c=98566&p=hnagroup> (such a move is risky; some commenters have suggested part of the reason the 3Com bid failed was that the acquirers did not voluntarily notify until the Committee was already interested in the transaction); Merrill, *supra* note 14, at 39 n.228. See Vipal Monga, *Ingram Micro To Submit \$6 Billion Tianjin Tianhai Deal for CFIUS Review*, WALL ST. J. (July 21, 2016, 5:19 PM), <http://blogs.wsj.com/cfo/2016/07/21/ingram-micro-to-submit-6-billion-tianjin-tianhai-deal-for-cfius-review/> (stating the company had previously indicated it did not expect to go before CFIUS but then reversed course).

<sup>56</sup> Monga, *supra* note 55.

termination fee provision in the agreement. This fee will be enforceable after a blocked deal, even if the target later finds another acquirer,<sup>57</sup> and compensates shareholders for the costs of delays or a busted deal. Related to any fee provision will be the efforts covenant: requiring the acquirer to reach some standard of effort in complying with a CFIUS regulatory requirement for closing.<sup>58</sup>

A survey of merger agreements shows a spectrum of CFIUS-related termination fees and efforts clauses. In Huawei and Bain's withdrawn bid for 3Com, the acquirers offered a 3% termination fee in the event their bid failed to get regulatory approval, along with a "reasonable best efforts" clause that included a commitment to making necessary divestitures.<sup>59</sup> The ambiguity of the termination fee clause, and in particular its relationship to CFIUS action, resulted in litigation.<sup>60</sup> Target boards should thus take heed and make such clauses explicit. In 2014, Siemens agreed to a 5% reverse termination fee in the event CFIUS rejected its planned acquisition of Dresser-Rand, as well as a wide-ranging "best efforts" clause that included divestiture obligations.<sup>61</sup> In contrast, in SAP's 2011 acquisition of SuccessFactors, the parties required reasonable best efforts but also included an explicit limitation on obligations to

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<sup>57</sup> *In re Chateaugay Corp.*, 198 B.R. 848, 861 (S.D.N.Y. 1996).

<sup>58</sup> See, e.g., Dale Collins, *Sample Antitrust-Related Provisions in M&A Agreements*, ANTITRUST UNPACKED: ANTITRUST LAW BLOG 17 (Apr. 27, 2013), [http://www.antitrustunpacked.com/siteFiles/BlogPosts/antitrust\\_risk\\_shifting4\\_27\\_2013.pdf](http://www.antitrustunpacked.com/siteFiles/BlogPosts/antitrust_risk_shifting4_27_2013.pdf).

<sup>59</sup> Agreement and Plan of Merger by and among Diamond II Holdings, Inc., Diamond II Acquisition Corp., and 3Com Corp., filed as Exhibit 2.1 to Form 8-K/A by 3Com, Inc. (Sept. 28, 2007). The "best efforts" clause is at §6.1(b); the termination fee is at §8.3(c)(iii).

<sup>60</sup> *3Com Corporation v. Diamond II Holdings, Inc.*, C.A. No. 3933-VCN, 2010 WL 2280734 (May 31, 2010) (case relating to discovery dispute over certain communications relating to the purpose of the termination fee).

<sup>61</sup> *Siemens Energy Inc., Dynamo Acquisition Corp. & Dresser-Rand Group, Inc.*, Agreement and Plan for Merger 35 (Sept. 21, 2014). The "best efforts" clause is contained in § 5.6(b).

make divestitures.<sup>62</sup> In the Shanghai-Smithfield transaction described above, the parties explicitly excluded CFIUS risk from the reverse termination fee.<sup>63</sup> On the other hand, they included a best efforts clause for regulatory compliance, as well as a “hell or high water” divestiture requirement.<sup>64</sup>

More recently in the Fairchild deal, the board rejected a 4.3% reverse termination fee as insufficient, even though the foreign consortium had also offered a hell or high water CFIUS covenant.<sup>65</sup> In its ongoing acquisition of Ingram Micro, Tianjin offered a 6.7% reverse termination fee if the deal was rejected by CFIUS, despite the initial choice not to notify CFIUS.<sup>66</sup> This suggests some tension between the parties with regard to the best approach: a high termination fee implies Ingram saw a need for protection against regulatory action, while the public decision not to seek CFIUS review suggested that Tianjin was initially confident CFIUS would not be interested in the deal. The recent decision to seek review validates Ingram’s concerns.

It is hard to discern a pattern in these agreements; perhaps because the parties are allocating not only the risks of their particular deal but also risks due to unpredictable, shifting political tensions. It appears from this small sample that higher reverse termination fees are correlated with a greater likelihood of success, thus suggesting confidence on the part of the acquirer.

