A Missing Link: International Arbitration and the Ability of Private Actors to Enforce Human Rights Norms

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I. INTRODUCTION

Members of the academic and human rights community have long pressed for effective enforcement of international norms with regard to human rights, such as effective labor standards. The inherent focus on the individual in human rights law has proved problematic in creating effective enforcement regimes compatible with preexisting international law.1 Recently, advocates for human rights causes have called for linking certain issues with more effective trade regimes.2 While such linkages may provide helpful solutions against the deleterious affects of globalization and should be pursued, this Comment addresses a link that has been overlooked. This Comment focuses on the potential for linking uniform labor standards with the extraordinarily effective adjudicatory mechanism of international commercial arbitration.

In the domestic context, employment and consumer advocates have often expressed hostility to compulsory arbitration agreements.3 This

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1. See infra Part III.


3. See, e.g., David R. Wade and Curtiss K. Behrens, Opening Pandora’s Box: Circuit City v. Adams and the Enforceability of Compulsory, Prospective Arbitration
hostility seems natural considering the context in which such arbitration agreements have been used. Contracted agreements seem to inevitably favor the party with more bargaining power. If the choice is between not having a job and having one that requires mandatory arbitration, most eager job seekers will take the latter. Such agreements may favor employers who generally create and draft the arbitration agreement. The employee loses the right to sue in court (and the protections afforded by law) and instead is bound by the decision of an arbitrator, who may or may not be swayed by the economic interest in pleasing the “repeat player” employer.

However, one might wonder if labor and human rights activists would find arbitration agreements so distasteful if their side had superior bargaining power. Imagine a multinational enterprise (MNE), Fairpay Apparel Co. (“Fairpay”), that wants to win the hearts and wallets of consumers by guaranteeing that their products are made in fair labor conditions. They have the ability to purchase large amounts of clothing items from subcontractors who are eager to sell. Knowing that Fairpay will only contract with manufacturers who maintain fair labor standards, these subcontractors provide assurances and perhaps even allow inspections to convince Fairpay Apparel to contract with them. Fairpay has reason to believe that these assurances are superficial and suspects that the manufacturer, eager to maximize profit margins, will likely cut corners in labor safety and standards. Fairpay knows that the country in which the manufacturer is located lacks labor standards and the country’s laws will be inadequate to guarantee compliance with the agreed working conditions. In such a scenario, an arbitration agreement can be a critical tool for enforcing the standards that are agreed upon in the contract.

Because of its superior bargaining power, Fairpay may be in a position to require compliance with its proposed labor conditions through an arbitration agreement. In this agreement, Fairpay can provide not only for the labor standards which it expects its subcontractor to maintain, but can also provide for surprise inspections, liquidated damages, and designate any country’s laws as the applicable standard controlling the agreement. Furthermore, it is very likely that the country’s courts would enforce such


5. See id. at 297.

6. See infra Part IV, for a discussion on whether an MNE would ever really employ such a strategy. At least in their rhetoric, many MNEs have demonstrated a commitment to fair labor practices.
an award, even if the courts and laws of that country do not generally favor protective labor standards. Thus, with adequate bargaining power, a private actor may enforce labor standards that would not otherwise be enforceable.

This Comment posits that private and responsible actors can encourage and enforce core labor standards by incorporating human rights related issues into their commercial contracts that provide for arbitration under the New York Convention of 1958. Although only a modest step in addressing the problems caused by globalization, such responsible behavior can go a long way in addressing certain problems such as sweatshop labor. Part II of this Comment explains why there is a need for international intervention in labor and employment rights. Part III addresses the failure of international public law to successfully intervene to prevent the abuses discussed in Part II. This failure is largely based on an inability to create an enforcement mechanism that is both international and effective. Part IV explains how under the New York Convention of 1958, international arbitration has become an effective mechanism for international disputes between private actors. Part V examines how human rights issues can be integrated into the existing structure of international commercial arbitration, and what limits are posed on such integration. This part concludes that under the New York Convention of 1958, private actors with bargaining power have a high degree of leeway to enforce human rights norms through arbitration agreements. Part VI briefly contemplates whether MNEs will effectuate the power they have to enforce such norms.

II. THE NEED FOR INTERNATIONAL MECHANISMS IN LABOR LAW

Why should there be international mechanisms to deal with labor and other human rights issues? Although simplistic, this question has merit. After all, many human rights issues are contained within the borders of a single nation-state. There seems to be a logical need for international law to guide cross-border international issues, such as laws of war and invasion, laws of admiralty, and trading laws. However, absent an intuitive sense of moral obligation, it is not as obvious why international law should concern itself with human rights issues that apply wholly inside the domain of a sovereign state, whether they be labor issues or genocide. Some might propose the slippery slope argument that if an international polity or sovereign can create and enforce human rights laws in a nation-state, what

7. Historically, international law has avoided addressing seemingly domestic concerns.
is to stop it from substituting itself for the sovereign in other respects. 8

One justification for international approaches and mechanisms addressing human rights is the fact that domestic governments are themselves often contributors, if not outright perpetrators, of human rights abuses. As Canadian Supreme Court Justice Louise Arbour wrote: “the sovereign state is at once the source and possibly the violator of the law, controlled only by self-imposed mechanisms.” 9 Thus, if the global community wants to commit to the stance that certain abuses will not be tolerated, an international approach must be taken precisely because domestic governments cannot be relied upon to protect the human rights of individuals residing within their borders. This principle is clearest in an egregious instance, such as a national government dedicated to the genocide of certain parts of its population. However, why is an international approach necessary to protect labor standards?

Most people in the legal community think of labor and employment in domestic terms. This view is validated by the history of the labor movement in this country, which has largely focused on passing national legislation and protecting American workers. However, many scholars and activists believe that due to globalization, 10 nation-states can no longer adequately protect the rights of workers. 11

Representing a panacea to corporate interests and a Pandora’s box for labor activists, globalization has eroded national constraints on business. Professor Katherine Van Wezel Stone suggests that traditional approaches


9. Louise Arbour, Genesis of International Criminal Justice: From an Impossible Marriage of Law to the Promising End of Impunity, 1 McGill Int’l R. 8 (2000). This conundrum leads Arbour to conclude that “[t]he establishment of an effective international criminal jurisdiction is therefore fundamental both to the effectiveness of international law and to world peace.” Id.


to labor reform and worker protection have become outdated, less effective or obsolete due to the changing nature of market relations.\footnote{See id.} The advent of multi-national trading blocks, advances in technology that facilitate trade, and an easing of trade restrictions have greatly altered labor’s bargaining power.\footnote{See id. at 988-90.} For example, previously the problem of the “run-away shop” (the deliberate moving of a corporate employer’s facilities to a place with lower wage rates, lower labor standards or fewer labor rights in order to increase profit margins) was largely contained within national borders.\footnote{See id. at 995.} In a national context, unions and lobbyists focused on establishing federal labor law which preempted less protective state laws and created uniform standards.\footnote{See id. at 995.} “One strategy employed by unions within the United States to diminish the possibility of runaway shops and race-to-the-bottom problems has been to advocate federal legislation that would equalize standards for particular labor issues.” \textit{Id.}\footnote{See id. at 999-95.} Similarly, labor has less incentive to advocate for increased government regulation, since such regulations may result in employers moving abroad.\footnote{See id. at 990.} It is feared that the global environment encourages countries to deregulate labor law in a “race-to-the-bottom” to attract multinational corporations and foreign investment.\footnote{See id. at 992-95.} As Professor Stone argues: “The threat of business flight creates interest groups that want to use low levels of labor regulation to attract business. This in turn could trigger a

\footnote{See id. at 990-92.}

\footnote{See id. at 992-95.} Professor Stone points out that there are actually two different race-to-the-bottom dynamics. Besides a race-to-the-bottom for governments to attract multinational corporations by having less regulation, there is a race-to-the-bottom among multinational corporations to search for lower production costs. \textit{See id.} at 992.
deregulatory spiral in which countries compete for business on the basis of their low labor standards.”

Essentially, labor activists face a Hobson’s choice, accept unacceptable employment conditions or raise standards only to lose employment altogether. Furthermore, this scenario encourages domestic governments that are eager for foreign investment to maintain lax labor laws.

Often times this equates to appalling sweatshop conditions that target the most vulnerable people in society.

