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THE CSCE IN THE NEW EUROPE: FROM PROCESS TO REGIONAL ARRANGEMENT

A CASE-STUDY ON THE LEGAL ASPECTS OF THE TRANSFORMATION OF THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE FROM A POLITICAL PROCESS TO A REGIONAL ARRANGEMENT UNDER ARTICLE 52 OF THE UNITED NATIONS CHARTER

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I. INTRODUCTION

"You can lead a horse to water but you can't make him drink."[1]

The European continent is synonymous with war and peace. European history can be viewed as a perpetual resuscitation of force as a means of solving conflict; it can also be regarded as a quest for security. Traditionally, security has been closely linked to the concept of the nation-state.[2] Notwithstanding the strong development of international organizations and other forms of cooperation between states since 1945, the nation-state has remained the fundamental cornerstone of the international system.[3] Thus, security has long

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1. Heinz Gärtner, *The Future of Institutionalization: The CSCE Example, in* REDEFINING THE CSCE: CHALLENGES AND OPPORTUNITIES IN THE NEW EUROPE 252 (Ian M. Cuthbertson ed., 1992).

2. The concept of the nation-state has its legal foundations in the Peace of Westphalia (1648) which ended the Thirty Years' War and through its Treaties (involving France, Sweden, and the Holy Roman Empire) established a new (legal) order on the continent, based on the principles of souvereignty and territoriality. See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 131, 242 (1988).

3. International (governmental) organizations exist by virtue of their founding Member-states. Indeed, the most fundamental legal document of the current international system, the Charter of the United Nations, is based on the concept of nation-states and sets forth in Article 2 the Principles according to which the Organization and its Members are to act in pursuit of the Purposes of Article 1. Sovereign equality of Member-states (Article 2(1)), the prohibition

been defined in terms of protection of the state against external aggression and threats to its territorial integrity.[4] Collective security arrangements have further strengthened this approach.[5]

The collapse of the Berlin Wall in 1989 seemed to mark the beginning of a new stage in Europe's struggle for stability. With the apparent disappearance of the traditional Cold War-division between East and West, confrontationist concepts of security required replacement by accommodationist approaches.[6] Hence, a scramble towards adaptation of existing institutions

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of the use of force against the territorial integrity or political independence of any state (Article 2(4)), and the prohibition of intervention by the Organization in matters which are "essentially within the domestic jurisdiction" of any state (Article 2(7)) are the pillars upon which the international (legal) system rests. U.N. CHARTER, June 26, 1945, indexed at 59 Stat. 1031, T.S. No. 993.

4. U.N. CHARTER art. 2, ¶ 4. See also The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., 1883rd plen. mtg., Supp. No. 18, U.N. Doc. A/8018 (1970) [hereinafter *Declaration on Principles*]. *Definition of Aggression*, G.A. Res. 3314, U.N. GAO R, 29th Sess., 2319th plen. mtg., Annex, art. 1, Supp. No. 19, U.N. Doc. No. A/9619 and Corr. I (1974).

5. For the purpose of this discussion, the term "collective security arrangements" encompasses those relationships between states which serve the purpose of addressing what are perceived as common political or military threats to peace and stability. For a more theoretical approach, see Michael R. Lucas, *The Challenge of Helsinki II*, in Cuthbertson, *supra* note 1, at 259-62 (distinguishing military security, common security, collective security and comprehensive security arrangements). *See also* Charles A. Kupchan & Clifford A. Kupchan, *Concerts, Collective Security and the Future of Europe*, 16 INT'L SEC. 116-25 (Summer 1991). In legal terms, the North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243, which established the North Atlantic Treaty Organization (NATO), and the Warsaw Treaty, May 14, 1955, 219 U.N.T.S. 3, which created the Warsaw Treaty Organization (WTO, Warsaw Pact) are the two best-known European examples of collective security arrangements; their articles concerning mutual assistance (Articles V and 4, respectively), bear close resemblance to provisions included in other, non-European security arrangements, such as Article 3 of the Inter-American Treaty of Reciprocal Assistance, *opened for signature* Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. No.1838, 21 U.N.T.S. 77 [hereinafter Rio Treaty] and Article 24 and 25 of the Charter of the Organization of American States (OAS), Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3 [hereinafter Charter of the OAS].

6. The Berlin Wall "crumbled" in October 1989. The German Democratic Republic (GDR) ceased to exist on October 7, 1990, when German reunification became effective. Less than 18 months later, the dissolution of the former Eastern bloc was complete: the Soviet Union dissolved into the Commonwealth of Independent States (CIS); Poland, Hungary and Czechoslovakia formed the Visegrad Group; Rumania, Albania and Yugoslavia plunged into political chaos, turmoil and even (civil) war; and Bulgaria faced its share of political instability as well. Since 1991, extremely violent eruptions of ethnicism, nationalism, religious and historical animosity have caused further disintegration of former Soviet Republics (Georgia, Tajikistan, Moldova) and the former Yugoslav Republic. See Victoria Syme & Philip Payton, *Eastern*

and arrangements has resulted in an Alphabet Soup of acronyms.[7]

Acronyms, however, have not been a sufficient and satisfactory response to the fundamental challenges of the current European (dis)order. Indeed, it is the lack of a comprehensive philosophical, political and strategic vision rather than the lack of institutional reform which is key to the failure of existing institutions in addressing the challenges of resurgent aggressive nationalism, ethnic strife, human rights protection, the questions of minorities and self-determination, and to some extent even the (lack of) legitimacy of the nation-state itself.[8] In short, a rapidly changing perception of security,[9] in wake of the unraveling of political, social and economic structures, requires reconsideration of expectations and realities, objectives and instruments.

Europe: Economic transition and ethnic tension, in EUROPEAN SECURITY-TOWARDS 2000 86-103 (Michael C. Pugh ed., 1992); Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992); Robert L. Pfaltzgraff, Jr. et al., *The Atlantic Alliance and European Security in the 1990's*, 23 CORNELL INT'L L.J. 467, 478-85 (1990).

7. Currently, Europe can be seen as an "inter-institutional landscape." The European Union (created by the Treaty on Political Union, Dec. 13, 1991, Eur. Doc. No. 1750/1751 [hereinafter Treaty of Maastricht]), has been equipped with a Common Foreign and Security Policy (CFSP) in which the Western European Union (WEU) has been integrated. NATO has created the North Atlantic Cooperation Council (NACC, operative since December 20, 1991), the Partnership For Peace (PFP, approved at the NATO Summit in Brussels, January 10-11, 1994) and the Combined Joint Task Forces process (CJTF, also approved at the NATO Brussels Summit). The Conference on Security and Cooperation in Europe (CSCE, founded with the Helsinki Final Act (HFA) of 1975 (14 I.L.M. 1292 (1975)) has created three Institutions: the Conflict Prevention Centre (CPC), the Office for Democratic Institutions and Human Rights (ODIHR) and the Forum for Security Cooperation (FSC). The CSCE also created the Berlin Mechanism for Emergency Meetings (1991), the Human Dimension Mechanism (1989-1991), the Valletta Mechanism for Dispute Settlement (1991) and the Vienna Mechanism for Unusual Military Activities (1990-1992) for the specific purpose of "managing change." In addition, the CSCE's endorsement of the Stability Pact (a combined effort of French Prime Minister Balladur and French President Mitterand) may result in another forum on the European scene. Finally, the Council of Europe, the Central European Initiative (CEI, resulting from the former Hexagonale of Italy, Austria, Hungary, Yugoslavia, Czechoslovakia and Poland), the Visegrad Four, the Council of the Baltic Sea States, the Nordic Council, the Balkan Initiative and the Economic Cooperation Council (ECO) are all directly the result of recent initiatives or are adapting to the changes in the setting. See Andrew Marshall, *Acronyms galore ride on the merry-go-round of summits*, THE INDEPENDENT, June 11, 1993, at 10; *Policies for Peace*, THE TIMES, Nov. 30, 1993.

8. *See* Dominick McGoldrick, *The Development of the Conference on Security and Cooperation in Europe—From Process to Institution, in* LEGAL VISIONS OF THE NEW EUROPE 135 (Jackson & McGoldrick ed., 1993).

9. Security is no longer defined in terms of military security only; e.g., the CSCE concept of security includes economic, social, political, environmental/ecological and humanitarian elements. See Helsinki Summit Declaration, July 10, 1992, 31 I.L.M. 1385, 1392, at ¶ 21 (1992).

Such reconsideration has taken place, *inter alia*, within the Conference on Security and Cooperation in Europe (CSCE). Defined either in terms of its Cold War-origins or its moral aspirations,[10] the CSCE has been characterized by its flexibility and responsiveness to the post-Cold War shake-up of the "Old Order." From the Charter of Paris for a New Europe (1990) to the most recent meeting of the CSCE Council of Ministers (Rome, 1993),[11] the CSCE has consistently emphasized its awareness of the changes occurring within Europe and its resulting intention of not only providing a forum for assessment and dialogue, but also of becoming an operational and effective "manager of change."[12] However, this implies a radically different approach from the instrumentality and functional concept underlying the original CSCE.[13]

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10. The CSCE has been termed a "child of the Cold War." Cuthbertson, supra note 1, at 2. Another commentator has defined the CSCE as the "established conscience of the continent." Peter Corterier, *Commentary: Grant CSCE Authority to Act; Forum Lacks Power to Manage Change in Europe*, DEF. NEWS, July 6-12, 1992, at 15.

11. The Charter of Paris for a New Europe was adopted at the First CSCE Summit in Paris, November 21, 1990. 30 I.L.M. 190 (1991) [hereinafter Charter of Paris]. The Charter of Paris proclaims that the "era of confrontation and division has ended," that "Europe is liberating itself from the legacy of the past and that a "new era of democracy, peace and unity in Europe" has arrived. Charter of Paris, pmbl., ¶¶ 1-2. The Charter is highly illustrative of the "New Europe" that the Participating States envisioned ("whole, united and free") and forms a necessary starting-point for any analysis of the (institutional) development(s) of the CSCE. The Fourth CSCE Council of Ministers Meeting in Rome, December 1-2, 1993, is the temporary culmination of efforts to transform the CSCE into an "operational" entity. See *CSCE and the New Europe—Our Security is Indivisible*, CSCE Doc. CSCE/4-C/Dec.2 (on file with author). *See infra* Part II.

12. *See, e.g.*, Helsinki Summit Declaration, *supra* note 9, at ¶ 18.

13. The origins of the CSCE can be traced to the early 1950's, when the Soviet Union repeatedly proposed a conference to establish a European collective security system. This conference would serve the Soviet objectives of legitimizing the Soviet position within (Eastern) Europe, creating division between North America and Western Europe and providing fresh impetus to East-West economic development. The negative Western response changed near the end of the 1960's, when West Germany's Ostpolitik and resulting *Ostverträge* (with the GDR, Poland, Czechoslovakia and the USSR) contributed to a general relaxation in the East-West relationship, commonly referred to as "detente." Subsequent exchanges of communiques and declaration between NATO and the Warsaw Pact, the conclusion of the Four-Power-Agreement on Berlin (1971), the conclusion of the first SALT agreement between the United States and the USSR (1972) and East-West agreement on the convening of the Mutual and Balanced Forces Reduction (MBFR) talks cleared the way for a Conference. As a result of the Multilateral Preparatory talks (MPT) from November 22, 1972 to June 8, 1973, the CSCE was set up as a forum for political dialogue and trade-off between East and West, thus becoming a policy instrument for both blocs. *See* ARIE BLOED, FROM HELSINKI TO VIENNA: BASIC DOCUMENTS OF THE HELSINKI PROCESS 2-4 (1990); STEFAN LEHNE, THE VIENNA MEETING OF THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE, 1986-1989: A TURNING POINT IN EAST-WEST RELATIONS 1-5 (1991); JAN SIZOO & RUDOLF JURRJENS, CSCE DECISION-MAKING: THE MADRID EXPERIENCE 23-45 (1984). *See also* JOHN J. MARESCA, TO HELSINKI, THE

Moreover, it requires a thorough reassessment of the basic structures of the CSCE, its institutional development and its achievements thus far. In fact, what is called for is a virtually new entity, rather than a restructured and institutionalized process.