Quantifying the value of a strong efforts clause is made more difficult by the lack of strong case law on what various

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<sup>62</sup> SAP America, Inc., Saturn Expansion Corp., & SuccessFactors, Inc., Agreement and Plan of Merger 51,53 (Dec. 3, 2011). The “reasonable best efforts” clause is contained within § 5.5(a) and the explicit non-divestiture clauses within § 5.5(h).

<sup>63</sup> See Smithfield Foods, Inc., Preliminary Proxy Statement (Schedule 14A) 154, § 8.03(e) (May 28, 2013).

<sup>64</sup> *Id.* at 139–40. “Hell or high water” requirements are those that require the party to take any and all actions necessary to accomplish the objective. See, e.g., *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 756 (Del. Ch. 2008).

<sup>65</sup> Fairchild Semiconductor Int’l, *supra* note 28.

<sup>66</sup> Ingram Micro Inc., Current Report: Entry into a Material Definitive Agreement (Form 8-K) 3 (Feb. 17, 2016).

efforts such standards require.<sup>67</sup> For this reason, targets are likely to require a significant and robust reverse termination fee. The Fairchild board's proxy amendment is a recent example of a board explaining why a mid-range (4.3%) fee plus a strong efforts clause is insufficient, even with a pricing premium to the domestic alternative.<sup>68</sup>

Are there risks associated with strong efforts clauses and termination fees? In the antitrust context, one study suggests there is evidence for both "signaling" and "bargaining" effects from hell or high water clauses: the antitrust authorities are more likely to take notice of an agreement with such a clause (the signaling effect), and the parties will have less negotiating leverage with the government if they are bound to undertake divestitures or other major actions (the bargaining effect).<sup>69</sup>

While similar effects may exist in the CFIUS context, the Committee has greater freedom than the antitrust authorities to investigate and require mitigation. Thus, while a foreign acquirer may be signaling CFIUS and lowering its bargaining power through voluntary notification and efforts clauses, it is still probably wise to work with the authorities to assuage their concerns.

### C. MITIGATION

A strong efforts clause is important because CFIUS approval may be conditioned on a variety of mitigation measures. At first blush, mitigation appears to be required

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<sup>67</sup> Delaware cases suggest the "reasonable best efforts" standard has not been clearly defined but may be met through good-faith affirmative efforts, which are still subordinate to the party's business judgment. *Hexion Specialty Chems., Inc.*, 965 A.2d at 755 (finding violation of an efforts clause when there was bad faith conduct).

<sup>68</sup> See *Fairchild Semiconductor*, Press Release, *supra* note 2.

<sup>69</sup> See John D. Harkrider, *Risk-Shifting Provisions and Antitrust Risk: An Empirical Examination*, 20 ANTITRUST 52, 56 (2005).

relatively rarely; CFIUS reports only 8% of cases from 2012 to 2014 required mitigation.<sup>70</sup> This statistic is somewhat misleading, however, because it is based on *all* covered transactions, and the definition of a covered transaction is quite broad; a more useful data point is nearly 22% of all *investigated* transactions required mitigation measures in 2013.<sup>71</sup> CFIUS can require a variety of mitigation measures ranging from passive ownership through proxy boards staffed only by U.S. citizens, to active ownership with information-sharing restrictions between the parent and the domestic corporation.<sup>72</sup>

CFIUS does not disclose specific mitigation requirements in approved deals, but a review of several recent deals gives a sense of the spectrum of what can be required. In 2007, as the financial crisis gained steam, Abu Dhabi's sovereign wealth fund invested in Citibank. To allay any fears over the investment — hardly a trivial concern given the furor over the Dubai Ports World deal a year earlier — the fund confirmed that it would not be involved in the management or operation of Citibank.<sup>73</sup>

Similarly, CNOOC succeeded in winning CFIUS's approval for its acquisition of Nexen Inc. in 2013,<sup>74</sup> contingent on compliance with mitigation requirements. According to a leaked e-mail, the mitigation measures apparently included ceding “operator” or decision-making authority on Gulf Coast oil projects.<sup>75</sup> In contrast to the

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<sup>70</sup> JACKSON, *supra* note 5, at 23.

<sup>71</sup> *Id.* at 3, 23–27 (Table I-2 noting there were 48 investigations in 2013, and page 27 noting 11 negotiations resulted in mitigation measures to arrive at 22%).

<sup>72</sup> *See id.* at 23.

<sup>73</sup> *See* Heather Timmons & Julia Werdigier, *For Abu Dhabi and Citi, Credit Crisis Drove Deal*, N.Y. TIMES (Nov. 28, 2007), [www.nytimes.com/2007/11/28/business/worldbusiness/28invest.html](http://www.nytimes.com/2007/11/28/business/worldbusiness/28invest.html).

<sup>74</sup> Rebecca Penty, *Cnooc Wins Final Approval for \$15.1 Billion Nexen Buy*, BLOOMBERG (Feb. 12, 2013, 10:36 PM), <http://www.bloomberg.com/news/articles/2013-02-12/cnooc-wins-final-approval-for-15-1-billion-nexen-buy>.