These circumstances indicate that labor protections have been greatly eroded by globalization. Furthermore, domestic solutions no longer suffice to protect the interests of workers. Therefore, international mechanisms seem to be necessary to improve global labor standards, if not to prevent a decline in them. However, as the next section will indicate, classical models of international law are not well adopted to protect the rights of individuals. Although new methods of public international law show promise in correcting these problems and should be pursued, this Comment advocates that private parties, such as multinational enterprises (MNE), can play a role in enforcing human rights such as uniform labor standards.

21. Id. at 993. See also Robert J.S. Ross, Labour in a Globalising World: The Challenges for the Asia, Address at Clark University (Jan. 4-6, 2001), available at http://www.clarku.edu/research/access/sociology/sweatshops.shtml (last visited Nov. 18, 2003). “Wherever globalisation unites, in the same industries, labor reserves of workers in richer countries with those in poorer ones, the tendency is for standards of employment in the richer countries to descend, often sinking below nominally adequate national legal standards.” Id.

22. See id.

This [process of devaluing labor] is structurally similar within poor countries as well: global industries will boost or maintain export advantages by keeping labor costs to a minimum. In poor countries the public justification is that these industries gain, and must maintain their comparative advantage in world trade by keeping wages low. This often means recruiting workers who are not able to command normal wages or maintain high labor standards in local terms.

Id.

23. As one professor stated:

In poor countries, it is young girls recruited from country villages who fuel the export industries that in turn fuel the hopes and controversies about world trade. It is these girls and women who in their very bodies and their vulnerability suffer the mortal consequences of their comparative inability to protect themselves in law and practice. At the end of November, 2000, 47 workers, many of them young women, died in a fire in a Bangladesh garment factory: victims of their country’s comparative advantage in world trade, just as the 146 young women were victims of the unregulated market of New York City’s garment factories of 1911.

Id.
III. INSTITUTIONAL SHORTCOMINGS OF PUBLIC INTERNATIONAL LAW

At least until recently, international law is law by, of, and for the nation-states. No international sovereign legislature or executive exists, nor is any international court armed with both general and compulsory jurisdiction. As a result, both the creation of, and compliance with, international law are largely dependent on nation-states. Thus, mechanisms for enforcing international law independent of the nation-state are inherently weak, as the international arena lacks the requisite mechanisms to express sovereignty. As Professor Laurence Helfer and Professor Anne-Marie Slaughter explained in Toward a Theory of Effective Supranational Adjudication, “the problem is relatively straightforward. International tribunals lack a direct coercion mechanism to compel either appearance or compliance.” Instead, such tribunals must consider alternative methods of coercion such as the immediate perceived interest of the disputing states with regard to the judgment, the court’s legitimacy, the strength of the legal rules governing a specific dispute, and the general force of normative obligation.

Perhaps this fragility of international law explains Helfer and Slaughter’s adoption of a “basic definition” of “effective adjudication.” They claim that the measures of effectiveness lie in a court’s power to (1) compel a party to defend claims, and (2) require a party to comply with the resulting judgment. Because international courts often do not have the requisite sovereignty to directly compel such actions, the effectiveness of adjudication often depends on an international or supranational tribunal’s ability to convince “domestic government institutions, directly and through pressure from private litigants, to use their power on its behalf.”

This precarious position is especially problematic in situations where international law seeks to protect individuals and not nation-states. As discussed above, human rights abuses are often times exactly the type of

24. See Arbour, supra note 9, at 8.
25. See id.
27. See id.
28. See id. at 283.
29. See id. “[T]he effectiveness of a particular court rests on its power to compel a party to a dispute to defend against a plaintiff’s complaint and to comply with the resulting judgment.” Id.
30. Id. at 278.
abuses that we cannot expect a nation-state to protect against because many
times the nation-state is complicit in the abuse. Multinational treaties are
the primary vehicles through which most international law is enacted. However, the classical model of international law perceives treaties as contracts between or among nations, not individuals. Therefore, treaties only bestow legally enforceable rights upon states. Under the classical model, individuals cannot sue to enforce a treaty and can only derive protection from a treaty to the extent that a nation-state will enforce its obligations.

In recognition of the problems with strictly classical international law, novel approaches have been attempted with varying degrees of success in the last few decades. Professor Van Wezel Stone identified four types of transnational labor regulations that are now being employed to counter some of the current difficulties facing labor. The approaches she defined are preemptive legislation, harmonization, cross-border monitoring, and extraterritorial jurisdiction. However, all of these regimes currently contain critical flaws.

A. Preemptive Legislation

Preemptive legislation is an international regulation that trumps national law. This type of transnational labor legislation is most likely to prevent the problem of the run-away shop. Assuming enforcement is equal, preemptive legislation creates uniform labor laws and standards that pan

31. See Arbour, supra note 9. This fact leads Arbour to observe that “[t]he establishment of an effective international criminal jurisdiction is therefore fundamental both to the effectiveness of international law and to world peace.” Id.


33. See id.

34. See id. However, modern contract law does not require this result. See id. at 243-44. Modern contract law has abandoned the “English rule” requiring contractual privity before a third-party beneficiary can enforce an award. See id. at 244. Instead, contract law now allows third-party beneficiaries to enforce a right “(1) where appropriate to effectuate the intention of the parties, and (2) the circumstances indicate that the promisee [the contracting state] intends to give the beneficiary (the foreign citizen) the benefit of the promised performance.” Id. Unfortunately, an adoption of this interpretation of contract law does not fully cure the problem of individual actors suing to enforce international treaties. If a state party fails to complain about a treaty violation that they had bargained for, it serves as evidence that the state party did not actually intend to bargain for such a right. See id.

35. See Stone, supra note 11, at 1021.
across nations. Therefore, there is no reason for a run-away shop because there is no place to run. Thus, an employer has more incentive to bargain with a union rather than simply move, since the same rights and protections will exist elsewhere. Unfortunately, this approach is as ideal as it is fanciful. Preemptive legislation directly trammels on national sovereignty. It requires a national government to forfeit its right to make the ultimate law of the land with regard to labor. Given the prominent role of the nation-state in creating and enforcing international laws, such legislation is not likely to occur. Even if countries implemented preemptive legislation, the international regime would still need to rely on domestic government to implement the laws. Even the European Union (EU), a strong alliance comprised of individual countries which have gone so far as to unify their currency, has only used this type of regulation sparingly.

B. Harmonization and the Call for Linkages

Harmonization is a regulatory approach that sets uniform goals and standards among nations, but allows those standards to be adopted and implemented unilaterally. It is similar to preemptive legislation in its integrative attempt to unify labor law, but differs in that it is more protective of national sovereignty in avoiding invasive adoption and enforcement. Although according to a European Union commission, “total harmonization of social policies is . . . not an objective of the commission or the Union;” harmonization has been a favorite device of the EU. The EU establishes a directive and then allows a period of time for a country to translate the directive into its own law. Therefore, both the adoption and implementation of the law are unilateral.

Although striking an important balance between national sovereignty and the creation of internationally uniform standards, harmonization cannot occur without international methods of coercion. Given the race-to-the-bottom scenario, why would a country voluntarily adopt and enforce uniform labor laws? The answer is that without a direct coercion mechanism to enforce compliance, countries will not rigorously adopt or

36. See id.
37. See id.
38. See id. at 1000.
39. See id. at 1023-24.
40. See id.
42. See Stone, supra note 11, at 1000-02.
enforce uniform labor standards. The International Labor Organization (ILO) is instructive on this point.

The ILO is an example of an organization that encourages harmonization but is armed with only minimal methods of coercion. With over 170 member nations, the ILO is the most universal and well-known international labor regime. The organization was founded in 1919 and has attempted to create uniform labor standards. The ILO operates by adopting conventions or recommendations, which must be approved by two-thirds of the General Conference before they can be unilaterally ratified by member countries. The ILO thereby encourages harmonization by adopting uniform standards in conventions, while allowing nations to adopt and ratify these standards on a voluntary basis. However, this structure provides minimal protections since nation-states that do not wish to adopt these uniform standards are under no obligation to do so.

Even more inimical to the legitimacy of the organization is the fact that the ILO has virtually no coercion mechanism to compel compliance even after a state has ratified a legally binding convention. The only available mechanisms to force compliance are to exert diplomatic pressure and threaten public embarrassment. The ILO does not even contain mechanisms to suspend or oust transgressing nations from the organization. The lack of an enforcement mechanism renders the ILO largely ineffective. As a result, the harmonization technique embodied by the ILO fails to satisfy the need for international protection.