The Helsinki Summit Declaration of July 10, 1992, has generally been considered a new chapter in the CSCE process because of its recognition that reality no longer fits the definition of the "New Europe" envisaged in the Charter of Paris.[14] The practical implementation of this recognition, which has been embodied in the Helsinki Decisions, has paved the way for an "operational" CSCE.[15] Nevertheless, the Helsinki Decisions appear to be no more than a half-hearted attempt to provide the "old" CSCE with legitimacy for its continued presence on the list of (European) acronyms.

This thesis is aimed at contributing to the redefinition of the CSCE's position in a changing European security-architecture. Indeed, redefining the CSCE's role on the European continent appears to be one of the key issues worthy of concern to the Participating States at the upcoming Budapest Summit.[16] Despite its structural adjustments since 1990, the CSCE has become a quagmire of conflicting political and legal interests. As a result, the current CSCE structures have been the subject of review at both the Stockholm (1992) and Rome (1993) meetings of the CSCE Council of Ministers.[17] What has

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CONFERENCE ON SECURITY AND COOPERATION IN EUROPE, 1973-1975 (1985); LJUBIVOJE ACIMOVIC, PROBLEMS OF SECURITY AND COOPERATION IN EUROPE (1981).

14. The Declaration notes that "the legacy of the past remains strong. We are faced with challenges and opportunities, but also with serious difficulties and disappointments." Helsinki Summit Declaration, supra note 9, at 1390, ¶ 3. This statement can be interpreted as an implicit acknowledgement of the problems in the Republics of the former Soviet Union (notably the ongoing struggle for political and economic reforms in the Republics, the issue of Russian troops still remaining in other Republics, and the outbreak of new (ethnic) conflicts and the continuation of existing ones in, inter alia, the Caucasus and Moldova), the dissolution of Yugoslavia, and the failure of international efforts to provide adequate and effective solutions.

15. In this particular context, the term "operational" refers to the capacity of an entity such as the CSCE to actively exert its influence upon a situation. In more specific terms, it refers to the ability of the CSCE to engage as an entity in the prevention, management and solution of conflicts. Helsinki Decisions, 31 I.L.M. 1394, 1403 (1992).

16. The Third Summit of Heads of State or Government of the 53 Participating States of the CSCE was scheduled to take place December 5-6, 1994. The phenomenon of CSCE Summitry started with the Paris Summit of November 1990; the Helsinki Summit of July 1992 was the second one. With regard to the number of Participating States, it must be noted that the continued exclusion of Serbia/Montenegro will reduce the Summit attendance to 52 Participating States. In addition, Japan may attend the Budapest Summit on invitation. See Helsinki Decisions, *supra* note 15, at 1403, ¶ 10.

17. The Third Meeting of the CSCE Council of Ministers took place in Stockholm, Sweden, on December 14 and 15, 1992. See *CSCE Council Summary of Conclusions of the Stockholm Meeting*, 32 I.L.M. 603 (1993). *See also* ALEXIS HERACLIDES, HELSINKI II AND

resulted from these reviews and how they relate to the Helsinki Summit and its Decisions is considered in Part I, which deals with the legal aspects of the institutionalization of the CSCE. For a proper understanding of the significance of the Helsinki Decisions and its subsequent reviews, Part I includes a survey of the origins, characteristics and main achievements of the CSCE.

One of the most remarkable decisions of the Helsinki Summit concerned the regional arrangement status of the CSCE. Not considered an international organization *stricto sensu*, the CSCE was nevertheless declared a regional arrangement under Article 52 of the U.N. Charter.[18] This decision seems to be closely related to the transformation of the CSCE into an "operational" entity. The legal meaning, as well as the implications and significance of this status, is discussed in Part II. Accordingly, Part III sets out the conclusions which are to be drawn from the preceding analyses. Although Part III cannot provide the ultimate answer to the legal problems which currently beset the CSCE, at least it attempts to clarify issues of direct concern which ought to be the subject of consideration in future reviews of the CSCE. Only in this way may the result that the Helsinki, Stockholm and Rome meetings failed to achieve be accomplished: a CSCE that is relevant to the changing European architecture, and more than just another acronym of political ambivalence.

PART I: FROM PROCESS TO INSTITUTION

II. FROM HELSINKI TO BUDAPEST: A SURVEY OF CSCE DEVELOPMENTS

A. *Introduction*

The Conference on Security and Cooperation in Europe (CSCE) has been the mirror-image of the political changes that have transformed the European continent from a potential battlefield to a real theatre of war. From the normative character of the Helsinki Final Act (HFA) of 1975 to the pretentious nature of the Charter of Paris for a New Europe (hereinafter the "Charter of

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ITS AFTERMATH: THE MAKING OF THE CSCE INTO AN INTERNATIONAL ORGANISATION 184-85 (1993). The Fourth Meeting of the CSCE Council of Ministers took place in Rome, Italy, on December 1-2, 1993. *See* CSCE Doc. CSCE/4-C/Dec.2, *supra* note 11. *See also* Anthony Robinson, *CIS Peacekeeping tops CSCE agenda: The organisation seeking a new framework for Europe*, FIN. TIMES, Nov. 27, 1993, at 2; *CSCE Ministers still stumped on security structures*, AGENCE FRANCE PRESS, Dec. 1, 1993; *Roundup: European security meeting achieves little*, XINHUA NEWS AGENCY, GENERAL OVERSEAS NEWS SERVICE, Dec. 2, 1993.

18. *See* Helsinki Summit Declaration, *supra* note 9, at 1392, ¶ 25; Helsinki Decisions, *supra* note 15, at 1403, ¶ 2.

Paris") of 1990, the CSCE has resembled more of a debating society than an organizational entity.[19] Indeed, the CSCE has been a vehicle for dialogue rather than a platform for action. At the same time, the CSCE has been instrumental to a norm-creating process which has become the source of its reputation as the "conscience of the continent."[20]

Notwithstanding this reputation, the CSCE has been confronted by its inability to translate its "moral authority" into respect for its Principles. Since the Charter of Paris' proclamation of a New Europe,[21] reality has been a stark reminder of the highly idealist perspective which it purports. The implicit acknowledgement of misperception has been made in the Helsinki Summit Declaration of 1992.[22] Consequently, the Helsinki Decisions have resulted in an unconvincing attempt to equip the CSCE with the means to command respect from its Participating States for the fundamental norms of conduct of the HFA, which still hold unrelentless strength.

To understand the importance of the Helsinki Summit and to identify the failure of the Participating States to create a legal and political framework within which CSCE authority is derived from the power of credibility, therefore, requires an understanding of the development of the CSCE between 1975 and 1992. Through a short survey of its characteristics and its highlights and/or low points (such as review conferences, expert meetings, etc.), the image of mixed successes and failed promises may emerge. Though this does not deviate from the current CSCE image, it is important to note that there is a strong difference in the respective explanations. In short, the CSCE has moved from the restrictions of deliberate choice to the limitations of political opportunism.

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19. *See* David Shorr, *Plenty of Work Ahead For a Beefed-Up CSCE*, THE CHRISTIAN SCIENCE MONITOR, July 14, 1992, at 18. For the text of the Helsinki Final Act, see 14 I.L.M. 1292 (1975); Charter of Paris, *supra* note 11; Supplementary Document to Give Effect to Certain Provisions Contained in the Charter of Paris for a New Europe, 30 I.L.M. 209 (1991) [hereinafter Supplementary Document]. *See also infra* Part III.

20. *See* Corterier, *supra* note 10.

21. *See* the Preamble titled "A New Era of Democracy, Peace And Unity," in particular ¶¶ 1-2, Charter of Paris *supra* note 11, at 193.

22. The Helsinki Summit Declaration holds several provisions which point at the reality of the day against the euphoria of the Paris Summit, including the acknowledgement that:

> This is a time of promise but also a time of instability and insecurity. Economic decline, social tension, aggressive nationalism, intolerance, xenophobia and ethnic conflicts threaten stability in the CSCE area. Gross violations of CSCE commitments in the field of human rights and fundamental freedoms, including those related to national minorities, pose a special threat to the peaceful development of society, in particular in new democracies.

Helsinki Summit Declaration, supra note 9, at 1391, ¶ 12. *Cf.* Charter of Paris, *supra* note 11, at 193. The preamble of the Charter of Paris makes a euphoristic claim of respect, co-operation, democracy, peace and unity.

Thus, the apparent similarity between problems encountered by the CSCE before the Helsinki Decisions and those thereafter serves to disguise the seriousness of the change in premises on which the CSCE rests.

B. *The Helsinki Final Act of 1975*

The signing of the Helsinki Final Act (HFA) on August 1, 1975, marked the end of the era of detente.[23] Despite a rapid deterioration in the East-West relationship, however, the HFA's "institutionalization" of detente through the adoption of a comprehensive code of conduct has assured the continuation of the CSCE. Designed to deal with questions relating to security in Europe,[24] cooperation in the fields of economics, science, technology and the environment,[25] and cooperation in humanitarian and other fields,[26] the CSCE

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23. A conventional and generally accepted definition of detente is a relaxation of tension between states, which does not change the underlying conflict between them. However, this definition is not absolute. The disagreement between East and West, as well as among the Western countries themselves, regarding the meaning of detente and the extent to which its application to their mutual relations should be reflected in visible results within the context of the CSCE became a serious obstacle in the initial years of the CSCE. *See* Ieuan G. John, *The Helsinki-Belgrade Connection*, 2 INT'L REL. 137, 138 (1977); LEHNE, *supra* note 13, at 13. The HFA was signed by the Heads of State and/or government of the 35 Participating States, which included 32 European countries, the United States and Canada, and the Holy See. These States could be "split" into three categories: the Eastern bloc countries (The Warsaw Pact), the Western bloc (NATO/EEC), and the group of Neutral and Non-aligned States (NNA).

24. Security issues are dealt with in Basket I of the HFA. Termed after the method used during the MPT to order the proposals for topics of consideration as submitted by the participating states, Basket I consists of two parts. The first part is the Declaration on Principles Guiding Relations between Participating States. The second part is the *Document on confidence-building measures and certain aspects of security and disarmament.* The *Declaration on Principles*, also known as the *Decalogue*, is the backbone of the CSCE process; the Document on CBM's was the first of its kind and has been strengthened by subsequent adoption of similar documents at several other occasions. *See* BLOED, *supra* note 13, at 5-6.

25. These issues are part of Basket II and are of major interest to the East European States. This basket has been the least controversial of the HFA's baskets and has been the source of relatively "easy" cooperation. The second basket deals with, inter alia, commercial exchanges; industrial co-operation and projects of common interest; provisions concerning trade and industrial co-operation; science and technology; environment; and cooperation in other areas (transport, tourism, migrant labour, training of personnel). For a variety of reasons, this basket has played a minor role in the CSCE, chief among them being the duplicative nature of the basket. In fact, the UN Economic Commission for Europe (ECE) holds a virtually identical mandate and is of almost identical composition. *See* LEHNE, *supra* note 13, at 8-9; John, *supra* note 23, at 141-46.

has provided a forum for political consultation between its Participating States.[27] The CSCE has been conditioned upon a Decalogue of Principles, which sets forth the standards guiding the relationships between the Participating States.[28] Being the backbone of the CSCE process and a source of contention

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26. The human rights issues are covered by Basket III and has become the trademark of the CSCE. This basket has been the most controversial element of the HFA and may indeed be regarded as the "Trojan Horse" of the CSCE. By specifying normative standards in the four areas of Human Contacts, Information, Culture and Education, the HFA effectively provided a catalyst for change: the standards were used by the "dissident" movements in the Eastern bloc (such as Charter 77 in Czechoslovakia) and the so-called Helsinki Monitor Committees to measure human rights practices in the East and bring them to the attention of the Western governments. They, in turn, regarded these standards a matter of principle: in their view, disregard of human rights threatened the stability of East-West relations and therefore endangered the security of Europe. Basket III has been supplemented by numerous instruments to achieve full implementation of the enumerated standards.