<sup>75</sup> *See* Rebecca Penty & Sara Forden, *Cnooc Said to Cede Control of Nexen's U.S. Gulf Assets*, BLOOMBERG (Mar. 1, 2013,

Citibank deal, CNOOC would still be able to have a partial role in the operation of the company.<sup>76</sup>

Foreign investors acquiring particularly sensitive assets may also use Proxy Agreements and Special Security Arrangements (SSA).<sup>77</sup> The Italian company Finmeccanica's acquisition of DRS Technologies, Inc., a U.S. defense contractor, illustrates these alternatives.<sup>78</sup> A subsidiary with a proxy board arrangement is used to address the most serious, top-secret contracts.<sup>79</sup> The parent can only review financial information and generally takes a passive role.<sup>80</sup> For those operations involving secret level clearances (and below), Finmeccanica set up a U.S. subsidiary with an SSA: a board comprised of three outside directors (all U.S. citizens) and two inside directors (one of whom was a U.S. citizen).<sup>81</sup> There are additional information security requirements and both subsidiaries are expected to be financially independent.<sup>82</sup>

The specific mitigation measures required appears to be based on the type of threat CFIUS may perceive.<sup>83</sup> Boards of companies involved in sensitive national security or critical infrastructure businesses may want to consider proposing proxy or SSA arrangements proactively, as

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7:43 PM), <http://www.bloomberg.com/news/articles/2013-03-01/cnooc-said-to-cede-control-of-nexen-s-u-s-gulf-assets>.

<sup>76</sup> See *id.*

<sup>77</sup> See e.g., Office of the Deputy Under Secretary of Defense for Policy Support, INT'L PROGRAMS SECURITY HANDBOOK 126 (2009),

[http://www.iscs.dsca.mil/documents/ips/Chapter12\\_062009.pdf](http://www.iscs.dsca.mil/documents/ips/Chapter12_062009.pdf).

<sup>78</sup> *Finmeccanica to Acquire DRS for US \$5.2 billion*, PRNEWSWIRE.COM (May 12, 2008 1:00 PM), <http://www.prnewswire.com/news-releases/finmeccanica-to-acquire-drs-for-us52-billion-euro-34-billion-57237712.html>.

<sup>79</sup> *FOCI FAQs*, U.S. DEP'T OF DEF., DEF. SEC. SERV. (Feb. 2008), [http://www.dss.mil/isp/foci/foci\\_faqs.html](http://www.dss.mil/isp/foci/foci_faqs.html).

<sup>80</sup> MORAN, *supra* note 21, at 30–31.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Spalding, *supra* note 18 (suggesting Theodore Moran's threat framework may be a useful guide here. SSAs and proxy arrangements appear to be most appropriate for the second and third types of threats in his taxonomy).

opposed to passively or retroactively, in their notice to CFIUS to show their goodwill. Even if the parties do not propose such measures, they may be forced to accept them.<sup>84</sup> For exchange offers in which shareholders will continue to own a stake in the merged company, the target board should carefully evaluate how ongoing compliance with these intrusive governance requirements might impact the value of the company going forward.

## V. CONCLUSION

While foreign investors grow increasingly concerned with the Committee's activism, members of Congress hope to expand its role to address concerns over the state of the United States' critical infrastructure, technological competitiveness, and susceptibility to espionage.<sup>85</sup> As the deals discussed in this article show, boards of American companies should watch this debate carefully because it will influence not only the willingness of foreign investors to make acquisition proposals but also the tactics with which these domestic boards respond.

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<sup>84</sup> Alan C. Myers & Ann Beth Stebbins, *2013 Insights: Global M&A* 123 (Jan. 2013), [https://www.skadden.com/sites/default/files/publications/Skadden\\_2013\\_Insights\\_Global\\_M-A.pdf](https://www.skadden.com/sites/default/files/publications/Skadden_2013_Insights_Global_M-A.pdf) (finding proxy arrangements are becoming more frequent).

<sup>85</sup> James R. Clapper, Dir. of Nat'l Intelligence, *Worldwide Threat Assessment of the US Intelligence Community*, (Feb. 9, 2016) [https://www.armed-services.senate.gov/imo/media/doc/Clapper\\_02-09-16.pdf](https://www.armed-services.senate.gov/imo/media/doc/Clapper_02-09-16.pdf).

*UNITED STATES V. ODoni*, 782 F.3D  
1226 (11TH CIR. 2015).  
THE INTERNATIONAL LOOPHOLE TO  
THE FOURTH AMENDMENT.