It is partly out of recognition that a stronger coercion mechanism is needed for effective harmonization that spawned the current proliferation


44. See id.

45. “Conventions” are legally binding obligations while “recommendations” are informal and not legally binding. See id. at 700.

46. See id. at 700. Over the decades the ILO has adopted over 176 conventions and 182 recommendations. See id. at 699.

47. See Robert Howse, The World Trade Organization and the Protection of Workers’ Rights, 3 J. SMALL & EMERGING BUS. L. 131, 133 (1999). However, in June 1998 the ILO took a large step towards creating mandatory obligations by adopting the Declaration on Fundamental Principles and Rights at Work. The Declaration makes achievement of compliance with fundamental labor rights an obligation arising from the very status of membership in the ILO. See id.

48. See Baltazar, supra note 43, at 701.

49. See id.

50. See id. at 702.
of “linkage” literature. The idea is that by linking trade regimes such as the World Trade Organization (WTO) with environmental or labor regimes like the ILO, the latter regimes will gain the powerful coercion mechanisms, such as trading sanctions, which are available to the former.

Thus, some scholars have proposed that harmonization would be significantly encouraged by linking the ILO to the WTO and allowing trading sanctions to be placed against transient nations.

Although it shines a ray of hope on an overall gloomy situation, the linkage of trade and harmonization remains an academic question until established in practice. The WTO has indicated a “powerful” resistance to linking labor issues with its ability to control trade and seems to have rejected the idea. Until such a linkage can be effectively put in place, harmonization remains a weak model for the enforcement of international labor norms.

C. Cross-Border Monitoring

Another transnational labor regime identified by Professor Stone is cross-border monitoring. Cross-border monitoring occurs when a transnational treaty requires each member nation to enforce the nation’s own laws. This approach is interpenetrational, not requiring or creating incentive for member nations to adopt a uniform approach to laws. Sovereignty is thus preserved in the sense that a nation neither cedes any law-making authority, nor any influence over foreign or transnational entities. However, sovereignty is diminished with regard to enforcement. Cross-border monitoring requires multilateral implementation, which means the treaty’s member nations have some ability to enforce the laws of each individual nation.

An example of a treaty providing for cross-border monitoring is the North American Agreement on Labor Cooperation.

51. See, e.g., Alvarez, supra note 2; Bhala, supra note 2; Ehrenberg, supra note 2.

52. See, e.g., Howse, supra note 47. “The idea that labor rights issues are simply a matter for the ILO, therefore, ignores the existing and continuing role the WTO has been playing in constraining one important instrument available to improve compliance with core labor rights: trade measures aimed at punishing noncompliance with core labor rights.” Id.


54. See id. Howse, supra note 47, at 133. “Nevertheless, resistance within the World Trade Organization (WTO) to any formal linkage between trade and core international labor rights remains powerful, as is reflected in the declaration that emerged from the 1996 WTO Singapore Ministerial Conference, suggesting that this issue is a matter for the ILO.” Id.

55. See Stone, supra note 11, at 1024-25.

56. See id.

57. See id.
(NAALC). As a side agreement to the North American Free Trade Agreement, (NAFTA), NAALC provides that each member nation must enforce its own laws and created certain procedures for its enforcement.58

This type of labor regime has an advantage over harmonization because it is likely already “linked” to a trading regime, such as NAALC is to NAFTA. Therefore, trading coercion mechanisms are more likely to exist. However, although there is an enforcement mechanism, there is no guarantee that there will be adequate standards to enforce. Since cross-border monitoring does not require the adoption of any uniform standards, it provides no protection and may in fact encourage a race-to-the-bottom among national lawmakers. Faced with the prospect of outside sanctions for failure to comply with national law, cross-border monitoring can, in fact, encourage a nation to adopt a low bar for national protection.

D. Extraterritorial Jurisdiction

A final form of transnational labor regulation is extraterritorial jurisdiction, which occurs when a country extends its labor laws to apply to parties outside the nation’s geographic borders.59 This approach is interpenetrative and unilateral.60 This form of regulation can only be as helpful to workers as are the laws of the nation seeking the broader jurisdiction. If the laws are not protective, application of extraterritorial jurisdiction may actually harm workers. Even in cases where the laws are meant to be protective, such as the United States Congress’s grant of extraterritorial jurisdiction to Title VII,61 extraterritorial jurisdiction can be detrimental to international peace and cooperation.62 For example, countries have already begun drafting legislation designed to nullify U.S. assertions of extraterritorial jurisdiction.63 Extraterritorial jurisdiction is ironically both unilateral and offensive to sovereignty.

E. Conclusion

Although there have been encouraging developments in international

58. See id. at 1007-12.
59. See id. at 1025.
60. See id.
62. See Stone, supra note 11, at 1026.
63. See id.
law which are designed to protect human rights and labor rights, current protections for individuals remain very weak. However, while public international law has had difficulty creating coercion mechanisms to enforce entire regimes, private international law has been far more successful in protecting individuals’ rights through contract. The following section will illustrate how these protections, which are generally only applied in business contexts, may allow private individuals and companies to help enforce uniform rights.

IV. ARBITRATION AS EFFECTIVE ADJUDICATION

Recall Helfer & Slaughter’s “basic definition” of effective adjudication.\textsuperscript{64} Although Helfer & Slaughter intend this definition of effectiveness to apply to courts rather than arbitration, they, in fact, define international arbitration as one of the most effective means of adjudication, especially with regard to private parties.\textsuperscript{65} This is because unlike most

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\textsuperscript{64} See supra note 29 and accompanying text.

\textsuperscript{65} See Helfer & Slaughter, supra note 26, at 285. Helfer & Slaughter make clear that they do not intend to apply their definition of effective adjudication to international arbitration. They claim the power stated in their definition (the power to compel response and to enforce compliance with judgment) “is the characteristic that typically distinguishes courts from other dispute resolvers such as go-betweens, mediators, and arbitrators.” Id. (emphasis added). However, at least in the international context, this distinction between court or tribunal and arbitrator seems unfounded. As will be explained, in the international context arbitrators often have more power to enforce compliance with their judgment (albeit, through the aegis of a domestic court) than their counterparts in formal tribunals. Therefore, the distinction fails if founded on the ability to enforce compliance with judgment.

The distinction also fails if based on the argument that arbitrators cannot “compel a party to a dispute to defend against a plaintiff’s complaint.” At least in civil matters, the method employed by most courts to “compel a party to a dispute” is to penalize failure to defend against a claim with a default judgment. Thus, this power essentially derives from the power to enforce a default judgment. Under the New York Convention of 1958, which governs the enforceability of most international arbitral awards, “no distinction exists between the awards rendered after participation in the arbitration by both sides and awards rendered by default.” ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 344 (1992).

The distinction also fails if one asserts that the difference between the power of a court and the power of an arbitrator is based on a mandatory/voluntary dichotomy. Although this distinction is sound in a domestic context, where courts of general jurisdiction can exercise power over a party that never bargained for or participated in the creation of the court, it is not sound in an international context. Generally, jurisdiction of international courts and tribunals is derived through an agreement of the involved parties (traditionally only nation-states) to be bound by such jurisdiction. Thus, most international courts and tribunals are
international courts and tribunals, which rely on alternative methods of coercing compliance, arbitration can be directly compelled and awards can be enforced by the courts of signatory nations pursuant to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention” or “Convention”). The New York Convention, however, contains a “commercial reservation” and certain grounds for refusal of enforcement. Nevertheless, the New York Convention may be applied to a broad class of issues.

A. Adoption and Purpose of the New York Convention

The New York Convention is considered the most important international treaty relating to international commercial arbitration. The Convention was developed to facilitate the international business community’s preference for international arbitration over litigation in national courts. This preference derives from a number of factors. Domestic courts in foreign nations can provide a disadvantage to business people who are unfamiliar with the substantive and procedural rules of the nation. In contrast, arbitration provides a forum that is mutually acceptable and a procedure agreed upon by the parties. The judges in foreign national courts are all presumably citizens from one single country and only bring that perspective. Arbitration, however, allows for arbiters from various countries and/or neutral countries. Thus, arbitration is seen as a shield from local biases of foreign tribunals and offers a measure of

negotiated and contracted for in the same way as arbitration, the only difference is that the contract is called a “treaty.”