27. The use of the term "Participating States" implies that the CSCE is a process rather than a (legal) entity. This use is consistent with the accepted doctrine that the HFA is not a legally binding document. This, however, does not deprive the HFA of its of its binding force, nor does it deprive the HFA of its political authority. Van Dijk argues: "The conclusion that the Final Act is not a legally binding agreement does not mean that the matters agreed upon between the participating states, and laid down in the Final Act, should not be binding. A commitment does not have to be legally binding in order to have binding force; the distinction between legal and non-legal binding force resides in the legal consequences attached to the binding force." Pieter Van Dijk, *The Implementation of the Final Act of Helsinki: The Creation of New Structures or the Involvement of Existing Ones?*, 10 MICH. J. OF INT'L L. 110, 114 (1989). Furthermore, Bloed notes that "the HFA incorporates numerous clauses which can be traced to international agreements to which a great number of or all of the CSCE States are bound." BLOED, *supra* note 13, at 11. Indeed, the HFA contains references to the purposes and principles of the U.N. Charter, human rights instruments (such as the 1966 International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR)) and principles of international law. *Id.*

28. The *Declaration on Principles Guiding Relations between Participating States* contains ten fundamental principles, which are directly derived from, or closely related to, recognized principles of international law:

I. Sovereign Equality, respect for the rights inherent in sovereignty
II. Refraining from the threat or use of force
III. Inviolability of frontiers
IV. Territorial integrity of States
V. Peaceful settlement of disputes
VI. Non-intervention in internal affairs
VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief
VIII. Equal rights and self-determination of peoples
IX. Co-operation among States
X. Fulfillment in good faith of obligations under international law.

at the same time, the Decalogue has been balanced by the provision that "all the Principles set forth . . . are of primary significance and, accordingly, they will be equally and unreservedly applied, *each of them being interpreted taking into account the others.*"[29] In practice, this provision has been reflected in the linkage between the Baskets of the HFA. Thus, a requirement of balance between security issues, economic issues and human rights has become a characteristic of the CSCE, both in terms of process and substance.[30]

Linkage between the Baskets of the HFA has provided the CSCE with its own dynamics. Combined with provisions regarding the Follow-up to the Conference, the so-called Fourth Basket,[31] linkage has strengthened the implementation-review process and has provided legitimacy to the subsequent extension of the CSCE's indivisibility-of-security-concept into a variety of

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Cf. Declaration on Principles, supra note 4; U.N. CHARTER art. 2, ¶¶ 1-4, 7; OAS Charter, *supra* note 5, art. 5; and Organisation of African Unity (OAU) Charter, May 25, 1963, 58 AM. J. INT'L L. 873 (1964) [hereinafter OAU Charter]. *See* Erika B. Schlager, *The Procedural Framework of the CSCE: From the Helsinki Consultations to the Paris Charter*, 1972-1990, 12 HUM. RTS. L. J. 221, 222 (1991).

29. *See* Schlager, *supra* note 28, at 222 (emphasis added). In fact, this formulation is not unique. The *Declaration concerning Friendly Relations among States, supra* note 4, at 340, contains an almost similar construction in its General Part, no. 2: "[I]n their interpretation and application the . . . principles are interrelated and each principle should be construed in the context of the other principle." In general terms, the Decalogue is illustrative of the trade-off between the objectives of both blocs: the East measured the success of the CSCE through Principles III (Inviolability of frontiers), IV (Territorial integrity) and VI (Non-intervention in internal affairs), whereas the West consistently pointed at the inclusion of Principle VII (Respect for human rights and fundamental freedoms) as the major achievement of the CSCE.

30. *See* Schlager, *supra* note 28, at 222.

31. Basket IV has been a source of controversy since the MPT. Conflicting views between the three "blocs" regarding the degree of institutionalization of the CSCE fuelled heated debates during the negotiations on the HFA (Geneva, September 18, 1973-July 21, 1975). Between the extremes of a permanent institution and no institution at all, agreement was reached on the basis of proposals submitted by the NNA. Thus, the compromise-result provided for meetings among representatives of the Participating States for the purpose of a

> Thorough exchange of views, both on the implementation of the provisions of the Final Act and of the tasks defined by the Conference, as well as, in the context of the questions dealt with by the latter, on the deepening of their mutual relations, the improvement of security and the development of the process of detente in the future . . . .

Despite its tortuous wording, this provision simply combines the dislike of implementation-review on the part of the Eastern bloc countries with the caution on the part of the Western countries regarding any new commitments within the framework of the CSCE. See BLOED, *supra* note 13, at 8; LEHNE, *supra* note 13, at 11-12. *See also Institutional aspects of the "New" CSCE, in* LEGAL ASPECTS OF A NEW EUROPEAN INFRASTRUCTURE 3-4 (Arie Bloed & de Jonge eds., 1992); Schlager, *supra* note 28, at 222-23.

Mechanisms and Documents.[32] At the same time, linkage has been instrumental to the contentious nature of the Follow-up Conferences of Belgrade, Madrid and Vienna.[33]

C. *The Follow-up Meetings: Belgrade, Madrid and Vienna*

The First CSCE Follow-up Conference in Belgrade (October 4, 1977-March 8, 1978) was dominated by the deterioration in East-West relations and a strongly confrontationist approach of the U.S. delegation.[34] The Western position was countered by the Eastern response that Principle VI (Non-intervention in internal affairs) barred discussion and/or review of the implementation of human rights commitments within the CSCE framework. Accordingly, the Concluding Document[35] carried little substantive weight. Nevertheless, the Belgrade Conference was not a complete failure. Its Yellow Book, containing the "Decisions on the Preparatory Meeting to Organize the Belgrade Meeting,"[36] contributed to the "definition of the appropriate modalities for the holding of other meetings in conformity with the provisions of the chapter of the Final Act concerning the Follow-up to the Conference," thus reaffirming the undertaking of a continuation of the CSCE process into the

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32. *See supra* note 7, and accompanying text.

33. *See* Schlager, *supra* note 28, at 230-31.

34. The deterioration in East-West relations was mainly due to the harsh and repressive reactions of the Eastern bloc countries to the emergence of independent, domestic monitoring groups (e.g. Charter 77), which alerted the West to the lack of respect for human rights. Combined with the emphasis which the Carter Administration put on respect for human rights (staunch support for activist human rights policies became the cornerstone of U.S. foreign policy during the Carter years), the Western concerns led to a strongly confrontational climate. The U.S. delegation in particular took the Belgrade Conference as a "tribunal" on human rights abuses. The resulting (temporary) rift between the United States and its NATO allies was blamed on the "undiplomatic" posture of the U.S. delegation. See HERACLIDES, *supra* note 17, at 10; Geoffry Edwards, *The Madrid Follow-up Meeting to the Conference on Security and Cooperation in Europe*, 8 INT'L REL. 49, 53 (1984); LEHNE, *supra* note 13, at 15-16; BLOED, *supra* note 13, at 13.

35. Concluding Document of the Belgrade Meeting 1977 of Representatives of the Participating States of the Conference on Security and Cooperation in Europe, Held on the Basis of the Provisions of the Final Act Relating to the Follow-up to the Conference, 17 I.L.M. 414 (1978).

36. The Yellow Book was named after the colour of its cover; similarly, the "Final Recommendations of the Helsinki Consultations" (June 8, 1973) became known as the Blue Book.

1980's.[37]

The setting for the Second Follow-up Conference in Madrid (November 11, 1980-September 9, 1983) was even worse than Belgrade's.[38] Against the background of heightened East-West tension, the Madrid Conference lasted longer than anyone envisaged.[39] Nevertheless, despite its extremely difficult proceedings, the Madrid Conference resulted in substantial achievements in the fields of security and human rights.[40] Among those, the agreement to convene in Stockholm for a multi-stage Conference on Confidence- and Security-Building Measures (CSBM's) and Disarmament in Europe (CDE) was heralded by the Eastern bloc countries as the key to Madrid's success.[41] The Western

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37. Between the First Follow-up Conference (Belgrade) and the Second Follow-up Conference (Madrid), three other meetings were held under the auspices of the CSCE:

* The Montreux Meeting of Experts on Peaceful Settlement of Disputes (Oct.-Dec. 1978)
* The Valletta Meeting of Experts on the Mediterranean (Feb.-Mar. 1979)
* The Hamburg Scientific Forum (Feb.-Mar. 1980)

The Montreux and Hamburg Meetings had already been stipulated in the HFA; The Valleta Meeting, however, was a result of the Maltese "conditioned approval" of the Belgrade Concluding Document. See BLOED, *supra* note 13, at 14-15, 105-30; LEHNE, *supra* note 13, at 17.

38. The Soviet invasion of Afghanistan in December 1979; the extremely bad human rights record of the GDR, Czechoslovakia and the USSR; the American grain embargo against the USSR; and a widespread boycott of the Olympic games in Moscow set the stage for the Madrid Conference. It marked the beginning of one of the worst periods of East-West confrontation.

39. The Madrid Conference was plagued by external events which caused great obstacles to the continuation of the Conference itself. In December 1981, the NNA-proposed Draft Declaration became the victim of the declaration of martial law in Poland; subsequently, the Conference went into a seven-month recess (March-October 1982). Only after prolonged consultations among the NATO Allies did the Conference regain its momentum. The Siberian gas pipeline controversy between the United States and its Allies (notably the UK) which erupted during the summer of 1982 created further difficulties for the common position of the Western countries. In addition, the shoot-down of a South Korean civil airliner by Soviet fighter-jets on the final day of the Conference did little to improve the already tense East-West relations.

40. The Madrid Conference has become synonymous with the excesses of the consensus regime in its decision-making structure. The Preparatory Meeting could not be completed within the allotted time span and resulted in the "Stopped Clock" phenomenon. (Restarting a clock which was stopped by consensus again requires consensus.) In addition, the incidents regarding "the Polish Chairman" and the "Night of the Silences," as well as the Maltese attempt to live up to its reputation as "troublemaker" at the very end of the Conference, have provided the Madrid Conference with the qualification "never again." See SIZOO & JURRJENS, *supra* note 13, at 18, 194-97 (*Stopped Clock*), 197-203 (*Polish Chairman*), 203-08 (*Night of the Silences*) & 242-44 (*Malta Phase*); LEHNE, *supra* note 13, at 18-22; BLOED, *supra* note 13, at 15-17.

41. The CDE was of keen interest to the Soviet Union. In view of the strong reactions of the West European public towards the 1979 Montebello decision modernization of NATO's nuclear arsenal), the CDE was perceived as an opportunity to create further divergence of views

countries emphasized the progress made on humanitarian issues and the agreements pertaining to the Conference Follow-Up.[42] Indeed, the Madrid Meeting proved to be of vital importance in continuing the East-West "dialogue" and in stimulating further progress within the framework of the HFA.

Whereas the Follow-up Conferences of Belgrade and Madrid had been dominated by the confrontation between East and West, the Third Follow-up Conference in Vienna (November 4, 1986-January 19,1989) signaled a "thaw" in East-West relations.[43] The duration of the Conference was to a large extent due to the changing nature of the traditional East-West confrontation. Moreover, the scope and implications of some proposals created a strong divergence of views among most participating States.[44] The Vienna Conference resulted

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between the United States and its NATO Allies. The Soviet proposals for a CDE were strongly supported by France, which viewed the CDE as a replacement of the MBFR Talks, from which it was absent. Amended proposals ultimately resulted in a two-stage Conference to be held in Stockholm from early 1984 onwards. See Edwards, *supra* note 34, at 60-63; Geoffrey Edwards, *The Conference on Security and Cooperation in Europe After Ten Years*, 9 INT'L REL. 397, 401-02 (1985); HERACLIDES, *supra* note 17, at 11; LEHNE, *supra* note 13, at 19-20.