*Stephanie C. Wharen\**

INTRODUCTION

This case comment discusses and evaluates the Eleventh Circuit's opinion in *United States v. Odoni*,<sup>1</sup> which appealed criminal convictions of co-defendants Simon Odoni and Paul Gunter for their involvement in an international investment fraud scheme.<sup>2</sup> While the defendants raised many issues on appeal,<sup>3</sup> I will focus on the most novel issue addressed by the court: whether obtaining a United States citizen's property from an agent of a foreign government constitutes a search under the Fourth Amendment and, therefore, requires a warrant in order to be lawful.<sup>4</sup> This case comment particularly addresses the following: (1) whether a citizen traveling abroad has a reasonable expectation of privacy in personal belongings; and (2) whether an agent of a foreign government, particularly an agent associated with foreign law

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<sup>1</sup> See *United States of America v. Odoni*, 782 F.3d 1226 (11th Cir. 2015).

<sup>2</sup> See *id.* at 1229-31.

<sup>3</sup> The United States Court of Appeals affirmed the ruling of the United States District Court for the Middle District of Florida in every issue and upheld the convictions of both defendants. Odoni's arguments included the following: (1) that the district court lacked personal jurisdiction; (2) there was insufficient evidence to convict; (3) the court erred in denying the motion for a new trial; and (4) the sentence was unreasonable. The Court of Appeals reviewed all of Odoni's arguments and ultimately affirmed the district court's decision. Additionally, Gunter's argument that the court erred in denying his motion to suppress electronic evidence due to an unlawful search was reviewed and the district court's decision was affirmed. See *Odoni*, 782 F.3d 1226 (11th Cir. 2015).

<sup>4</sup> See *id.* at 1237-40.

enforcement, should be considered a “third-party.” This article takes the position that the *Odoni* decision expands the well-established, so-called “third-party doctrine” that generally finds a Fourth Amendment search has not occurred where the items examined have been previously and knowingly exposed to third parties.<sup>5</sup>

## I. HISTORY

The Fourth Amendment of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>6</sup>

One of the protections provided by the Fourth Amendment is to guard against arbitrary government intrusions and to provide citizens with a sense of privacy in their own matters. This goal is achieved by requiring that a search warrant be obtained prior to executing a search in order for the search to be lawful. The courts have established the exclusionary rule to protect against the Fourth Amendment becoming nothing more than “a form of words.”<sup>7</sup> Generally, the exclusionary rule prohibits the use of evidence obtained in violation of the Fourth Amendment from being used against a defendant whose Fourth Amendment rights were violated.<sup>8</sup>

Private intrusions not conducted under the authority of the government are exempted from the Fourth Amendment’s

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<sup>5</sup> See, e.g., *California v. Greenwood*, 486 U.S. 35 (1988); *Smith v. Maryland*, 442 U.S. 735 (1979).

<sup>6</sup> U.S. CONST. amend. IV.

<sup>7</sup> *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

<sup>8</sup> *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

requirements.<sup>9</sup> Where a private party has first searched or been exposed to the information, there is no longer a reasonable expectation of privacy, and therefore, examination of anything knowingly exposed or first searched by a third party is not a search under the Fourth Amendment.<sup>10</sup>

The advent of technology has required courts to address searches in the realm of electronic sources of evidence. In *United States v. Segura-Baltazar*, the Eleventh Circuit held that to prove an electronic search is unconstitutional, an individual needs to show that there was a reasonable expectation of privacy when the United States law enforcement entity viewed the evidence.<sup>11</sup> The Supreme Court has previously held that the Fourth Amendment's prohibition against unreasonable searches and seizures did not apply where United States agents searched and seized property located in a foreign country owned by a nonresident alien in the United States.<sup>12</sup> The *Odoni* decision extends that holding to apply to citizens of the United States.<sup>13</sup>

## II. FACTS

Co-defendants Simon Andrew Odoni and Paul Robert Gunter were convicted and sentenced in the United States District Court for the Middle District of Florida.<sup>14</sup> Simon Odoni was sentenced to 160 months in prison for one count of conspiracy to commit mail and wire fraud, one count of conspiracy to commit wire fraud, one count of conspiracy to commit money laundering, one count of engaging in illegal monetary transactions, ten counts of mail fraud, and nine counts of wire fraud.<sup>15</sup> Odoni's convictions were a result of

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<sup>9</sup> U.S. CONST. amend. IV.

<sup>10</sup> See *United States v. Jacobsen*, 466 U.S. 109, 119–20 (1984); *Odoni*, 782 F.3d at 1238 (11th Cir. 2015).

<sup>11</sup> *United States v. Segura-Baltazar*, 448 F.3d 1281, 1286 (11th Cir. 2006) (citing *United States v. Robinson*, 62 F.3d 1325, 1328 (11th Cir. 1995)).

<sup>12</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270–75 (1990).