Admittedly hard to pin down, important distinctions can be made between international courts or tribunals and international arbitration, such as the role of precedent, responsibility to outside parties and the public at large, and procedural differences. Nonetheless, these distinctions do not address the basic power at issue in the definition of “effective adjudication.”

66. See Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration 46 (1986); Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 1 (1981). “[T]he New York Convention can be considered as the most important Convention in the field of arbitration and as the cornerstone of current international commercial arbitration.” Id.


68. See Jan van den Berg, supra note 66.

69. See id.

70. See id.
predictability and certainty to commercial transactions. Furthermore, the factors that favor arbitration in a domestic context may also apply in the international context. These factors include “speed of determination, informality, monetary savings, expertise of the arbitrators as compared to judges, and protection of confidential business information.”

Designed to encourage and reinforce arbitration as a means for dispute resolution, the New York Convention was a considerable improvement to its predecessor, the Geneva Convention of 1927. The purpose of the New York Convention was to make arbitral awards rendered in a foreign state enforceable in any state that is party to the Convention. Before the Convention, it was difficult, and sometimes impossible to enforce arbitral awards outside the state in which arbitration had taken place. For state Y to enforce an award made in state X, a party often had to bring an action in X on the award and then bring an action in Y on the judgment of the X court. The New York Convention created a shortcut to this procedure, providing that all contracting states “shall recognize” arbitral awards made in foreign states “on the same basis as it recognizes and enforces domestic awards.”

Although supported by business interests, the New York Convention took several years to negotiate and was slow in gaining support. The United States was largely in the background during the drafting of the Convention, and the U.S. delegation at the Convention opposed the adoption of the Convention. Not until 1970 did Congress approve the

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73. REDFERN & HUNTER, supra note 67, at 46. The New York Convention of 1958 was an improvement in that it provided a much simpler and effective method for enforcing foreign awards. See id. It also expanded the validity of arbitration agreements over the Geneva Protocol of 1923. Id.
74. See LOWENFELD, supra note 65.
75. See id.
76. Id.
77. In 1953, the International Chamber of Commerce (ICC) requested the Economic and Social Council of the United Nations to consider and adopt a Convention it proposed to reinforce international commercial arbitration. See *Cho*, supra note 67, at 3. In April 1954, the Council created a committee to study the proposed ICC Convention. See id. After reviewing the ICC’s proposed convention, the committee created a Draft Convention of its own, which it distributed to several nations. See id. The Conference for the conclusion of the Convention commenced on May 20, 1958 and resulted in the final Act, which was adopted on June 10, 1958. See id.
78. See Ramona Martinez, *Recognition and Enforcement of International Arbitral*
Convention and adopt it by enacting chapter two of the Federal Arbitration Act. The United Kingdom did not adopt the Convention until 1975. Despite this initial resistance, the New York Convention has slowly become one of the most universally adopted international treaties. With the recent accession of Brazil, the Dominican Republic, Iceland, and Zambia to the Convention, the multilateral treaty now has 131 member states, including almost every commercial state and many third-world nation-states.

B. Overview of the New York Convention

The New York Convention fundamentally contemplates two actions: (1) the enforcement of arbitration agreements, and (2) the enforcement of the arbitral award. The Convention also contains two reservations that place limitations on the jurisdictional scope of the Convention when adopted by member nations. The Convention is comprised of sixteen Articles, the most fundamental aspects of which are explained in the following

Awards under the United Nations Convention of 1958: The “Refusal” Provisions, 24 INT’L L. LAW. 487, 491. The delegation noted four principal reasons for its decision not to endorse the convention: (1) If the Convention did not conflict with state laws, it offered no advantage to the United States; (2) if there were advantages to the federal government, it would override the arbitration laws of a majority of the states; (3) the United States lacked a sufficient domestic legal basis for acceptance of the advanced international convention dealing with this subject matter; (4) the Convention embodied principles of arbitration law that the United States would not find desirable to endorse. See id. at 491-92.

80. See LOWENFELD, supra note 65.
82. See CHO, supra note 67, at 7; RENE DAVID, ARBITRATION IN INTERNATIONAL TRADE 146 (1985). “[The Convention] deals both with the validity of arbitration agreements and with the execution of arbitral awards.” Notice that the two actions contemplated are congruent to Helfer and Slaughter’s two sources of power that make a tribunal effective. See supra notes 28-29 and accompanying texts. The power to enforce an arbitration agreement is in a very real sense the equivalent to the power to compel a party to defend claims against a plaintiff. By enforcing an agreement, a party is forced to participate in the arbitration process. Similarly, the power to enforce an arbitration agreement is virtually indistinguishable from the power of a court to compel compliance with a judgment. As will be discussed, the New York Convention ensures that arbitration will be effective in this manner by mandating enforcement in domestic courts.
This explanation is needed to provide a context to understand the potential of applying the Convention to arbitration agreements designed to enforce human rights standards.

1. Enforcement of Arbitration Awards

(a) Scope of Convention

Article I(1) explicitly states that “[t]his Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.” This statement introduces several concepts. First, it emphasizes that the Convention applies to the recognition and enforcement of arbitral awards. It explicitly states that the Convention applies to persons, “physical or legal.” The statement also announces a clear territorial concept of applicability -- the Convention applies when the recognition or enforcement was made in the “territory of a State other than the State where the recognition and enforcement of such awards are sought.” However, this clarity is obfuscated by the next sentence in Article I(1): “[The Convention] shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.” Scholars believe that this provision, along with the fact that the Convention does not define “non-domestic” awards, was deliberately designed to cover as wide an array of arbitration awards as possible, while permitting the enforcing authority to supply its own definition of “non-domestic.”

The result is that the application of the Convention will vary at least slightly in accordance with the law of the country that adopts the Convention. In Bergesen v. Joseph Muller Corp., a U.S. circuit court found that “awards not considered as domestic” includes awards that should be governed by the Convention not because they are made abroad, but because they are made within the legal framework of another country.

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84. Id.
86. New York Convention, supra note 83.
89. See Cho, supra note 67, at 8; Jan van den Berg, supra note 66, at 19.
However, as applied, the Convention usually is limited to the recognition and enforcement of foreign awards. For that reason, a U.S. circuit court refused to apply the New York Convention to an award made in New York involving an international transaction between a U.S. corporation and a Norwegian ship owner.90

It is important to point out that the Convention, on its face, does not take into consideration the “nationality” of the party.91 However, the United States has adopted the approach that an arbitration agreement or award arising out of a relationship which is “entirely between citizens of the United States shall be deemed not to fall under the [New York] Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.”92 This section excludes awards made in foreign countries which are between U.S. citizens and concern a domestic matter.93

(b) Procedure and Substance: Rules for Enforcing a Foreign Arbitration Award

Article III of the New York Convention commands that “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . . .”94 Besides clearly mandating the recognition of foreign arbitral awards, this Article also provides an indication of what procedural rules apply. Both the plain language and the legislative history of Article III indicate that the rules of procedure for enforcement of a Convention award are to be controlled by the law of the country where enforcement of an award is sought.95 Thus, nation-states are free to adopt their own procedures to enforce foreign arbitral awards. There are three approaches generally taken. First, a country can enact specific procedures for enforcing awards governed by the Convention. The specific procedures are normally found within the acts implementing the Convention.96

90. See JAN VAN DEN BERG, supra note 66, at 19.
91. See id.
93. See JAN VAN DEN BERG, supra note 66, at 17.
94. New York Convention, supra note 83. Article III also provides: “There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.” Id.
95. See JAN VAN DEN BERG, supra note 66, at 236.
96. See id. at 236-37.
approach has been adopted by many nations, including the United States.\(^\text{97}\) Secondly, a country can simply provide that the procedure for the enforcement of a Convention award is the same as that for the enforcement of other foreign awards.\(^\text{98}\) This is the procedure most countries have adopted.\(^\text{99}\) Lastly, although not often enacted, a country can adopt the same procedures used in the enforcement of a domestic arbitral award.\(^\text{100}\)

It should be noted, however, that although the Convention provides flexibility with regard to the adoption of procedural rules, those adopted under Article III are not concerned with the conditions of enforcement. Article III rules of procedure are confined to questions such as the form of the request and the competent authority.\(^\text{101}\) The procedural law governing the enforcement of Convention awards may not derogate from the principles of the Convention.\(^\text{102}\)

(c) Grounds for Refusal of Enforcement of Arbitration Award

Article V of the New York Convention provides certain grounds on which a court may refuse to enforce a Foreign Arbitral agreement.\(^\text{103}\) It is

\(^{97}\) See id.