42. As a result of the Madrid Conference, six meetings were agreed upon:

* The first stage of the CDE (Jan. 17, 1984-Sept. 19, 1986)
* The Athens Meeting of Experts on Peaceful Settlement of Disputes (Mar. 21-Apr. 30, 1984)
* The Venice Seminar on the Mediterranean (Oct. 16-26, 1984)
* The Ottawa Meeting on Human Rights and Fundamental Freedoms (May 7-June 17, 1985)
* The Budapest Cultural Forum (Oct. 15-Nov. 25, 1985)
* The Bern Meeting on Human Contacts (Apr. 15-May 26, 1986)

The Stockholm Conference proved to be extremely successful. LEHNE, supra note 13, at 24-28. The Ottawa Meeting resulted in complete failure. BLOED, *supra* note 13, at 19-20. Finally, the Bern Meeting resulted in an American veto of the Concluding Document. LEHNE, *supra* note 13, at 31-33.

43. As a result of policy reforms initiated by the new Soviet leadership, East-West tension decreased significantly. Summits between President Reagan and Soviet leader Gorbachev ultimately resulted in the conclusion of the INF Treaty (1987), new consideration of conventional arms control talks (CDE II and CFE) and a breakthrough in human rights issues. Bloc-to-bloc confrontation also dissipated as a result of decreasing cohesiveness within both NATO and the Warsaw Pact. (Although the lack of cohesion was more visible within the Warsaw Pact, disagreements between the United States and some of its NATO partners influenced the progress made regarding issues in Basket I.) See McGoldrick, *supra* note 8, at 136; LEHNE, *supra* note 13, at 33-54, 58-67, 107-11, 140-49. *See also* HERACLIDES, *supra* note 17, at 12.

44. This divergence was most visible in the West's response to the "Moscow Proposal" on a meeting in Moscow regarding humanitarian (Basket III) issues which was launched in the opening speech of Soviet Foreign Minister Shevardnadze on November 5, 1986. See Eduard A. Shevardnadze, Soviet Minister of Foreign Affairs, Speech at the CSCE Review Meeting in Vienna (Nov. 5, 1986), Doc. CSCE/WT/VR.3, *reprinted in* VOJTECH MASTNY, THE HELSINKI PROCESS AND THE REINTEGRATION OF EUROPE, 1986-1991 88, 92 (1992). In addition, divergent

in the adoption of extremely important documents guiding new commitments in the areas of security and human rights.[45] In addition, the Vienna Concluding Document included the mandate and organizational/procedural modalities for future CSCE Meetings.[46] Thus, the Vienna Conference could be considered

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views emerged among NATO-Allies with regard to the linkage between the CSCE and conventional arms control talks (CFE). *Id.* at 13; LEHNE, *supra* note 13, at 63-64.

45. The Concluding Document of the Vienna Meeting 1986 includes a mandate for the Negotiation on Conventional Armed Forces in Europe (CFE talks) and the Negotiations on Confidence- and Security-Building Measures (CDE II) in Basket I, the enumeration of new substantive commitments (freedom of religion, freedom of movement, security of the person, National Minorities, the Rule of Law, Human Contacts and Information) in Basket III, and the agreement on a Conference on the Human Dimension (CHD), which consists of:

(1) A supervisory mechanism for Basket III-implementation (The Moscow Mechanism),

(2) A series of Conferences set up for the purposes of:

* Review of implementation
* Evaluation of the supervisory mechanism; and
* Development of new measures to enhance effectiveness of review and monitoring.

28 I.L.M. 527 (1989) [hereinafter Vienna Concluding Document]. These Conferences took place in Paris in 1989 (no Concluding Document), in Copenhagen in 1990, 29 I.L.M. 1305 (1990), and in Moscow in 1991, 30 I.L.M. 1670 (1991). *See* BLOED, *supra* note 13, at 21-25; LEHNE, *supra* note 13, at 135-84; McGoldrick, *supra* note 8, at 137-51. For an elaborative overview of the CHD, *see* THE HUMAN DIMENSION OF THE HELSINKI PROCESS: THE VIENNA FOLLOW-UP MEETING AND ITS AFTERMATH (Arie Bloed & Pieter Van Dijk eds., 1991); R. BRETT, THE DEVELOPMENT OF THE HUMAN DIMENSION MECHANISM OF THE CSCE (1992).

46. In the Vienna Concluding Document (VCD), provisions were made for:

* The London Information Forum (Apr. 18-May 12, 1989, Annex VIII, VCD)
* The Palma de Mallorca Meeting on the Mediterranean (Sept. 24-Oct. 19, 1990, Annex VII, VCD)
* The Valletta Meeting of Experts on Peaceful Settlement of Disputes (Jan. 15-Feb. 8, 1991, Annex I, VCD)
* The Cracow Symposium on Cultural Heritage (May 28-June 7, 1991, Annex IX, VCD)
* The Bonn Conference on Economic Co-operation (Mar. 19-Apr. 11, 1990, Annex V, VCD)
* The Sofia meeting on the Protection of the Environment (Oct. 16-Nov. 3, 1989, Annex VI, VCD; No Concluding Document)
* The Vienna Negotiations on Conventional Armed Forces in Europe (Mar. 9, 1989-Nov. 1990, Annex III and IV of the VCD)
* The Vienna Negotiations on Confidence- and Security-Building Measures (Mar. 9, 1989-Nov. 1990, Annex II of the VCD)
* The Paris Meeting of the CHD (May 30-June 23, 1989, Annex X, VCD; No Concluding Document)
* The Copenhagen Meeting of the CHD (June 5-29, 1990, Annex X, VCD)
* The Moscow Meeting of the CHD (Sept. 10-Oct. 4, 1991, Annex X, VCD)

Vienna Concluding Document, supra note 45.

the epilogue of Cold War traditions and the prologue of a new era.[47]

D. *Summitry: From Paris to Helsinki II*

The beginning of a new era was heralded at the First CSCE Summit, held in Paris, November 19-21, 1990.[48] Originating from a proposal made by Mr. Gorbachev and fully supported by French President Mitterand,[49] the Paris Summit was envisaged as the start of a "New Europe," based on respect for human rights, economic liberty, market economies, political pluralism, democracy and the rule of law. In fact, this "New Europe" appeared to be a blueprint of traditional western ideas and values.[50] This blueprint was baptized as the Charter of Paris for a New Europe.

Deceptive in its conceptual simplicities,[51] the Charter of Paris nevertheless marked a significant turning point in the CSCE process. Hailed as the "Magna Carta for Europe,"[52] the Charter effectively abandoned the premises of the HFA.[53] Unprecedented institutionalization and a lack of substantive commitments formed the thrust of the new direction into which the CSCE

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47. As Soviet Foreign Minister Shevardnadze stated: "The Vienna Meeting has shaken up the Iron Curtain, weakened its rusty supports, made new breaches in it and hastened its corrosion." CSCE Doc. CSCE/WT/VR.13, quoted in LEHNE, *supra* note 13, at 133.

48. The Concluding Document of the Paris Summit, the Charter of Paris for a New Europe stated: "The era of confrontation and division of Europe has ended. . . . [H]enceforth our relations will be founded on respect and cooperation. . . . [T]he power of the ideas of the Helsinki Final Act . . . opened a new era of democracy, peace and unity in Europe." Charter of Paris, supra note 19, pmbl., at 193.

49. Mr. Gorbachev's calls for the convening of a Summit within the CSCE framework were initially met with cool responses from the West. Aimed at securing "damage control" opportunities in view of the threatening collapse of the Eastern bloc and the movement towards German reunification, Mr. Gorbachev's proposal was later regarded by the West as a convenient forum for reassessment of the "European Architecture" and the redesigning of the "European House." Strongly supported by the FRG and France, the Paris Summit proved to be the starting point for a dual process: the disintegration of existing political structures in Central and Eastern Europe (as well as the disintegration of the Soviet Union) vis-a-vis creation of new political institutions within the CSCE-framework. See MASTNY, *supra* note 44, at 24-26; McGoldrick, *supra* note 8, at 151-52.

50. McGoldrick, supra note 8, at 155.

51. MASTNY, supra note 44, at 38. Direct reference is made to the euphoric tone of the Charter and the simplicity of its assumptions regarding the spread of democracy, peace and unity in a New Europe.

52. *See* McGoldrick, *supra* note 8, at 135.

53. The premises of the HFA were, inter alia, a non-institutionalized forum for dialogue and a framework for the enumeration, implementation and review of substantive commitments in the areas of security, economics and human rights.

was being guided.[54] In short, this new direction pointed at regularized consultations at predetermined levels of participation, in conjunction with the establishment of three administrative bodies for the purpose of facilitating increased cooperation between the Participating States in particular areas.[55]

The Charter of Paris provided for the establishment of political organs and administrative bodies, the creation of a CSCE Parliamentary Assembly, and the enumeration of procedural and organizational modalities related to these provisions.[56] Detailed institutional arrangements were set out in the Charter of Paris' Supplementary Document.[57] Nevertheless, the degree of

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54. *See* Schlager, *supra* note 28, at 234.

55. *Id.*

56. *See* the third part of the Charter of Paris, "New Structures and Institutions," *supra* note 19, at 206. In view of the Charter's objectives of promoting peace, democracy and unity in Europe, the requirements of a "new quality of political dialogue and co-operation" and an intensification of consultations among the Participating States lead to the decision to:

* Establish a permanent *CSCE Summit Meeting*, to be convened at the level of Heads of State or Government on the occasion of the Follow-up Meetings. These Follow-up Meetings are to be held, as a rule, every two years and serve the purpose of "taking stock" of developments, reviewing implementation of the commitments of the Participating States and considering "further steps" in the CSCE process.
* Establish a *CSCE Council*, to be formed by the Ministers of Foreign Affairs and meeting "regularly and at least once a year." The Council meetings serve as the "central forum" for political consultations within the CSCE.
* Establish a *CSCE Committee of Senior Officials* (CSO), which is tasked to prepare the Council meetings and to carry out its decisions.
* Consider the development of an Emergency Mechanism for convening the CSO in "emergency situations."
* Establish a *CSCE Secretariat* in Prague for the purpose of providing administrative support to increased consultations among the CSCE-States.
* Create a *Conflict Prevention Centre* (CPC) in Vienna to assist the Council in "reducing the risk of conflict."
* Establish an *Office for Free Elections* (OFE) in Warsaw to "facilitate contacts and the exchange of information on elections" within Participating States.
* Call for the creation of a *CSCE Parliamentary Assembly* to further the parliamentary involvement in the CSCE.
* Provide procedural and organizational modalities in a Supplementary Document to be adopted together with the Charter.

57. *See* Supplementary Document, *supra* note 19, at 209. Adopted by consensus, the provisions of the Document stipulate:

* The position, purpose and tasks of the CSCE Council of Ministers (Section A).
* The position, purpose and tasks of the CSO (Section B).
* The possibility of an Emergency-Mechanism (Section C).
* The frequency and duration of the Follow-up Meetings (Section D).
* The tasks and staffing of the CSCE Secretariat (Section E).
* The tasks and institutional structure of the CPC (Section F)

institutionalization emerging from this Document was more noteworthy for what was being excluded than for what it included.[58] Therefore, the rapid crumbling of the realities of the Charter shortly afterwards clearly necessitated a reconsideration of the exclusionary approach.[59]

Attempts to facilitate the political changes within the new CSCE structure

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* The tasks and staffing of the OFE (Section G).
* The procedures and modalities concerning CSCE Institutions, which includes general staffing arrangements and costs (Section H).
* The use of the CSCE communication network (Section I).
* The application of CSCE Rules of Procedure (Section J).