<sup>13</sup> See *Odoni*, 782 F.3d 1226 (11th Cir. 2015).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1230–31.

his roles in two schemes.<sup>16</sup> The first was a fraudulent stock scheme where he held two roles that lead to his convictions.<sup>17</sup> Odoni managed an advisor group by the name of “Bishop and Parkes” where he managed advisors, helping them write fabricated scripts in order to sell stock in shell companies.<sup>18</sup> Odoni also was the CEO of one of these shell companies, Nanoforce, which did no actual business, although he issued press releases with false statements to incentivize victims to buy stocks.<sup>19</sup>

The second scheme was a forex-fraud scheme involving the sale of foreign-exchange options.<sup>20</sup> Odoni provided escrow services to Hartford Management Group by creating the International Escrow Enterprises, which set up accounts to receive investor funds; he received a five-percent escrow fee from the company that was participating in foreign- exchange options without informing investors of risks or placing trade hedges on the investors’ trades.<sup>21</sup> Simon Odoni appealed his conviction on four grounds: “(1) [T]he district court lacked personal jurisdiction over him; (2) there was insufficient evidence to convict him; (3) the district court erred in denying his motion for a new trial; and (4) his 160- month sentence is unreasonable.”<sup>22</sup>

For his role in the two investment-fraud schemes, Paul Gunter was sentenced to 300 months in prison for one count of conspiracy to commit mail and wire fraud, one count of conspiracy to commit wire fraud, one count of conspiracy to commit money laundering, thirteen counts of engaging in illegal monetary transactions, ten counts of mail fraud, and nine counts of wire fraud.<sup>23</sup> Gunter provided escrow services and managed bank accounts for both the fraudulent-stock and forex-fraud schemes.<sup>24</sup> The Norfolk Constabulary seized

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<sup>16</sup> *Id.* at 1229.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1229–30.

<sup>19</sup> *See* Odoni, 782 F.3d at 1230 (11th Cir. 2015).

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

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

<sup>22</sup> *Id.* at 1229.

<sup>23</sup> *Id.* at 1237.

<sup>24</sup> *Id.* at 1234.

electronic evidence in the UK after looking into the fraudulent stock scheme.<sup>25</sup> Due to a lack of sufficient resources, the Norfolk Constabulary asked the U.K.'s Serious Fraud Office (SFO) to step in.<sup>26</sup> During its investigation, the SFO seized several scripts for boiler rooms, notebooks, volumes of shares, computers, and boxes of documents. The SFO documented and placed all seized items in an office where only investigators had access.<sup>27</sup> Upon Gunter's arrest in the UK, two mobile phones, a laptop computer, a thumb drive, some photo CDs, and a camera were seized.<sup>28</sup> A forensic investigator from the SFO reviewed these items in September 2007.<sup>29</sup> British authorities provided the electronic evidence to U.S. officials in late 2007, whereupon federal agents reviewed the evidence without a search warrant.<sup>30</sup> On appeal, Gunter argued that the district court "erred in denying [his] motion to suppress electronic evidence (and the fruits thereof), which" U.S. authorities searched without obtaining a warrant.<sup>31</sup>

### III. DISCUSSION

#### A. REPORT

The United States Court of Appeals affirmed the United States District Court for the Middle District of Florida's ruling on all four issues raised in Simon Odoni's appeal. Regarding Odoni's argument that the court lacked personal jurisdiction due to the methods used to bring him to the United States from the Dominican Republic for prosecution, the appellate court determined it did not violate the extradition treaty between the two countries.<sup>32</sup> *United States v. Arbane* reiterated the *Ker-Frisbie* doctrine, which holds that "a criminal defendant cannot defeat personal jurisdiction by

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<sup>25</sup> See Odoni, 782 F.3d at 1236 (11th Cir. 2015).

<sup>26</sup> See *id.* at 1234.

<sup>27</sup> *Id.* at 1235.

<sup>28</sup> *Id.* at 1236.

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> *Id.* at 1234.

<sup>32</sup> See *id.* at 1232.

asserting the illegality of the procurement of his presence in the relevant jurisdiction.”<sup>33</sup>

First, Odoni claimed that his extradition fell within the one exception to the *Ker-Frisbie* doctrine. <sup>34</sup> “This [doctrine]...has one exception for when ‘an extradition treaty contains an explicit provision making the treaty the exclusive means by which a defendant’s presence may be secured.’”<sup>35</sup> To prevail under the exception, a defendant must “demonstrate, by reference to the express language of a treaty and/or the established practice thereunder, that the United States specifically agreed to not seize [the defendant] from the territory of its treaty partner.”<sup>36</sup> Yet, the court determined that Odoni failed to prove that the Dominican Republic’s extradition treaty, by its express terms, required the United States only to obtain him through a formal extradition request; rather, the court determined that when conditions of the treaty are met and one government requests extradition, the other will uphold the extradition.<sup>37</sup>

Next, the appellate court found that Odoni’s second argument—that the evidence used to convict him was insufficient—failed because the evidence was not just sufficient, but overwhelming. <sup>38</sup> Appellate courts review evidence sufficiency claims “in the light most favorable to the government and draw all reasonable inferences and make all

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<sup>33</sup> *United States v. Arbane*, 446 F.3d 1223, 1225 (11th Cir. 2006) (citing *United States v. Noriega*, 117 F.3d 1206, 1214 (11th Cir.1997)).