\(^{98}\) See id. at 237.

\(^{99}\) See id.

\(^{100}\) See id.

\(^{101}\) See id.

\(^{102}\) See id.

\(^{103}\) Article V of the New York Convention, supra note 83, provides in full:

\((1)\) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not
important to note that these provisions for refusal are discretionary, as Article V adopts the position that recognition and enforcement “may be refused.”\textsuperscript{104} It is also important to emphasize that the burden of convincing a court not to enforce an award is placed on the party opposing enforcement.\textsuperscript{105} Most of the reasons for denial of enforcement are based on procedural flaws such as lack of notice or lack of fair process.\textsuperscript{106} Furthermore, a general rule exists that there is no ground for refusal based on a review of the merits of the arbitral award.\textsuperscript{107} However, some substantive aspects of the award may prohibit enforcement. Article V(2) provides that a court may refuse to enforce an award when: “(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.” These limitations will be relevant in determining the enforceability of arbitration agreements that relate to human rights issues.

2. Enforcement of the Arbitration Agreement

The New York Convention does not speak as definitively about the enforcement of arbitration agreements as it does arbitration awards.\textsuperscript{108}
Nevertheless, it dedicates several provisions related to the enforcement of an arbitration agreement. The controlling provision is Article II(3), which states:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Notice that the language of the Convention is mandatory. Thus, the general rule is that upon request by one of the parties, a court of a Contracting State “shall . . . refer the parties to arbitration.” However, Article II(3) provides some conditions that must be met for such a referral.

First, the arbitration agreement must be made “within the meaning of this article.” Article II(1) provides:

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in referral to arbitration were to be addressed in a separate Protocol. Id. However, the drafters of the Convention changed their mind near the end of the New York Conference in 1958 and as a result the drafting of Article II was rushed and consequently incomplete. See id.

Article V(1)(a) also relates to the enforcement of an agreement as it states that an arbitral award may be refused if the party against whom the enforcement is sought proves that: “The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made . . . .” JAN VAN DEN BERG, supra note 66, at 122.

Article II of the New York Convention, supra note 83, at 40 states in full:

(1) Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

(2) The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

(3) The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

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New York Convention, supra note 83.
respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.\textsuperscript{111}

Article II(2) further defines “an agreement in writing” by stating that one “shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”\textsuperscript{112} Thus, a court of a Contracting State must refer cases to arbitration where all following preconditions are satisfied: (1) one of the parties has requested the enforcement of an arbitration agreement; (2) there is an agreement in writing, either in the form of a contract or arbitration agreement that has the signatures of both parties, or in the form of an exchange of letters or telegrams; (3) the agreement is one in which the parties undertake to submit to arbitration all or any differences that have arisen or that may arise between them; (4) the arbitration agreement is in respect to a “defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration”; and (5) the arbitration agreement is not “null and void, inoperative or incapable of being performed.”\textsuperscript{113} Most likely due to the hurried conditions in which Article II was drafted,\textsuperscript{114} the Article leaves some important jurisdictional questions unresolved. Because Article I of the Convention only applies expressly to “the enforcement and recognition of arbitral awards,” it is not clear whether that Article also applies to enforcements of agreements. Thus, uncertainty exists as to when jurisdiction over the enforcement of an arbitration agreement exists. Whether analogized to Article I or on the plain language of the Article, it appears “self-evident” that the Convention applies to agreements to arbitrate in a foreign state.\textsuperscript{115} However, Article I cannot be applied to an agreement providing for arbitration in the State in which the agreement is invoked because of Article I’s focus on a foreign award.\textsuperscript{116} As a result some states, such as Sweden, understand the Convention to apply only where the enforcement of agreements “stipulate[] that the proceedings are to take place outside” the country.\textsuperscript{117} However, this approach has been criticized as being too restrictive and thwarting the Convention’s goal of uniformity in arbitration agreements.\textsuperscript{118} For

\begin{itemize}
\item \textsuperscript{111} Id.
\item \textsuperscript{112} Id.
\item \textsuperscript{113} See id.
\item \textsuperscript{114} See JAN VAN DEN BERG, supra note 108 and accompanying text.
\item \textsuperscript{115} See JAN VAN DEN BERG, supra note 66, at 57.
\item \textsuperscript{116} See id. at 61.
\item \textsuperscript{117} Id.
\item \textsuperscript{118} See id.
\end{itemize}
uniformity to exist, an arbitration agreement must be enforceable in all
Contracting States, including the state where the proceedings take place.\textsuperscript{119} This broad view has been adopted by most nations, including the United States, which provides in its statute for the incorporation of the New York Convention into national law. It states that a court having jurisdiction under this Chapter “may direct that arbitration be held in accordance with [the] agreement at any place provided for in agreement, whether or not that place is within the United States.”\textsuperscript{120} This statute unequivocally adopts the position that the Convention applies to all international\textsuperscript{121} arbitration agreements, regardless of whether the proceedings are to be located in the United States or not.

3. Reservations

Article I(3) contains two reservations that any member nation of the Convention can make. The first is known as the “reciprocity reservation.”\textsuperscript{122} It states that “any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.”\textsuperscript{123} This reservation allows a state to choose whether the Convention will govern all foreign arbitration awards universally or only foreign arbitration awards made in member states. In the early years of the Convention this reservation was highly relevant as there were so few member states.\textsuperscript{124}
However, the reservation has diminished in importance as more nations have adopted the Convention. 125

The second reservation contained in Article I(3) is known as the “commercial reservation.” The reservation provides that a member nation may “declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.” 126 Thus, the “commercial reservation” allows a country to only recognize and enforce awards “considered as commercial” within that country. This reservation can be viewed as an amplification of Article V(2)(a)’s provision that allows a country to refuse to enforce an award: “[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country.” 127 Essentially, the commercial reservation limits the “subject matter capable of settlement by arbitration” under the Convention to those “considered as commercial.” Furthermore, unlike Article V(2)(a), when a country adopts the commercial reservation, the reservation becomes mandatory. Thus, the commercial reservation creates a formidable obstacle to the enforcement of human rights related arbitration agreements. Nevertheless, this Comment will explain ways in which the commercial reservation clause may be overcome to effectuate human rights related arbitration agreements.

V. LINKING HUMAN RIGHTS TO THE NEW YORK CONVENTION

The New York Convention provides private parties who act across national borders with a fair and predictable method of adjudicating arbitration agreements. Save some important caveats, the Convention virtually guarantees the enforcement of procedurally correct arbitration agreements and awards through the direct coercion mechanism of national courts. This degree of security is far superior to the relatively ineffective and indirect coercion mechanisms employed by many international organizations, such as the ILO. 128 Furthermore, the New York Convention provides a uniform system of laws that creates some predictability. Following the adoption of the Convention, it is no surprise that international commercial arbitration has exploded in the last few

became a member nation in 1975. See JAN VAN DEN BERG, supra note 66, at 12.
125. See id.
126. New York Convention, supra note 83.
127. Id.
128. See supra note 52 and accompanying text.
Putting aside for a moment the difficulties presented by the commercial reservation clause and Article V(2)’s discretionary limits of adjudication, human rights supporters can benefit tremendously from the structure and content provided by the New York Convention. This is because many of the same concerns facing business interests that motivated the enactment of the Convention are concerns that human rights supporters now face. For example, as discussed earlier, human rights issues are often exactly the type of issues in which private parties cannot depend on domestic governments to resolve properly, due to the fact that domestic governments are often complicit, if not perpetrators, of human rights violations. Therefore, the courts of such countries cannot be trusted to protect even the most basic of human rights, either because there is no substantive law providing for such protections, or because the courts are hostile to such substantive law. Just as in the business context, arbitration can act as a shield from the local biases of foreign tribunals and may be viewed as favorable because it may provide for less biased adjudicators from different or neutral countries and can be brought in a less hostile forum.