The substantive elements of these provisions are incorporated in the analysis of Part III.

58. *Id.* The provisions of the Supplementary Document created a very loose institutional structure. The political organs were defined in relatively vague terms (e.g., the Council of Ministers was to "consider" issues "relevant" to the CSCE and take "appropriate" decisions); the CSCE Secretariat was small, subordinate to the Council and CSO, and functionally limited; the CPC was granted a limited mandate, subject to the supervision of the Council; the OFE was specifically tasked with fostering the implementation of provisions of the Document of the Copenhagen Meeting of the Conference on the Human Dimension, 29 I.L.M. 1305 (1990); and the procedures and modalities concerning CSCE institutions, in particular those relating to staffing arrangements and the position of the Institutions within the overall framework, appeared to be specifically worded to prohibit "institutional dynamics," i.e., the evolution of the Institutions into potent forces for self-sustaining development of the newly created institutional arrangements. *See* McGoldrick, *supra* note 8, at 152.

59. The first signs of trouble emerged in relation to the implementation of the provisions of the Treaty on Conventional Armed Forces in Europe, 30 I.L.M. 1 (1991) [hereinafter CFE Treaty], which had been signed by the NATO and Warsaw Pact Member-States on the occasion of the Paris Summit. Disagreements regarding the reduction of forces and equipment led to violations of the letter and the spirit of the Treaty provisions by the Soviet Union, only to be resolved in April 1991 through the adoption of a Treaty on Conventional Armed Forces in Europe: Statement Regarding Obligations Assumed Outside the Framework of the Treaty and Certain Armaments and Equipment, 30 I.L.M. 1141 (1991). Soon thereafter, Slovenia and Croatia issued Declarations of Independence, thereby effectively dissolving Yugoslavia and sparking armed conflict with Serbia. In addition, a mass exodus of Albanians to Italy resulting from political and economic anarchy in Albania focused some attention on human rights concerns in the Balkans. The most dramatic changes came in the second half of 1991: the failed August coup in the USSR; the recognition of the independence of the Baltic Republics, and the subsequent disintegration of the USSR completely restructured the political landscape. The USSR was succeeded by the Russian Federation. The Commonwealth of Independent States (CIS) was created, the Warsaw Pact and COMECON were dissolved, and the CSCE grew from 35 to 38 Participating States (German Unification in October 1990 had reduced the number of States to 34; Albania was admitted in June 1991, and Lithuania, Latvia and Estonia were admitted on September 10, 1991). See McGoldrick, *supra* note 8, at 143-45; MASTNY, *supra* note 44, at 38-42; Weller, *supra* note 6, at 569-70. For the text of the CIS Agreement, *see* Council of Europe: Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 30 I.L.M. 148 (1991).

were made at numerous occasions, of which the Berlin Meeting of the Council of Ministers (June 1991) and the Moscow Meeting of the Conference on the Human Dimension (CHD, September 1991) were the most significant.[60] The Berlin Meeting marked the first occasion at which the Council of Ministers could initiate steps to clarify its own position within the CSCE structure. This was only partly achieved. The adoption of a Mechanism for Consultation and Co-operation With Regard to Emergency Situations, the admission of Albania as its 35th Participating State, and the endorsement of the Valletta Mechanism were the only significant decisions taken by the Council.[61] Matters relating to the further development of CSCE structures were relayed to the CSO, with a request for recommendations for the next Council Meeting.[62]

The Moscow Meeting of the CHD provided an additional opportunity

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60. Apart from these two meetings, the VCD had provided for, inter alia, a Meeting of Experts on the Peaceful Settlement of Disputes, to be held in Valletta, January 15-February 8, 1991. In addition, the Charter had set a Meeting of Experts on National Minorities, to be held in Geneva, July 1-19, 1991. The Valletta Meeting produced the so-called Valletta Mechanism, which was characterized by a compulsory dispute settlement procedure regarding the initiation of the Mechanism, as well as a safety-clause limitation on the applicability of compulsory initiation. The Geneva Meeting was illustrative for the deep division among CSCE States regarding minority rights. Illuminating the sharp differences between the individual rights approach and the collective group rights approach, the Meeting achieved little in terms of substantive elaboration of normative commitments. Nevertheless, it was considered to be important in view of the situations in Rumania and Kosovo. For the text of the Valletta Report, *see* Conference on Security and Co-operation in Europe: Report of the CSCE Meeting of Experts on Peaceful Settlement of Disputes, 30 I.L.M. 382 (1991). *See also* HERACLIDES, *supra* note 17, at 16; MASTNY, *supra* note 44, at 39. The text of the Geneva Report can be found at 30 I.L.M. 1692 (1991). *See also* MASTNY, *supra* note 44, at 42-43; HERACLIDES, supra note 17, at 17.

61. The adoption of an Emergency Mechanism had been impossible at the Paris Summit; the subsequent unraveling of the political foundations of the Charter not only necessitated such a Mechanism, it also provided the necessary political leverage for creating one. Thus, this so-called Berlin Mechanism appeared to be in direct response to the ominous developments on the Balkans. Apart from its political significance, the Mechanism marked a fundamental change in the CSCE decision-making procedures. Setting aside the sacrosanct principle of consensus, the Mechanism provides for its initiation by a limited number of States (12 or more). However, the Meeting thus convened can only discuss the crisis and possibly adopt recommendations (by consensus!) without acting upon them, or request the convening of a Meeting at ministerial level. Political sensitivities have already demonstrated the limitations of the Mechanism. See Summary of Conclusions of the Berlin Meeting of the Council, Including Arrangements for Consultation in Emergency Situations and Peaceful Settlement of Disputes, 30 I.L.M. 1348, 1353 (1991) [hereinafter Summary of Conclusions]; Robert Mauthner, *CSCE Crisis-Management Mechanism Scrapes Through*, FIN. TIMES, July 6, 1991.

62. The second Council Meeting was to be held in Prague on January 30-31, 1992. See Summary of Conclusions, *supra* note 61, at 1350-51, ¶¶ 13-14, 20.

to adapt the CSCE structures to the realities of the day.[63] The admission of the Baltic States to the CSCE constituted an implicit acknowledgement that the HFA's premise of territorial status quo had become obsolete and proved indicative of future expansion of the CSCE.[64] Moreover, the admission of the Baltic Republics signaled the necessity for a thorough review of decision-making procedures. With the increasing number of Participating States, the "classic" rule of consensus became proportionally cumbersome. The consensus rule provided a serious obstacle to the creation and functioning of an "effective" and "operational" CSCE and, therefore, became subject to review.

The departure from the rule of consensus was only slight, being strictly limited to the so-called Moscow Mechanism and specified for a few situations only.[65] Nevertheless, the Moscow Meeting revealed the changing views and attitudes of Participating States on the proper role for the CSCE and generated fresh debate on the eve of the second Meeting of the Council of Ministers.[66] This debate was closely related to the deteriorating situation in the former Yugoslavia and the inability of the international community

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63. The Moscow Meeting took place September 10-October 4, 1991, against the background of a fast-changing political scene in the USSR and Yugoslavia. See Moscow Report, 30 I.L.M. 1630 (1991).

64. The CSCE admitted ten States at the Prague Council Meeting in January 1992. All of them were former Soviet Republics: Armenia, Azerbaijan, Belarus, Kazakhstan, Kirgistan, Moldova, Tajikistan, Turkmenistan, Ukraine and Uzbekistan. In addition, Slovenia and Croatia were admitted as observers. In March 1992, the CSO admitted them as Participating States, together with Georgia. Bosnia-Herzegovina was admitted in April 1992. See HERACLIDES, *supra* note 17, at 42-44; MASTNY, *supra* note 44, at 44.

65. The Moscow Mechanism comprises three distinct processes, designed to deal with issues related to the Human Dimension of the CSCE:

(a) A voluntary mechanism for assistance by a mission of experts;

(b) A mandatory mechanism for initiation of a Rapporteurs mission, to be requested by at least six Participating States; and

(c) A "Super"-mandatory mechanism for addressing "serious threats," to be requested by at least ten Participating States.

The Moscow Mechanism has been described as "cumbersome" and "baroque," and it has only been used a few times (Croatia and Estonia in 1992; Moldova in 1993). For a concise description of the Mechanism, see McGoldrick, *supra* note 8, at 149-51; H.J. Hazewinkel, *Paris, Copenhagen and Moscow, in* Bloed and Van Dijk, *supra* note 45, at 128-42; and BRETT, *supra* note 45.

66. One of the most striking examples of a changing attitude towards the CSCE was the German position. Its advocacy for international intervention on the basis of serious human rights concerns was sharply defined by Foreign Minister Genscher in his Opening Speech and went beyond the common position of the Twelve EC Member States. Germany's position was in line with Soviet views, but strongly divergent from the British, French and American views. See Opening Speech by Hans-Dietrich Genscher, FRG Minister of Foreign Affairs, on the occasion of the CSCE Conference on the Human Dimension, in Moscow (Sept. 10, 1991), *reprinted in* MASTNY, *supra* note 44, at 320-22.

to provide for a political solution to the conflict.[67]

In a larger perspective, the Moscow Meeting illustrated the need for rethinking the underlying premises of the Helsinki process. Its all-inclusiveness, both in terms of participation and areas of concern, had been its largest asset since the very beginning. By 1991, however, all-inclusiveness was either an illusion or an obstacle. Further institutionalization of the process could make it into a competitor with other entities (NATO, EC, ECE and the Council of Europe), or even worse, an irrelevant duplicator of sorts. On the other hand, no further institutionalization might condemn the CSCE to the backyard of the New Europe. The road not taken could thus become more than just an unexercised option. Indeed, it could very well become a faint glimpse of a viable future security concept. The answers were to be provided at the Second CSCE Summit in Helsinki, July 1992.

III. FROM HELSINKI-II TO BUDAPEST: THE CSCE AS AN INSTITUTION

A. *Introduction*

The Prelude to the Helsinki-II Follow Up Meeting of July 1992, took place in Prague. The Second CSCE Council Meeting convened January 30-31, 1992, in order to set the guidelines for the Helsinki Preparatory Meeting which would precede the Helsinki Summit.[68] In hindsight, the Prague Council can be regarded as the testing ground for the Helsinki Summit. Several issues on which no agreement could be reached were to be of a similar obstructive character at the Helsinki Summit.[69] Other issues were dealt with at a

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67. The CSCE remained largely ineffective in the initial stages of the conflict between Slovenia, Croatia, and Serbia, despite efforts by the newly active CSO to provide for a good offices mission and to assist the European Community in its efforts to broker a cease-fire, and possibly a peace-agreement. Sharply worded declarations did not resort any effect at all. A year later, when Bosnia-Herzegovina became the scene of conflict, unabated and widespread violations of CSCE commitments by Bosnian Serb forces (strongly supported by the Serbian government), resulted in the indefinite suspension of the Federal Republic of Yugoslavia (i.e., Serbia-Montenegro). The legal basis for this unprecedented action was found in the Prague Document on Further Development of CSCE Institutions and Structures, 31 I.L.M. 976, 989-90, ¶ 16 (1992) [hereinafter Prague Document] (which authorizes "appropriate action" by the Council or CSO, if necessary "in the absence of consent of the State concerned," in cases of "clear, gross and uncorrected violations of relevant CSCE commitments"). For a very detailed overview of CSCE involvement in the Balkan conflict, see Weller, *supra* note 6, at 570-77, 596-600.

68. The Helsinki Preparatory Meeting took place March 10-24, 1992, and was set up for the preparation of the Fourth Follow-Up Meeting, to be held March 24-July 8, 1992.

69. E.g., the CSCE in peacekeeping and the creation of a Court of Arbitration and Conciliation. *See* HERACLIDES, *supra* note 17, at 29.

remarkable rate of progress.[70] Most important, however, seems to have been the stage-setting character of the Prague Council Meeting.