<sup>34</sup> *Odoni*, 782 F.3d at 1231.

<sup>35</sup> *Id.* at 1231 (citing *Arbane*, 446 F.3d at 1225); *See also United States v. Alzarez-Machain*, 504 U.S. 655, 662 (1992) (noting that there is “an ‘exception’ to the rule in *Ker* only when . . . the terms of the treaty provide that its breach will limit the jurisdiction of a court.”).

<sup>36</sup> *Odoni*, 782 F.3d at 1232 (quoting *United States v. Noriega*, 117 F.3d 1206, 1213 (11th Cir.1997)).

<sup>37</sup> *Odoni*, 782 F.3d at 1231-32; *see also* *Convention Between the United States and the Dominican Republic for the Extradition of Criminals*, Dom. Rep.-U.S., art. I, June 19, 1909, 36 Stat. 2468.

<sup>38</sup> *Odoni*, 782 F.3d at 1232.

credibility determinations in support of the jury's verdict.”<sup>39</sup> Here, the court considered witness testimony from two individuals who claimed Odoni discussed the fraud scheme with them in depth.<sup>40</sup> Additionally, the court considered circumstantial evidence of Odoni’s knowledge and involvement with fraudulent companies.<sup>41</sup> Thus, considering the totality of the record, the court found that the evidence was more than sufficient to sustain the convictions.<sup>42</sup>

On Odoni’s third claim—that the court erred by not granting a mistrial—the appellate court held that any such error was harmless.<sup>43</sup> Odoni argued that the district court violated Federal Rule of Criminal Procedure 43; the Rule states that the defendant should be at every trial stage.<sup>44</sup> However, the court found that Odoni’s absence from one conference call (addressing a potentially missing exhibit that was never entered during trial) did not rise to the level of being absent from a trial stage.<sup>45</sup>

Lastly, Odoni argued that his 160-month sentence was unreasonable. The appellate court ruled that his sentence was substantively reasonable.<sup>46</sup> The factors Odoni argued that showed his sentence was unreasonable are codified in 18 U.S.C. §3553(a) and include his personal history, and the characteristics of the offense; Odoni also argued some factors outside the statute: his diminished role in the offense, and the proportionality of his sentence compared to those of more culpable co-defendants.<sup>47</sup> The court used the review standard set out in *United States v. Irey*: “We will vacate a sentence only if we ‘are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that

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<sup>39</sup> *E.g.*, *United States v. Thomas*, 987 F.2d 697, 701 (11th Cir. 1993).

<sup>40</sup> *Odoni*, 782 F.3d at 1232.

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

<sup>42</sup> *Id.* at 1232-33.

<sup>43</sup> *Id.* at 1233.

<sup>44</sup> Fed. R. Crim. P. 43(a).

<sup>45</sup> *Odoni*, 782 F.3d at 1233.

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

<sup>47</sup> 18 U.S.C. § 3553(a) (2012); *Odoni*, 782 F.3d at 1233-34.

lies outside the range of reasonable sentences dictated by the facts of the case.”<sup>48</sup> The court determined that Odoni’s sentence was warranted and not an abuse of discretion.<sup>49</sup>

The United States Court of Appeals affirmed the United States District Court for the Middle District of Florida’s ruling on both issues Paul Gunter appealed but stated only one issue—the denial of a motion to suppress electronic evidence—warranted discussion.<sup>50</sup> The Court of Appeals held the District Court correctly denied Odoni’s motion to suppress electronic evidence.<sup>51</sup> In reviewing this issue, the appellate court had to address the search and seizure of the electronic evidence.<sup>52</sup> Gunter was not appealing the seizure of the evidence by the foreign entity because of the exclusionary rule in the Fourth Amendment. This is due to the fact that in *United States v. Morrow* the court repeated the standard that the exclusionary rule cannot apply to seizures that occurred on foreign soil.<sup>53</sup> To prove that the examination of Gunter’s data files by United States agents was unconstitutional, he had to prove an objectively reasonable expectation of privacy.<sup>54</sup> However, the precedent repeated in *United States v. Jacobsen* states that if a private party, or foreign government agent, has searched the content prior to the U.S. government agent, the individual no longer has a reasonable expectation of privacy.<sup>55</sup> Since the British officials searched the electronic data before sending them to United States agents, Gunter no longer had a reasonable expectation of privacy in the data. Therefore, the agents’ search of the electronic evidence in the United States was not a violation of his Fourth Amendment rights.<sup>56</sup>

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<sup>48</sup> Odoni, 782 F.3d at 1233 (quoting *United States v. Irey*, 612 F.3d 1160, 1188–89 (11th Cir. 2010) (en banc)).

<sup>49</sup> Odoni, 782 F.3d at 1233.