The flexibility provided by arbitration agreements combined with the enforcement ability provided by the New York Convention open up countless possibilities when applied to human rights. Focusing again on labor standards, any entity that has a large degree of bargaining power, such as a Multinational Enterprise, can use that power to negotiate a contractual obligation to adhere to certain labor standards with foreign counterparts. These contractual obligations can be bolstered by liquidated damage clauses or other remedies. They can also include clauses that ensure compliance, such as the right of labor monitors to make surprise inspections. Furthermore, almost every arbitration agreement contains a clause designating a controlling law. Thus, an entity with bargaining power may insist that the controlling law be one favorable to the enforcement of the contractual provisions. With sufficient bargaining

130. See supra note 9 and accompanying text.
131. See id.
132. See supra notes 68 - 71 and accompanying text.
133. For a discussion on why MNEs would want to use their bargaining power in this way, see Part VI.
power, an MNE or other entity can contractually obligate another entity to abide by labor standards, to agree to measures that will assure compliance, to be subject to laws of a foreign country, and to participate in arbitration proceedings in a foreign country. Assuming proper procedure is followed, under the New York Convention all member nation-states would have to enforce the decisions of the arbitrators.

Unfortunately, the commercial reservation clause and Article V(2)’s discretionary limitations provide obstacles to the universal enforcement of such arbitration agreements. However, as the next subsection will demonstrate, these obstacles by no means block all avenues for human rights reforms.

A. The Limited Applicability of the Commercial Reservation

The problem posed by the commercial reservation clause is that, where adopted, the reservation limits the Convention’s enforcement to matters “considered as commercial” in the country where enforcement is sought. Thus, enforcement of an arbitration agreement will depend on a country’s definition of “considered as commercial.” However, even though the New York Convention is normally considered an instrument facilitating international commercial arbitration, the overwhelming fact is that most states that are members of the Convention have not adopted the commercial reservation. The ninety-four states that have not adopted the commercial reservation must enforce all foreign arbitral awards, unless subject to the discretionary grounds in Article V. Thus, with regard to most member states, the commercial reservation provides no barrier to the enforcement of

135. New York Convention, supra note 84.
136. The following is a list I compiled of nation states that have not adopted the commercial reservation: Australia, Austria, Bangladesh, Belarus, Belgium, Belize, Benin, Bermuda, Bolivia, Brunei Darussalam, Bulgaria, Burkina Faso, Cambodia, Cameroon, Cayman Islands, Chile, Christmas Island, Cocos Island, Colombia, Comoro Islands, Costa Rica, Cote D’Ivoire, Croatia, Czech Republic, Djibouti, Dominica, Egypt, El Salvador, Estonia, Finland, France, Georgia, Germany, GDR, Ghana, Gibraltar, Guernsey, Guinea, Haiti, Hong Kong, Ireland, Isle of Man, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People’s Democratic Republic, Latvia, Lebanon, Lesotho, Luxembourg, Mali, Mauritania, Mauritius, Mexico, Morocco, Mozambique, Netherlands, Netherlands Antilles, New Caledonia, New Zealand, Niger, Norfolk Island, Norway, Pakistan, Panama, Paraguay, Peru, Portugal, Republic of Moldova, Russian Federation, San Marino, Saudi Arabia, Senegal, Singapore, Slovakia, South Africa, Spain, St. Perre et Miquelon, Suriname, Syrian Arab Republic, Thailand, Uganda, Ukraine, United Kingdom, United Republic of Tanzania, Uruguay, Uzbekistan, Wallis and Futuna Island, Zimbabwe. See generally SICE, Foreign Trade Information System Website, at http://www.sice.oas.org/DISPUTE/comarb/unctiral/uncsig_e.asp (last visited Apr. 17, 2004).
human rights related arbitration clauses. For example, suppose an anti-sweatshop Non-Governmental Organization (NGO) headquartered in Britain offers garment industries a “sweat-shop free” label if their inspection standards are met, in exchange for free access to facilities for labor inspections and liquidated damages of $10,000 in the event that the NGO finds out that an entity has deceived it about its labor practices. A Thai garment factory, eager to obtain a good reputation agrees to the conditions and signs a contract providing for arbitration in Paris. Eventually, the British NGO believes that the Thai factory has engaged in deception in violation of the contract and properly submits to arbitration. The French arbitrators administer proper proceedings in Paris and issue an award for the liquidated damages of $10,000. Since none of the countries involved have adopted the commercial reservation, even though there is no overt commercial transaction, this award must be enforced if the NGO attempts to have the award enforced in Thailand or in the United Kingdom. The only limitations on enforcement for human rights groups in these situations are the discretionary limits provided in Article V(2).

However, even in states that have adopted the “commercial reservation,” there can still be a large amount of latitude to negotiate arbitration agreements that are primarily commercial yet also effectuate human rights conditions. The amount of wiggle room will depend on the definition of “considered as commercial” in domestic law. As scholars have noted, determining what a country regards as “commercial” can be a very difficult task. For example, often times national law does not provide a clear solution as to whether a transaction with a mixed nature (e.g. the transaction is commercial for one party, but not for the other party) is considered commercial or not. Another problem that arises is whether the concept of commerce changes between the domestic and international context.

137. Rene David, Arbitration in International Trade 149 (1985). One commentator has lamented:

The reference to legal relations regarded as commercial in the country where enforcement is sought is most unfortunate. The concept of ‘commercial matters’ may be understood in many ways and it is to be deplored that a suggestion made by the United Kingdom . . . was not followed; this would have required States making use of the reservation to make clear what a commercial matter is according to their national laws.

Id.

138. See id.

139. See id.
Although there have been some anomalies, the trend has been that the term “commercial” is to be construed broadly.\(^\text{140}\) The courts of the United States are representative in adopting a broad definition.\(^\text{141}\) For example, in *Societe Generale de Surveillance, S.A. v. Raytheon European Management and Systems Co.*,\(^\text{142}\) a U.S. company was involved in a dispute with a French company in a contract for the field testing, inspection, and evaluation of missiles.\(^\text{143}\) Even though the contract was strictly a services contract, namely for the transportation and testing of missiles (and not for an exchange in the commodities) the court found that the contract “clearly” covers trade “between citizens of this country and subjects of a foreign country . . . .”\(^\text{144}\) The First Circuit court summarized:

> There is a strong judicial policy favoring the submission of contractual disputes to arbitration particularly under the provisions of the Federal Arbitration Act, which embodies the agreements reached in an international convention on arbitration [by the adoption of the New York Convention]. Thus, the courts have held that the term “commerce” in this provision of the Act refers to interstate or foreign commerce and is to be broadly construed.\(^\text{145}\)

Here, the First Circuit stressed that there is a “strong judicial policy

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\(^{140}\) See *Jan Van den Berg*, supra note 66, at 51 (“Under the New York Convention, most courts have so far also given a broad interpretation to the meaning of commercial.”).

\(^{141}\) The most notorious anomalies were decisions made in Indian courts. In one case a foreign company had supplied technical assistance for the construction of suspended machinery used to electrify trains and trolleys. See *David*, supra note 137, at 150. The High Court of Bombay ruled that the contract was not commercial because “the work carried out by the defendant was of a professional nature and in no way related to business or commerce. . . . The contract was more like a contract for services or a contract made between an advocate on one hand and a client on the other.” *Id.* In another case, the High Court of Bombay refused to enforce an award involving a technology transfer, stating that the transfer was not covered by the Indian arbitration act. See *id.*

\(^{142}\) *Kevin C. Kennedy*, *Invalidity of Foreign Arbitration Agreement or Arbitral Award*, 31 AM. JUR. PROOF OF FACTS 3d 495, § 11 (2002). “In interpreting this provision of the New York Convention, U.S. courts have construed the term “commercial” broadly . . . .” *Id.*


\(^{144}\) See *id.* at 863.

\(^{145}\) *Id.* at 867.

\(^{146}\) *Id.* (internal citations and footnotes omitted) (relying on *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-520 (1974); *See Weight Watchers of Quebec Ltd. v. Weight Watchers Int’l Inc.*, 398 F.Supp. 1057 (E.D.N.Y.1975); *Caribbean Steamship Co., S.A. v. La Societe Navale Caennaise*, 140 F.Supp. 16 (E.D.VA.1956)).
favoring the submission of contractual disputes to arbitration.” Thus, courts are to read the term “commercial” in light of this strong judicial policy. This reading implies that where it is not clear whether a contract is to be considered commercial, the policy is to weigh in favor of arbitrability.