Convened against the background of a deteriorating situation in the Yugoslav conflict, the ongoing fighting over the enclave of Nagorno-Karabakh, the new position of Russia in the European security context and the growing anticipation of more ethnic, economic and political trouble to come, the Prague Council Meeting made decisions which seemed to abandon some of the premises of the HFA in favor of a more pragmatic approach. Through the admission of ten new Republics which had been part of the former Soviet Union,[71] as well as the admission of Croatia and Slovenia as observers, the CSCE appeared to let State succession and self-determination prevail over the Principle of inviolability of frontiers.[72] Moreover, it included at least several non-European participants for fear of creating a potential source of conflict if they were left out.[73]

The Prague Council also adopted a Document on the Further Strengthening of CSCE Institutions and Structures.[74] By doing so, it elaborated the mandates of the Committee of Senior Officials (CSO), the Conflict Prevention Centre (CPC), the Office for Free Elections (which was at the same time renamed into the Office for Democratic Institutions and Human Rights, ODIHR), adopted the Consensus-Minus-One principle,[75] created an Economic Forum[76] and set forth requests for further study on both the strengthening of the CSCE structure and the development of an operational capability.[77] The former will be discussed in this part, whereas the latter will be subject to scrutiny in Part II.

B. *The Strengthening of CSCE Institutions and Structures*

1. *General Observations*

Several main trends emerged in the months between the Prague Council

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70. E.g., the admission of new Participating States, the adoption of the Consensus-Minus-One Rule. *Id.*

71. The newly admitted States were Armenia, Azerbaijan, Belarus, Moldova, Ukraine, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan.

72. *See* HERACLIDES, *supra* note 17, at 28.

73. The Republics concerned (Kyrgyzstan, Tajikistan, Turkmenistan, Kazakhstan, Turkmenistan and Uzbekistan) were considered "easy prey" for Islamic fundamentalism from Iran. *Id.*

74. Prague Document, *supra* note 67, at 976.

75. *Id.* at 989-90, ¶ 16.

76. *Id.* at 990, ¶¶ 18-20.

77. *Id.* at 991, ¶¶ 21-25.

Meeting and the Helsinki Summit. Contrary to the earlier Follow-Up Meetings, there was no longer a strict bloc-to-bloc confrontation. Traditional East-West division was replaced with internal discord among the Western ranks, particularly among the E.C.[78] The disappearance of the bloc structure also led to the dissolution of the Warsaw Pact and the Non-Aligned "Caucuses."[79] In addition, new informal consultation groups surfaced, but they appeared to be much less influential than the traditional ones had been prior to the dissolution.[80]

Three major and fundamental differences in views surfaced during the Helsinki II negotiations. First, there was the "process" versus the "organization" approach. This related closely to a second difference between the legal and the quasi-legal line of development. Third, there was the fear of smaller Participating States that the granting of operational capability to the CSCE would render it effective to such an extent that the CSCE could establish itself de facto as a directorate of Great Powers, thereby in effect abandoning the CSCE Principle of sovereign equality.[81] In addition to intra-conference dynamics, a lack of leadership, internal discord and external distractions contributed to making the Helsinki Summit a mixed success. Indeed, shortly after the Helsinki Summit had been concluded and the United Kingdom had started its six-month shift in the Presidency of the European Community, there would be a reconsideration of the (lack of) achievements of the Helsinki Summit. Significant decisions left out at the Helsinki Summit would be made at the Stockholm Council Meeting (December 14-15, 1992) and the Rome Council Meeting (December 1-2, 1993).

On the basis of the Prague Document, the Helsinki Decisions have created a more coherent institutional framework. Nevertheless, what has emerged from the negotiations after three months of strenuous activity in the two bodies concerned with these issues, Working Group I (WG I) and the plenary Committee of the Whole (COW),[82] is neither a process nor a legal entity. Instead,

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78. Arie Bloed, *Helsinki-II: The Challenges of Change*, 3 HELSINKI MONITOR 37, 38 (1992). *See also*, HERACLIDES, *supra* note 17, at 33-37.

79. The meetings of NATO Member States and Warsaw Pact countries to coordinate their respective viewpoints initiated these caucuses; they were soon followed by the NNA's; the Member States of the European Communities coordinated their positions within the framework for European Political Cooperation.

80. New informal consultation groups were formed, *inter alia*, by the Visegrad Countries, between the Visegrad and Benelux States, and between the Pentagonale / Hexagonale countries. *See* Bloed, *supra* note 78, at 38.

81. For a detailed description of virtually every Participating State's position, *see* HERACLIDES, *supra* note 17, at 33-38, 45-62.

82. The Helsinki Preparatory Meeting set the framework for the negotiations on the Decisions. After considerable discussion, four Working Groups were set up to deal with a variety of tasks. Working Group I received a mandate for:

it appears to have been granted a hybrid character. To some extent, its institutional structure meets the characteristics of an intergovernmental international organization (IGO),[83] and to another extent, it remains a half-hearted attempt at creating a modern, flexible entity suited to the needs of its Participating States. A brief review of the organs and institutions will illustrate this point.

2. *Summits and Review Conferences*

The Helsinki Decisions have codified the CSCE's learning experience through Follow-Up Meetings and Review Conferences. The long duration of the Madrid and Vienna Meetings can be considered as the sparking flame for the provision that Review Conferences will be "operational and of short duration."[84] In practical terms, this requires a solid, comprehensive and manageable agenda, dedicated to a review of the entire range of activities within the CSCE (including a thorough implementation debate) and the preparation of a decision-oriented document to be adopted at the Meeting of the Heads of State or Government.[85] The Summit Meetings are to be held once every two years on the occasion of the Review Conferences.[86] Accordingly, these Summit Meetings will set priorities and provide orientation at the highest political level.[87] In practical terms, this means setting the guidelines for the political direction which the Council or the CSO is expected to take and leaving the actual decision-making to these political organs.

> Questions relating to the further development of CSCE institutions and structures, including the political consultation process, the decision-making process, mechanisms, crisis management and conflict prevention instruments, including peaceful settlement of disputes, legal, financial and administrative arrangements, relations with international organizations, relations with Non-Participating States, and the role of NGO's.

The Four Working Groups were to submit their draft texts to the plenary session, called the Committee of the Whole; its acronym COW subsequently became its trademark. *Id.* at 40-41.

83. It could be argued that a modern-day, full-fledged Intergovernmental Organization has an effective decision-making structure, a division of functions and tasks, political organs and administrative organs, policy-instruments and financial support. The CSCE meets most of these criteria. *See* Bryan Schwartz & Elliot Leven, *What Makes International Organizations Work?*, 30 CAN. Y.B. OF INT'L L. 165, 167 (1992).

84. Helsinki Decisions, *supra* note 15, at 1394, ch. 1, ¶ 4.

85. *Id.*

86. *Id.* ¶¶ 2-3.

87. *Id.*

3. *Political Organs*

a. *The CSCE Council*

The CSCE Council constitutes the central decision-making and governing body of the CSCE.[88] It is formed by the Ministers of Foreign Affairs, who are collectively endowed with the task of ensuring that the various CSCE activities relate closely to the central political goals of the CSCE.[89] As such, the Council acts as an intermediary between the political orientation provided by the Summit Meetings and the implementation of these guidelines by the CSO. The Council convenes at least once a year.[90] This seems extremely contradictory to its purported position within the decision-making framework, since its lack of regularity leaves much of the actual decision-making in the hands of the CSO. On the other hand, Ministers may have the opportunity to do CSCE business *en marge* of other consultations, or may initiate emergency meetings if deemed necessary. Thus, the lack of regularity in the Council meetings is not *per se* to the disadvantage of the CSCE.

b. *The Committee of Senior Officials*

The Committee of Senior Officials (CSO) carries responsibility for the overview, management and coordination of CSCE action between Council Meetings, and acts for all practical purposes as the Council's agent in making appropriate decisions.[91] The CSO serves its primary role in the context of crisis management.[92] In addition, it has a role in relation to the Coordinating Committee of the Conflict Prevention Centre (CC/CPC), or as Economic Forum.[93] It does not present a permanent forum for decision-making, although it is probably the component which meets the most frequently within the overall decision-making framework.[94] Though acting as an agent to the Council, the CSO has a significant margin of discretion, which allows it to play a prominent role within the political structure of the CSCE. In particular, its

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88. *Id.* ¶ 6.

89. *Id.* ¶ 7.

90. BLOED, *supra* note 13, at 40.

91. Helsinki Decisions, *supra* note 15, at 1394, ch. 1, ¶ 9.

92. *Id.* at 1399-1400, ch. 3, ¶¶ 6-11.

93. *See* BLOED, *supra* note 13, at 40.

94. Since its first meeting on January 28-29, 1991, the Committee of Senior Officials (CSO) has met 27 times. Its most recent meeting took place in Prague (seat of the CSCE Secretariat), June 13-15, 1994. *See* 27-CSO/Journal No. 3 (June 15, 1994), *reprinted in* 5 HELSINKI MONITOR 81 (1994). *See also* Arie Bloed, *CSCE Chronicle: CSO on Crises in CSCE Area*, 5 HELSINKI MONITOR 69 (1994).

role in conflict prevention and crisis management through the use of a range of instruments has become a focal point of attention.

c. *The Chairman-in-Office*

The Chairman-In-Office is modelled after the Presidency of the European Communities (the present European Union) and has been developed in practice to create better coordination between decisions of the CSO and actions by the Participating States.[95] With the Helsinki Decisions, its role has become more formalized and stronger. However, the CIO may be assisted in the performance of his tasks by:

* The preceding and succeeding Chairmen, operating together as a Troika
* Ad hoc steering groups
* Personal representatives, if necessary

The Troika concept is another element that has been taken from the experience of the European Communities through the European Political Cooperation. The assistance to be rendered by *ad hoc* steering groups is a novum to the CSCE, especially since they are closely related to the provisions on conflict prevention, crisis management and dispute resolution and may be established on a case-by-case basis.[96] Such an *ad hoc* steering group will be composed of a restricted number of Participating States, with the obligatory involvement of the Troika.[97] Furthermore, its size and composition will be decided based on the need for efficiency and impartiality.[98] In hierarchical terms, the *ad hoc* steering group will be under the supervision of the Council/CSO. The CIO is expected to report to the CSO, regularly and comprehensively, on the activities of the *ad hoc* steering group.[99]

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95. The first Chairman-in-Office (CIO) was Germany, in the person of then Foreign Minister Genscher. He held the position from November 1990 to January 1992. At the Prague Council Meeting, Czechoslovakia took over. Between the Third and Fourth CSCE Council Meeting, Sweden held the CIO. Since the Council Meeting of Rome (December 1993), Italy has been CIO. *See* BLOED, *supra* note 13.

96. Helsinki Decisions, *supra* note 15, at 1395, ch. 1, ¶¶ 16-21.

97. *Id.* ¶ 19.

98. *Id.*

99. *Id.* ¶ 21.

4. *Decisions regarding Administrative Organs*

The major failure of the Helsinki Summit was its inability to create the function of Secretary-General, which had been proposed by Belgium.[100] Related to the general dislike of too much bureaucratization within the CSCE, proposals in this regard were rejected, only to be revived after the adoption of the Helsinki Decisions.[101] Indeed, even with regard to the existing administrative organs (strictly speaking only the CSCE Secretariat in Prague, but to some extent the CPC and ODIHR as well) no other decision could be taken but for a request to the CSO to study ways and means of enabling the three institutions to better accomplish their objectives.[102]

In this respect, the suggestion was offered to grant an internationally recognized status to the three organs.[103] At that stage, the three were simply legal entities under the domestic laws of the Host-States (Czech, Poland and Austria) for the purpose of their functions.[104] Decisions were taken however, in regard to the expansion of the roles of the CPC in the newly created Security Forum, and the ODIHR in the Human Dimension (including the Human Dimension Mechanism).[105]

5. *Other Institutions and Structures*

a. *The CSCE High Commissioner On National Minorities*

The establishment of a High Commissioner on National Minorities (HCM) is closely related to the development of the CSCE's operational capability.[106] The HCM's primary task is to provide "early warning" and, as appropriate, "early action" at the earliest possible stage in regard to tensions involving minority issues that have the potential to develop into a conflict within the CSCE area, and to affect peace, stability, or relations between Participating

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100. According to the Belgian proposal, the position of the CSCE Secretary-General (CSCE SG) would be closely modelled upon the position of the U.N. Secretary-General. As such, the CSCE SG would have the possibility to engage in political consultations. *See* HERACLIDES, *supra* note 17, at 36, 46 & 84.