<sup>50</sup> *Id.* at 1234.

<sup>51</sup> *Id.* at 1240.

<sup>52</sup> *Id.* at 1237.

<sup>53</sup> *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976) (citing *Birdswell v. United States*, 346 F.2d 775, 782 (5th Cir. 1965)).

<sup>54</sup> Odoni, 782 F.3d at 1238.

<sup>55</sup> *Jacobsen*, 466 U.S. at 119–20.

<sup>56</sup> Odoni, 782 F.3d at 1289.

B. ANALYSIS

The Fourth Amendment of the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>57</sup>

In 1901, Justice Harlan stated that “[n]o higher duty rests upon this court than to exert its full authority to prevent all violation[s] of the principles of the constitution.”<sup>58</sup> A citizen’s right to privacy and protection from an unreasonable search is the essential principle of the Fourth Amendment.

In recent years, the Supreme Court has used the so-called “third-party doctrine” to interpret whether a search has occurred under the Fourth Amendment, and whether it leaves information collected from third parties with no protection.<sup>59</sup> There is difficulty in creating a meeting place, which governs how and when information should be accessible to police via a third party.<sup>60</sup> The difference between the generic third-party doctrine and the situation in the *Odoni* case is that the third party at play is a foreign investigative police force.<sup>61</sup> How far can this extend? Indeed, how far should it extend?

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<sup>57</sup> U.S. CONST. amend. IV.

<sup>58</sup> *Downes v. Bidwell*, 182 U.S. 244, 382 (1901) (Harlan, J., dissenting).

<sup>59</sup> See Stephen E. Henderson, *Beyond the (Current) Fourth Amendment: Protecting Third Party Information, Third Parties, and The Rest of us Too*, 34 PEPP. L. REV. 975, 976 (2007) (The author points out that the “third-party doctrine” affords no Fourth Amendment protection to information in the hands of a third party).

<sup>60</sup> See, *id.* (Pointing out the difficulty of applying the “third-party doctrine” to police usage).

<sup>61</sup> See *Odoni*, 782 F.3d at 1234 (This is an international investigation being conducted with the aid of the International

In *Miranda v. Arizona*, the Supreme Court of the United States stated that “[w]here rights secured by the Constitution are involved, there can be no rulemaking or legislation which would abrogate them.”<sup>62</sup> In my opinion, the *Odoni* decision creates a loophole that allows the U.S. government to overreach and abrogates a federal right granted by the Constitution. Searches that would be unlawful if conducted inside the United States can now be lawful simply because a foreign entity, with drastically different laws regarding search and seizures, looked at the material first. This alone does not merit the expulsion of a citizen’s reasonable expectation of privacy. The law in the United States has set a standard that a search warrant requires probable cause, an oath or affirmation, a particular description, and due process.<sup>63</sup> Exceptions to this standard should be rare and include exigent circumstances, search incident to arrest, cars and containers, the plain-view doctrine, and consent.<sup>64</sup> Although it may be plausible that agents from a foreign legal authority may act as individuals to provide an affirmation or particular description, the simple fact alone that they have viewed the electronic data should not be sufficient to violate an individual’s Fourth Amendment protections. The search warrant requirement is an essential element in our justice system that should not be tossed aside lightly. The reasonableness of the search should also be addressed.

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Criminal Police Organization, otherwise known as “INTERPOL,” as well as British, Spanish, and Icelandic Police forces).

<sup>62</sup> *Miranda v. Arizona*, 384 U.S. 436, 491 (1966).

<sup>63</sup> *See, e.g.*, *Groh v. Ramirez*, 540 U.S. 551, 557 (2004) (holding particularity is required in a search warrant as provided in Fourth Amendment); *Nathanson v. United States*, 290 U.S. 41, 47 (1933) (explaining a judicial official cannot issue a valid warrant without finding probable cause given the facts presented to him under oath or affirmation); *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (clarifying the right to privacy is enforceable against the states through the Due Process Clause, and the Due Process Clause protects other rights such as “right to be secure against rude invasions of privacy by state officers....”).

<sup>64</sup> *See* Jeanette D. Brooks, *Valid Searches and Seizures Without Warrants*, INST. OF GOV’T 1–4, 6–7 (2004), <http://www.ncids.org/Defender%20Training/2004%20Fall%20Conference/Exceptions.pdf>.