But what exactly are the limits of what can be considered as commercial under U.S. law? Societe Generale de Surveillance illustrated that a dispute over the transport and testing of military hardware can be considered commercial. In other cases, U.S. courts have construed the term “commercial,” as read in the New York Convention, to include relationships involving contracts to construct buildings, claims by a state superintendent of insurance on behalf of insolvent insurers against reinsurers, and shipping contracts. Perhaps most relevant to our inquiry, one court has even found the arbitration of an employment agreement to fall under the “considered as commercial” provision. In Faberge Intern. Inc. v. Di Pino, an appeals court in New York held that an employment agreement whereby a U.S. citizen worked in Italy as the executive in charge of the Italian branch of an international corporation was “commercial” within the meaning of the United Nations Convention on Arbitration Awards. The court stated that “[t]he fact that the employer-employee relationship may include a degree of fiduciary obligation does not deprive it of its commercial character, expressly concluding that the employer-employee relationship is of a commercial character.”

In Island Territory of Curacao v. Soliton Devices, Inc., the Federal District Court of New York illustrated the potential for arbitration to protect against labor violations, even when applied in a country that has adopted the commercial reservation. This case involved a corporation named Soliton, which made semiconductors and was based in the United States, and the sovereign Island Territories of Curacao. They entered into a contract because

[[there was “heavy price competition” in the industry, “pressures on Soliton mounted,” and Soliton believed a plant in Curacao would give

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147. See id. (citing Corcoran v. Ardra Ins. Co., 77 N.Y.2d 225 (1990)).
148. See id.
150. See id. at 238.
151. See id. at 239.
it the needed advantages. On their part, Curacao and Antilles wanted to
attract industry to the islands and thus to create jobs. There were no
representations in the agreement, however, as to wage rates -- past,
present, or future -- or as to anything else.153

In the contract that resulted, Curacao agreed to set aside land and to aide in
the construction of a factory that would be leased to Solitron, in exchange
for a promise that Solitron would immediately hire 100 natives, and
eventually hire 3,000 natives of Curacao to work at the facility.154 The
terms of employment were never discussed.155 The contract contained an
arbitration agreement which governed all disputes arising under or in
breach of the agreement.156

After the factory was completed at a substantial cost to Curacao,
political instability caused the Curacao government to experience a change
in some personnel and a minimum wage was established.157 Solitron
promptly attempted to get out of the agreement, with its counsel bluntly
stating: “[t]he new wage rate destroys the economic advantage of
manufacturing in Curacao.”158 Eventually Solitron breached the agreement
and refused to participate in arbitration.159 The arbitration proceeded
according to proper procedure and rendered an award in favor of Curacao,
although not granting all of their damage requests.160 However, the
arbitrators did grant awards for the rent owed during the period of
breach.161 More controversially, because Solitron never hired the one
hundred workers as promised, the arbitrators awarded compensation to the
Curacao government for the amount equal to the cost of unemployment
benefits paid for those one hundred workers.162

The trial court in Solitron dismissed Solitron’s objection to the
enforcement of the award on the grounds that it was not “considered as
commercial.”163 In its decision, the court made clear that the term
commercial was to be interpreted in the same way as the term “commerce.”

153. Id. at 4.
154. See id.
155. See id.
156. Solitron, supra note 152, at 4-5.
157. See id. at 6.
158. Id.
159. Id. at 6-7.
160. See id. at 8.
161. See Solitron, supra note 152, at 8.
162. See id.
163. See id.
Specifically, the court said:

It has been said in this connection (Quigley, Convention on Foreign Arbitral Awards, 58 A.B.A.J. 821, 823 (1972)): “In the case of the United States reservation it seems clear that the full scope of ‘commerce’ and ‘foreign commerce,’ as those terms have been broadly interpreted, is available for arbitral agreements and awards.”

One need only think of the expansive reach of “Commerce Clause” jurisprudence in the United States to understand the implications. Given this conclusion, the court held that the arbitration award against Solitron was commercial by any test. The court further speculated that perhaps the only purpose of the “commercial reservation” was to “exclude matrimonial and other domestic relations awards, political awards, and the like.”

*Solitron* is an example of the successful enforcement of an arbitration award that relates to a contract over terms and conditions of employment. However, was the court in *Solitron* right to insist that the term commercial was to be granted the same scope as the term “commerce”? One theory that would substantiate this claim can be derived from the laws enacting the New York Convention. The single chapter Federal Arbitration Act was enacted decades prior to the adoption of the New York Convention. When the Convention was enacted into U.S. law, it became the second chapter of the preexisting Federal Arbitration Act. The United States’ adoption of the commercial reservation was enacted in 9 U.S.C. § 202, which states that “an arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreements described in Section 2 of this title, falls under the Convention.” A reasonable interpretation of this sentence is that agreements described in Section 2 of the Federal Arbitration Act are to be considered commercial. Section 2 provides for the arbitration of “a contract evidencing a transaction involving commerce.” Thus, if the term commercial is to include

164. *Id.* at 13.
165. *See id.*
167. Also known as the United States Arbitration Act.
170. *Id.* at § 2 (2002).
agreements in Section 2, then contracts “involving commerce” apply. The Supreme Court has recently reemphasized in Circuit City Stores, Inc. v. Adams,\textsuperscript{171} that Section 2’s reference to “involving commerce” represents Congress’s intent “to exercise [its] commerce power to the fullest.”\textsuperscript{172} Taken together, a reasonable interpretation of the laws enacting the New York Convention is that “commercial” is to be defined to the fullest sense of Congress’s commerce power. Furthermore, in Circuit City, the Court expressly ruled that the Federal Arbitration Act applies to employment contracts, except for a narrow class of employees engaged in interstate transport.\textsuperscript{173}

In summary, the commercial reservation is not necessarily fatal to attempts to arbitrate international human rights disputes. Most countries have declined to adopt the commercial reservation and thus, in those countries it provides no barrier at all. Furthermore, most countries that have adopted the reservation have construed it very broadly. For example, in the United States the commercial reservation only creates a small hurdle to the enforcement of valid contractual arbitration agreements. Almost any contract that has a significant nexus to a commercial enterprise will likely be valid. It is hard to imagine then that if an American based corporation were to negotiate a contract to buy goods from a foreign factory, and included a clause stating certain labor standards, that such an agreement would not be enforced due to the commercial reservation. Thus, the commercial reservation should not ultimately deter parties from entering into agreements that enforce human rights standards; although designing the agreement to show a nexus to commerce should be a consideration.

B. Article V(2) Grounds for the Refusal of Enforcement

Beside the commercial reservation, the only other substantive limits to the practicability of enforcing an award are the grounds for refusal of enforcement under Article V(2). As discussed, these grounds for refusal are discretionary and the Convention places the burden of proving the non-enforceability of an award on the party seeking to prevent enforcement.\textsuperscript{174} Courts generally favor granting recognition whenever possible.\textsuperscript{175}

\textsuperscript{172} Id. at 112.
\textsuperscript{173} See generally, id.
\textsuperscript{174} See Martinez, supra note 78, at 497.
\textsuperscript{175} See id.
1. Article V(2)(a): Subject Matter Not Arbitral

Article V(2)(a) provides that a court may refuse to enforce a foreign award where “the subject matter of the difference is not capable of settlement by arbitration under the law of that country.” A court believing that this condition is satisfied may refuse enforcement on its own motion. Due to the large degree of domestic variation in determining non-arbitrability subject matters, general principles are difficult to elicit. This is because arbitral matters differ from country to country. Nevertheless, classic examples of non-arbitral subject matters are (i) antitrust; (ii) the validity of intellectual property rights such as patents and trademarks; (iii) family; and (iv) the protection of certain weaker parties. Furthermore, as a general principle, the non-arbitrability of a subject matter of arbitration cannot be of an incidental nature in the resolution of the dispute. Instead, non-arbitrability must be of a categorical nature.

Even if a category precludes arbitration in a domestic context, that does not necessarily preclude the enforcement of an arbitration on that matter in a foreign context. Taking the United States again as an example, the United States Supreme Court has twice permitted the enforcement of international arbitral awards in subject matters that could not be enforced domestically. In Scherk v. Alberto-Culver Co., the Supreme Court held that despite the rule barring the arbitration of disputes arising out of securities transactions in a domestic contract, disputes arising out of such transactions are arbitral if the contract is international. The Court noted that international securities regulations had dramatically different considerations than domestic regulations. Similarly, in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., the Supreme Court allowed the enforcement of an anti-trust arbitration dispute that would not have been allowed in the domestic context. In an extraordinarily strong statement of support for international arbitration awards, the Supreme Court held:

176. New York Convention, supra note 83.
177. See JAN VAN DEN BERG, supra note 66, at 368.
178. See id.
179. See id. at 369.
180. See id. at 374.
181. See id.
183. See JAN VAN DEN BERG, supra note 66, at 362.
184. See id.
As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to “shake off the old judicial hostility to arbitration,” Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (CA2 1942), and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.186

Thus, at least in the United States, non-arbitrability in a domestic context does not indicate non-arbitrability in a foreign context. In fact, the policy favoring international commercial arbitration trumps “subordinate domestic notions of arbitrability.”