101. The issue sparked prominently on the agenda of the next Council Meeting in Stockholm. *Id.* at 180-85.

102. Helsinki Decisions, *supra* note 15, at 1395, ch. 1, ¶¶ 24-25.

103. *Id.* ¶ 25.

104. *See* HERACLIDES, *supra* note 17, at 113-14.

105. Helsinki Decisions, *supra* note 15, at 1404-13, chs. 5-6.

106. *See* Helsinki Decisions, *supra* note 15, at 1396-97, ch. 2, ¶¶ 2-7. *See also* BLOED, *supra* note 13, at 47-49; HERACLIDES, *supra* note 17, at 100-05, 220-25.

States.[107] The High Commissioner's mandate does not cover violations of CSCE commitments with regard to an *individual* person belonging to a national minority, but to a *situation* involving minorities.[108] The HCM works under the *aegis* of the CSO,[109] which implies a larger measure of discretion than being an agent of the CSO. The HCM can collect information from a variety of sources and can draw upon the facilities of the ODIHR in Warsaw.[110] The HCM has been in function since 1992.

b. *The CSCE Parliamentary Assembly*

The Parliamentary Assembly resulted from initiatives following the adoption of the Charter of Paris; it held its first meeting in Budapest, July 3-5, 1992. The resulting Document, the Budapest Declaration, appeared to embrace the efforts to strengthen the role of the CSCE and to give it a legal basis.[111] Its purpose is the encouragement of active dialogue with the Council, possibly through the assistance of the CIO.[112] The Parliamentary Assembly also created a permanent secretariat, to be temporarily located in Copenhagen.[113] Notwithstanding the initial positive reactions of the Participating States to the establishment of the Assembly,[114] its creation as well as its actual recommendations have become subject to strong criticism.[115]

C. *Decision-Making: Consensus-Minus-One and Consensus-Minus-Two*

From its earliest days, the CSCE has been synonymous with sacrosanctity

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107. Helsinki Decisions, *supra* note 15, at 1396, ch. 2, ¶ 3.

108. *Id.* ¶ 5c.

109. *Id.* ¶ 2.

110. *Id.* ¶¶ 10, 23-26.

111. *See* BLOED, *supra* note 13, at 50. *See also* ARIE BLOED, THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE: ANALYSIS AND BASIC DOCUMENTS 1972-1993 116-18 (1993).

112. *See* Final Resolution Concerning The Establishment of the CSCE Parliamentary Assembly, 30 I.L.M. 1344 (1991). *See also* BLOED, *supra* note 13, at 50.

113. *Id.*

114. *See* Helsinki Summit Declaration, *supra* note 9, ¶ 41.

115. On the work of the Assembly, *see* T. Buschsbaum, *The 1993 Session of the CSCE Parliamentary Assembly*, 4 HELSINKI MONITOR 26 (1993). The criticism is directed at the Assembly's isolated position (no linkage to other, already existing European institutions) and its "irresponsibility" in tending to "decide hastily with hazardous majorities on fundamental issues." *See* Emmanuel Decaux, *CSCE Institutional Issues at the Budapest Conference*, 5 HELSINKI MONITOR 18, 20 (1994).

when it comes to its decision-making process.[116] Consistent with the view that the CSCE's primary function was to serve as a forum for political dialogue, without the legal restraints of institutionalization, the guiding principle on which the CSCE has rested since the adoption of the HFA has been the souvereign equality of the Participating States.[117] Accordingly, decision-making has always been premised on the rejection of (qualified) majority regimes.[118] Instead, the HFA has enshrined the principle of consensus as the basis for decision-making within the CSCE context.[119]

Until the adoption of the Charter of Paris, consensus remained generally unchallenged. With the sweeping changes in the political and security architecture of the European continent came the realization that the developments which required a change of vision also required a change in action. In other words, attempts to enhance the CSCE's role in the New Europe by gradually changing its character from a forum for dialogue to an active participant in

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116. The CSCE's decision-making process has been viewed as the ultimate combination of three competing elements in the approach to international decision-making: the equalitarianism of traditional law, the majoritarianism of democratic philosophy, and the elitism of European Great Power diplomacy. As such, it is a "hybrid phenomenon of contemporary international diplomacy . . . primarily aimed at avoiding confrontations." *See* SIZOO & JURRJENS, *supra* note 13, at 41-42.

117. *See* Principle No. I of the *Declaration on Principles*, *supra* note 28.

118. One commentator stated at the outset of the CSCE process:

> Majority decisions must be ruled out in view both of the nature of a conference and also of the numerical imbalance between the NATO and the Warsaw Pact countries. Decisions would therefore have to be reached by consensus or, if formal votes were to be held, by unanimity based on each country casting one vote: consensus would obviously be more flexible.

SIZOO & JURRJENS, *supra* note 13, at 41.

119. The rule of consensus has been stipulated in the Blue Book, Chapter VI, rule no. 69: "Decisions of the Conference shall be taken by consensus. Consensus shall be understood to mean the absence of any objection expressed by a Representative and submitted by him as constituting an obstacle to the taking of the decision in question." The specific formulation of this rule illustrates the advantage of consensus over unanimity; it excludes an outright power of veto, while at the same time safeguarding the possibility of objection. The consensus rule has been stretched to its limits by Malta during the first years of the CSCE's existence, and taken into the realm of ridicule at the Madrid Follow Up Meeting. However, the incidents mark the exception rather than the rule. Moreover, the effects of the consensus rule are mitigated by the provision of rule no. 79, which states: "Representatives of States participating in the Conference may ask for their formal reservations or interpretative statements concerning given decisions to be duly registered by the Executive Secretary and circulated to the Participating States. Such Statements must be submitted in writing to the Executive Secretary."

This possibility does not, however, exclude the concerned State from its responsibility to comply with a given decision. *See* SIZOO & JURRJENS, *supra* note 13, at 57-63. *See also supra* note 40.

the redefining of the European security structure had to be accompanied by a revision of the decision-making process if the attempts were to be successful. Thus, the Berlin Council Meeting considered suggestions for a change to the principle of consensus and came up with a strictly defined, extremely limited diversion from the consensus rule.[120]

Nevertheless, the adoption of this exception to the consensus principle marked a cautiously phrased turning point. The Moscow Meeting of the Conference on the Human Dimension later that year expanded the scope of the Berlin Council's decision to mandatory mechanisms within the Human Dimension.[121] The Prague Document on Further Development of the CSCE Institutions and Structures, however, signalled the real break with the consensus rule and a departure from its underlying premise of consistency with the Decalogue of Principles.[122] Partially enforced by the circumstances of the moment, the Prague Council Meeting set the stage for subsequent action by the CSO on the basis of this new Consensus-Minus-One rule.[123]

In view of the Helsinki Decisions and its aim of rendering the CSCE in an operational capacity, it has been interesting to observe recent trends related to this aspect. From a theoretical point of view, "operationalization" and "effectiveness" seem to be inconsistent with retaining the consensus-based decision-making structure. Yet this has been the case so far. The principle of consensus has remained in effect for initial decisions on CSCE actions, but the practical implementation of these decisions has become a matter of delegation.[124] Thus, the consensus rule is maintained for politically sensitive and substantive decisions for the sake of appearance, whereas it is circumvented on the practical level for the sake of effectiveness. Notwithstanding the relatively recent addition of the Consensus-Minus-Disputants rule, which has been qualified as the Consensus-Minus-Two rule, the practice of decision-making within the CSCE has thus far prevented a ride on the slippery slope to majority rule.[125]

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120. *See supra* note 61.

121. *See* McGoldrick, *supra* note 8, at 149-51.

122. *Id.* at 163.

123. Reference is made to the decisions taken by the CSO regarding the suspension of Serbia/Montenegro from the CSCE. *See* Arie Bloed, *Helsinki II: The Challenges to Change*, 3 HELSINKI MONITOR 37, 49 (1992); McGoldrick, *supra* note 8, at 161-62; HERACLIDES, *supra* note 17, at 84.

124. A clear example of this has been the establishment of the Minsk Group for the purpose of reaching a negotiated settlement in the conflict involving the CIS Republics of Armenia and Azerbaijan, which both became Participating States of the CSCE in January 1992. The Minsk group consists of the Participating States which make up the Troika, both Republics and six other CSCE States, including the United States and Russia. *See* HERACLIDES, *supra* note 17, at 43-44.

125. *See* McGoldrick, *supra* note 8, at 163; HERACLIDES, *supra* note 17, at 179-80.

D. *Further Institutionalization: Problems Ahead*

1. *The Stockholm Council Meeting*

In the aftermath of the Helsinki Summit, only a few Member-States realized that, as a collective, the EC had lost the proper momentum to advance some long-term proposals on the institutionalization of the CSCE.[126] Thus, given the external developments that the Participating States were facing, and the more subjective perception of failure under the Portuguese Presidency, the British Presidency of the EC renewed the debate on further institutionalization.[127] It received surprising support from Poland with regard to many of its proposals.[128]

Noting three main obstacles to the effective functioning of the CSCE in crisis management, the United Kingdom launched a very detailed set of proposals to remedy each shortcoming in the Helsinki Decisions. With regard to the absence of a permanent political forum, suggestions were made for a Permanent Forum of Representatives or a European Security Council. The existence of a weak and divided secretariat provided the impetus for rehabilitation of the Belgian proposal of a Secretary-General and the call for unifying the Warsaw, Prague and Vienna-based organs into one entity with international legal status.[129] In addition, the continued applicability of the consensus rule for substantive decisions provoked a suggestion to alter the consensus rule. Finally, proposals were introduced for an Executive Committee (Super-steering committee) and for reassessment and restructuring of the CSCE's financial basis.[130]

Polish proposals further clarified the position of the Permanent Executive body as a subsidiary to the CSO and the position of the CSCE Secretary-General to reflect some of the features of the position of the U.N. Secretary-General. These suggestions were incorporated in the EC Draft text submitted to the Third CSCE Council Meeting in Stockholm, December 14-15, 1992. The single most important feature of the proposed Secretary-General position was the grant of political authority. It was suggested that the Secretary-General should be able to bring to the attention of the Council of the CSO (via the CIO) "any matter which in his opinion may threaten the maintenance of peace

126. For a detailed review of the course of events leading up to the Stockholm Council Meeting, *see* HERACLIDES, *supra* note 17, at 180-85.

127. *Id.* at 181-82.

128. *Id.* at 183. The British proposals were first submitted to its EC Partners barely a month after the conclusion of the Helsinki Summit. The Polish proposals started circulating by mid-November and bore a striking resemblance to the EC approach.

129. *Id.* at 182.