To determine if a search is unreasonable, a balancing test between the government interest and privacy interest must be weighed. Clearly, if there is a present emergency the justice system allows for a lower standard for Fourth Amendment privacy rights of an individual. The exigent circumstances exception takes account for this specific instance.<sup>65</sup> However, in situations where foreign police collect the evidence, there are no exigent circumstances present absent immediate threats of attack. The warrant requirement exemptions mentioned above exist for a reason: to keep law enforcement and the community safe.<sup>66</sup> I believe the foreign loophole established in *Odoni* is more of a loophole for matters of convenience rather than necessity. In *Odoni*, the government failed to obtain a search warrant because it was more convenient not to, not because they were unable to obtain one.<sup>67</sup> Convenience should not be a deciding factor for infringing on an individual's Constitutional rights. In my opinion, foreign obtained evidence intended to be used in a criminal proceeding in the United States against a citizen of the United States should be held to the same standard as domestic evidence; therefore, a search warrant should be executed to retrieve it. "[N]othing can destroy a government more quickly than its own failure to observe its own laws, or worse, its disregard of the character of its own existence."<sup>68</sup> Additionally, "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure" and this foreign entity loophole is an appropriate depiction of this standard.<sup>69</sup>

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<sup>65</sup> See generally *id.* at 1–2 (outlining the various exceptions available to government agents to being required to obtain a warrant, under so-called "exigent circumstances").

<sup>66</sup> Cf. *United States v. Robinson*, 414 U.S. 218, 231 (1973) (suggesting that officer safety and public safety were both important components of "reasonable" Fourth Amendment searches).

<sup>67</sup> Cf. *Odoni*, 782 F.3d 1226 (11th Cir. 2015) (suggesting that the government did not obtain a warrant out of a sense of convenience and not for reasons of exigency).

<sup>68</sup> *Harris v. New York*, 401 U.S. 222, 232 (1971) (quoting *Mapp v. Ohio*, 367 US 643, 659 (1961)).

<sup>69</sup> Wayne R. LaFave, Essay, *The Forgotten Motto of Obsta Principiis in Fourth Amendment Jurisprudence*, 28 *Ariz. L. Rev.* 291, 294 (1989) (citing *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

To some, this may seem like a meaningless or unnecessary step, but it is the basis of the Fourth Amendment of the United States Constitution's "reasonable expectation of privacy" that is granted to every citizen of the United States.<sup>70</sup> The Government interest does not outweigh the privacy interest of an individual simply because the information sought after is obtained in a foreign country.<sup>71</sup>

### C. PRACTICAL IMPACT

#### 1. DECREASING INDIVIDUALS' FOURTH AMENDMENT PROTECTIONS

A significant practical impact of *United States v. Odoni* is its, "[expansion of] the reach of the private-search doctrine and limited the application of the Fourth Amendment."<sup>72</sup> Essentially, the "private party exception" is now expanded under *Odoni* to encompass foreign law enforcement authorities.<sup>73</sup> This provides the U.S. government with a loophole around individuals' Fourth Amendment rights granted by the United States Constitution.<sup>74</sup> If any foreign law enforcement authority conducts a search of a particular piece of evidence, then a United States law enforcement authority would have the right to search that piece of evidence as well, regardless of the legality of the originally conducted search.<sup>75</sup> Treating a foreign law authority the same as a

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<sup>70</sup> See *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (establishing a "reasonable expectation of privacy" protected by the Fourth Amendment of the United States Constitution).

<sup>71</sup> *But cf.*, *Odoni*, 782 F.3d at 1237 (suggesting that government interests are outweighed by private privacy interests when evidence is obtained in a foreign country).

<sup>72</sup> *Cf.* Day Pitney LLP, *United States: White Collar Roundup*, MONDAQ (Feb. 4, 2015), <http://www.mondaq.com/unitedstates/x/371552/Corporate+Crime/White+Collar+Roundup+February+2015> (last visited Dec. 9, 2015) (explaining the expansion of the "private search doctrine" under the *Odoni* decision).

<sup>73</sup> *Id.*

<sup>74</sup> See *Odoni*, 782 F.3d at 1238–39; Day Pitney LLP, *supra* note 72.

<sup>75</sup> *Cf.* Day Pitney LLP, *supra* note 72.

private party is drastically unfair. In the United States, the Fourth Amendment does not apply to a private action, such as a neighbor finding something and turning it over to police. However, the Fourth Amendment does apply if the person is a law enforcement agent. In order to safeguard citizens' privacy rights, this standard should apply similarly in a foreign capacity as well. If a foreign individual turns something over to foreign law enforcement, which is then provided to United States law enforcement, then that evidence should be deemed acceptable under the American standard, but not if the private party viewing the evidence is a foreign law entity.

#### IV. CONCLUSION

The decision in *Odoni* expands the third-party exception to searches by considering foreign law enforcement officers to fall within its scope.<sup>76</sup> This loophole lowers individuals' expectations of privacy by following different search warrant requirements than that of the Fourth Amendment while decreasing the protections afforded by the Amendment. Nevertheless, the Eleventh Circuit in *Odoni* sets a new precedent by treating foreign law enforcement entities as private parties, eliminating the need for a search warrant if foreign law enforcement views evidence prior to turning it over to United States law enforcement. The question then becomes, "is anything private when traveling abroad?"

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<sup>76</sup> *Odoni*, 782 F.3d at 1237.