Given the fact that most of the traditional grounds for non-arbitrability will not be relevant in a human rights context, and the fact that countries like the United States generally adopt a broader definition of arbitrability in the international context, this ground for non-enforcement presents only a minimal obstacle for the enforcement of awards.

2. Article V(2)(b): Contrary to Public Policy

Article V(2)(b) allows a court to refuse enforcement because “the recognition or enforcement of the award would be contrary to the public policy of that country.”187 This defense to enforcement has been the most frequently litigated.188 If a broad definition of public policy were adopted for this defense, then the clause would effectively relegate the enforceability of foreign awards to the good faith of the contract states.189 A broad interpretation of the public policy defense would have the effect of undermining the New York Convention, and therefore would undermine the effectiveness of international arbitration.190 However, such a broad

186. Id. at 638-39 (emphasis added).
187. New York Convention, supra note 83.
188. See Martinez, supra note 78, at 508.
189. See id.
190. See id.
definition has not been adopted by contracting states. The intent of the framers of the Convention was to limit the public policy defense “to cases in which the recognition or enforcement of a foreign arbitral award would be distinctly contrary to the basic principles of the legal system of the country where the award was invoked.” 191 This intention has been respected. 192

In the United States, courts have very narrowly construed the public policy exception. The defense is rarely successful although it is often asserted. 193 The Second Circuit became the first U.S. court to rule on the scope of the public policy defense in Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (RAKTA). 194 In Parsons, a U.S. corporation withdrew its work crew from Egypt in violation of a contract and attempted to justify the abandonment because of the deteriorating relations between the United States and Egypt that occurred as a result of the Arab-Israeli Six-Day War. 195 The Second Circuit found the argument that American citizens in Egypt had an obligation to abandon a commercial contract when United States–Egyptian relations were severed to be unconvincing. 196 Fearing that a broad definition of public policy would undermine the goals of the Convention, the Second Circuit concluded “that the Convention’s public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice.” 197 This interpretation is now the standard by which the public policy defense is applied. 198

The United States Supreme Court has reinforced this narrow interpretation. It has made clear that when analyzing the public policy defense, both international public policy and domestic policy must be viewed together. 199 As a result, public policy defenses that are made sufficient in a domestic context may not be sufficient in an international context. For example, in Scherk the Supreme Court distinguished a domestic case from the case before them by noting “such an international

191. Id. at 508-09.
192. Id.
193. See Martinez, supra note 78, at 508-509.
195. See Martinez, supra note 78, at 509.
196. See id. at 510.
197. Parsons & Whitmore, supra note 194 at 973-74.
198. See Martinez, supra note 78, at 510.
199. See id. at 509.
contract involves considerations and policies significantly different from those controlling in [a domestic case]."\textsuperscript{200} Furthermore, in \textit{Mitsubishi Motors}, the U.S. Supreme Court unequivocally stated that it is "necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration."\textsuperscript{201}

D. Conclusion

The New York Convention has extraordinary potential to apply to the private enforcement of almost any arbitration agreement. In this context, private actors wishing to enforce human rights norms have a vehicle to do so. Although the commercial reservation and Article V grounds for non-enforcement provide some limitations on what will and will not be enforced, in most cases these limitations will not be insuperable hurdles. However, the potential for human rights standards to be incorporated in commercial contracts assumes that private actors will be willing to incorporate such standards. The next section will discuss whether private actors such as MNE will be willing to enforce such standards.

VI. CAN THE DISEASE BE THE CURE?

Part II of this Comment explained how globalization has eroded traditional sources of protection for labor. Many scholars have identified MNEs as catalysts and beneficiaries of the process of globalization.\textsuperscript{202} This conclusion is not surprising. Many MNEs have lobbied, given political gifts, and have pressured governments to support free trade initiatives and treaties, which is a fundamental aspect of globalization.\textsuperscript{203} Furthermore, the race-to-the-bottom problem would not exist if governments did not feel the need to allure foreign investment and MNEs through maintaining low labor standards. The reality of this race-to-the-bottom process was demonstrated in Part V, \textit{supra}, discussing how Solitron abandoned plans to bring employment and industry to a small island nation as soon as the island adopted a protective minimum wage law.\textsuperscript{204} For many commentators, MNEs represent the disease driving the negative repercussions of globalization.

Yet this Comment illustrates a method that can be employed by private entities to help curb the harmful effects of globalization. Since MNEs are

\begin{itemize}
  \item \textsuperscript{200} \textit{Scherk, supra} note 182, at 515.
  \item \textsuperscript{201} \textit{Mitsubishi Motors, supra} note 185, at 638-39 (emphasis added).
  \item \textsuperscript{202} \textit{See Stone, supra} note 11, at 988.
  \item \textsuperscript{203} \textit{See id.}
  \item \textsuperscript{204} \textit{See supra} notes 152 - 161 and accompanying text.
\end{itemize}
likely the private actors with the closest commercial nexus and most 
bargaining power vis-à-vis non-governmental human rights abusers, 
whether they be factory sweatshop owners or environmental vigilantes, 
they are in the best position to enforce human rights standards through 
contractual obligations and arbitration clauses. The likely costs of such 
enforcement are by no means exorbitant and potentially would be closely 
limited to the gain in value that the MNE derives from taking advantage of 
human rights violations. This is because it is possible that human rights 
NGOs would be willing to bear the costs of inspections and contribute to 
the costs of litigating violations in the arbitration clause. Ultimately, the 
question comes down to whether the MNEs are really committed to curbing 
the advantages they gain from human rights abuses.

MNEs certainly talk as if they are committed to such protections. For 
example, on a website dedicated to its manufacturing practices, Nike states 
that its mission is “[t]o make responsible sourcing a business reality that 
enhances worker’s lives.”205 According to the website, the company’s 
goals include: “manag[ing] a consistent, effective and comprehensive 
monitoring system; build[ing] capacity to achieve compliance, refin[ing] 
and manag[ing] remediation process; beyond compliance, develop[ing], 
invest[ing], and build[ing] capacity to improve the workplace, [the] 
workers’ lives and the community; and integrat[ing] compliance into a 
business model.”206 Nike’s commitment to working conditions is only to 
be outdone by its rival, Reebok, which states on its website: “Standing up 
for human rights is a hallmark -- as much a part of our corporate culture 
and identity as our products.”207 Reebok believes that “we all have a 
responsibility to expose injustice, and to support efforts that ensure dignity 
and rights for all human beings.”208

Some MNEs have actually taken initiatives in matters relating to human 
rights. For example, after a campaign in early 1995 by labor and religious 
groups protesting the sweatshop conditions at one of Gap, Inc.’s (The Gap) 
contractors and suppliers.209 When this failed to change the behavior of 
one of their contractors, The Gap refused to renew a contract until the

206. Id.
208. Id.
209. See Baltazar, supra note 43, at 718.
government of El Salvador said it would investigate the labor disputes.210 Many other MNEs have now jumped on the “codes of conduct” bandwagon including Levi Straus & Co., Timberland, and Nike.211 Some of these programs have extensive monitoring systems, providing for detailed questionnaires, surprise site visits, and termination of contracts with suppliers found to violate these guidelines.212

This Comment illustrates that these MNEs can use arbitration agreements as a tool in enforcing codes of conduct. Thus, if Nike really wants to “integrate compliance into a business model,” it can start by giving its code of conduct teeth, providing for arbitration in the event of breach. Whether prodded by NGOs, public interest watchdogs, the public at large, or their own sense of corporate altruism, the efficacy of international commercial arbitration can be linked to the need for human rights reform through motivated private actors. If private actors fail to link their ability to enforce reforms through arbitration agreements while extolling their will for such reforms, then their hypocrisy is exposed. However, if private actors succeed in this regard, it will be as much a triumph for the corporate community as for the human rights community.

210. See id.
212. See id.