130. *Id.*

and security in Europe."[131]

This position proved untenable at the Stockholm Meeting; the mandate for the Secretary-General was weakened substantially, and no permanent forum of Representatives was created.[132] On the other hand, the office of the Secretary-General itself was established; the CSCE and CPC Secretariat were joined in one organizational structure, and provisions were made for further strengthening of the Secretariats. The Secretary-General was appointed a few months later.[133]

2. *The Rome Council Meeting*

The Fourth CSCE Council Meeting in Rome on December 1-2, 1993, marked another stage in the institutional development of the CSCE. Based on recommendations submitted by the CSCE ad hoc Group of Legal and Other Experts to the CSO,[134] the Council adopted a decision on legal capacity and privileges and immunities in relation to the CSCE.[135] It recommended, inter alia, that CSCE Participating States confer legal capacity on CSCE Institutions in accordance with the provisions adopted by the Ministers, subject to respective nations' constitutional, legislative and related requirements. In similar terms, it suggested that privileges and immunities be conferred on CSCE Institutions, Permanent Missions of the Participating States, Representatives of the Participating States, CSCE Officials, and members of the CSCE Missions. Finally, the Council suggested that CSCE Identity cards may be issued.[136]

In general, the legal capacity conferred upon the CSCE Secretariat, the ODIHR, and any other CSCE institution determined by the Council is limited to the extent that it is functional.[137] As such, it is similar in legal capacity to any full-fledged international organization. In addition, the privileges and

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131. *Id.* at 184.

132. However, it should be noted that the Council instructed representatives of the CSCE Participating States to meet regularly in Vienna. This resulted in the creation of the CSO Vienna Group, which, as a rule, would meet weekly. BLOED, *supra* note 111, at 113.

133. HERACLIDES, *supra* note 17, at 184-85. *See also* CSCE Council Summary of Conclusions of the Stockholm Meeting, 32 I.L.M. 603 (1993).

134. These proposals were drafted as a result of a request submitted at the Stockholm Council Meeting. They were submitted to the CSO at its 24th Meeting.

135. *See CSCE and the New Europe—Our Security is Indivisible*, CSCE Doc. CSCE/4-C/Dec.2., 1993.

136. *Id.* Annex 1.

137. Legal capacity is conferred "as is necessary for the exercise of their functions, and in particular the capacity to contract, to acquire and dispose of movable and immovable property, and to institute and participate in legal proceedings." *Id.* Annex 1, ¶ 1.

immunities are closely modelled on the provisions of the U.N. General Convention on Privileges and Immunities (1946).[138] It may be claimed, therefore, that these provisions, taken together, appear to push the CSCE across the line from a non-legal entity to an International Organization *in statu nascendi*. The Council's decision to strengthen its organizational structure through the creation of a Permanent Council, which would be located in Vienna and serve as a permanent forum of consultation for representatives of the Participating States, closely fits this pattern of further institutionalization.[139]

3. *The "Joint Agenda For Budapest": New Initiatives and Old Proposals*

Although the decisions taken at the Rome Council Meeting may be indicative of the CSCE's change in character, some Participating States view the current organizational and decision-making structure as a main contributing factor to a perceived lack of credibility. Hence, The Netherlands and Germany drafted the Joint Agenda For Budapest.[140] With the stated purpose of enhancing the effectiveness of the CSCE in conflict prevention, the Agenda includes a set of remarkable proposals aimed at the organizational structure

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138. The General Provisions of the CSCE Document hold, *inter alia*, that privileges and immunities are accorded in the interests of the CSCE institutions, and for the safeguard of independent exercise of function in relation to individuals. A waiver of immunity can be granted by the Secretary-General in consultation with the CIO or by the CIO itself. The Government may waive immunities for its Representatives. The specific provisions include, *interalia*, the stipulation that CSCE institutions, their property, and assets, will enjoy the same immunity from legal process as is enjoyed by Foreign States. This implies that the CSCE is perceived as an international organization. Its premises are inviolable (This would apply at least to the CPC in Vienna, the Secretariat in Prague, and the ODIHR in Warsaw), and its property and assets are to be immune from search, requisition, confiscation, and expropriation. Its archives are inviolable; there can be no restrictions on the CSCE funds and transfer of currency; there is to be a direct tax exemption; and in their official communications, CSCE institutions are to be accorded the same treatment as that accorded to diplomatic Missions. The document details the privileges and immunities to be accorded to Permanent Missions of the Participating States, Representatives of the Participating States, CSCE Officials (which are similar to diplomatic status) and Members of CSCE Missions (this could be any kind of Mission established by one of the CSCE's decision-making bodies) or Personal Representatives of the CIO. In addition, the CSCE may issue a CSCE Identity Card to persons on official duty travel for the CSCE. This is also modelled on U.N. practice. In all respects, these explicit stipulations suggest that the CSCE may be viewed as an Organization *in statu nascendi*. *Id.* Annex 1, at 1-8.

139. The Permanent Council has replaced the CSO Vienna Group.

140. The Joint Agenda For Budapest was presented by the Ministers of Foreign Affairs of both states at a meeting of the CSCE Permanent Committee on May 17, 1994. *See* Decaux, *supra* note 115, at 19.

and decision-making powers of some of the CSCE's organs.[141] An extension of the Consensus-Minus-Two rule also is suggested.[142]

The extraordinary character of these proposals revolves around their origin rather than their content. The suggestion of a broader mandate for the CSCE Secretary-General is similar to previous Polish proposals, which had been incorporated in the EC Draft text submitted to the 1992 Stockholm Council Meeting (and which failed to succeed!). The recommendation to extend the Consensus-Minus-Two rule to relevant issues of peacekeeping is further proof of the revival of earlier EC positions.

An explanation for this Joint Agenda initiative most likely can be found in a number of recent developments. These include the expansion of the number and size of CSCE Missions and the subsequent difficulties with their effectiveness in conflict areas, the Russian efforts aimed at tying the institutionalization of the CSCE hierarchically to other European institutions while obtaining a broad mandate for unilateral CIS peacekeeping operations in the Near Abroad, and the negative example of the NATO-U.N. relationship in Bosnia-Hercegovina.[143] Clearly, the Joint Agenda seeks to establish the CSCE in a tenable, effective and credible position that is consistent with its limited "operational capabilities." It will be left to the participants of the upcoming Budapest Summit to take notice of these developments and to clarify the Summit's position on these matters.

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141. Most prominent among these proposals is the following suggestion:

> The Secretary-General of the CSCE, acting in close consultation with the Chairman-in-Office (CIO), should be given a broader mandate. He should be empowered to bring to the attention of the Council, the CSO or the Permanent Committee any matter which in his opinion may threaten peace and security in the CSCE area. To this effect, he should have the right to initiate reports and to dispatch fact-finding missions, drawing upon the resources of the CSCE Secretariat. In some instances, the Secretary-General or his representative could be given a role in chairing meetings.

Cf. U.N. CHARTER art 99. Through his right of initiative, the CSCE Secretary-General would in fact be granted political authority. Thus, the CSCE Secretary-General would become a prominent player in the political decision-making structure of the CSCE, while at the same time completely changing the role of the Secretariat. Furthermore, it should be noted that the CSCE Secretary-General would communicate directly with the other organs (and no longer through the CIO) and that the dispatch of fact-finding missions is a CSO-prerogative. *See* Decaux, *supra* note 115, at 19.

142. This rule would have to be extended to relevant issues of CSCE peacekeeping operations. This would include decisions to refer a matter to the U.N. Security Council in the absence of the consent of the state(s) directly involved in a crisis or a conflict situation. *See* A Joint Agenda For Budapest, point II.3, *cited in* Decaux, *supra* note 115, at 24.

143. *Id.*

PART II: THE CSCE AS A REGIONAL ARRANGEMENT

IV. REGIONAL ARRANGEMENTS UNDER ARTICLE 52 OF THE UNITED NATIONS CHARTER

A. *Introduction*

The merits of regional arrangements have been an issue of debate since the early days of the League of Nations.[144] The explicit provision of Article 21 of the League's Covenant, that regional arrangements for maintaining peace were not to be considered incompatible with the provisions of the Covenant, was instrumental in the failure of the collective security system designed by the Covenant.[145] Indeed, the experience of the Interbellum has demonstrated the potential threat of autonomous regional arrangements to the effective functioning of a collective security mechanism like the Covenant.

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144. The League of Nations was created in the aftermath of the First World War and negotiations on the Covenant of the League were held within the framework of the Paris Peace Conference. The Covenant was signed as part of the Treaty of Versailles on June 28, 1919, and created a framework for the maintenance of peace on the basis of collective security. The League failed as a result of its inability to deal with a series of crises in the 1930's which rapidly undermined its initial successes, and ultimately its credibility. *See* D.W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 15-16 (1963).

145. Article 21 of the Covenant was the result of a proposal made by President Wilson on April 10, 1919. Contrary to his earlier statement of September 27, 1918, that there could be no place for regional pacts, leagues, or alliances within the "family" of the League of Nations, and in clear opposition to the ideas of the majority of States involved, President Wilson advocated the incorporation of a provision granting explicit acknowledgement of the compatibility of regional arrangements with the provisions of the Covenant. However, no consideration was given to an explicit formulation of the relationship between the League and such regional arrangements in terms of primary responsibility or degree of autonomy. The desire of the majority of States to see the United States become a Member of the League, as well as their proper understanding that this was conditional upon the President's ability to convince the U.S. Senate that the Monroe Doctrine would still be the cornerstone of American foreign policy, prompted the acceptance of the proposal and its subsequent transformation into Article 21, which stated in full: "Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of Peace." Despite proposals to amend Article 21 in order to establish a supervisory relationship between the League and regional arrangements (with the stipulation that regional arrangements were subject to the approval of the League's Council and could also be negotiated under the auspices of the League's Council or Assembly), the turn of events in the 1930's ultimately exposed the weakness of the provision and the inability of the League to control the actions of regional (security) arrangements. *See* Hana Saba, *Les Accords Regionaux Dans La Charte de L'O.N.U.*, 80 R.C.A.D.I. 639, 649-59 (1952); J.M. Yepes, *Les Accords Régionaux et le Droit International*, 71 R.C.A.D.I. 246, 257-61 (1947).

The San Francisco Conference has marked the second stage of the debate on the merits of regionalism versus universalism.[146] While the outcome of the debate has resulted in the accommodation of regional arrangements within the framework of Chapter VIII of the U.N. Charter,[147] the concept of regional arrangements itself has been subject to scrutiny and criticisms directed at its underlying assumptions.[148]

Nevertheless, regional arrangements have become an established phenomenon. In the wake of recent events in the Middle East, Africa, Asia, Central America and Europe, the concept has revived old issues and generated new ones.[149] Thus, the debate within the CSCE is clearly part of a larger

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146. The United Nations Conference on International Organization (UNCIO) was held in San Francisco, April 25-June 26, 1945, and culminated in the signing of the Charter of the United Nations Conference. *See supra* note 2. The San Francisco Conference was premised on the *Dumbarton Oaks Proposals for the Establishment of a General International Organization* (hereinafter *Dumbarton Oaks Proposals*) of October 7, 1944. For the text of the *Dumbarton Oaks Proposals, see* Doc. 1 G/1, 3 U.N.C.I.O. Docs. 1. *See also* RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER 398-400, 472-73 (1958); L. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 354-55 (3rd ed. 1969).

147. U.N. CHARTER arts. 52-54.

148. Prime Minister Churchill stressed the regional approach to the organization of international security because in his opinion "only the countries whose interests were directly affected by a dispute . . . could be expected to apply themselves with sufficient vigour to secure a settlement" (*quoted in* RUSSELL, *supra* note 137). His proposition that organized action would operate best within regional groupings was questioned some 20 years later by scholar Inis Claude, who pointed out that "interregional affinities may be offset by historically rooted intraregional animosities, and geographical proximity may pose dangers . . . rather than collaborative possibilities which [states] wish to exploit in regional privacy." In short, the effectiveness of regional arrangements in contributing to the maintenance of international security is conditioned upon the "capacity for organization" of the arrangement. This capacity is dependent upon a set of factors which includes the degree of internal cohesion and the distribution of (economic, military and political) power. *See* INIS L. CLAUDE, SWORDS INTO PLOWSHARES 104-05 (4th ed. 1971).

149. Since the end of the Cold War, regional organizations or arrangements have played a role in a variety of situations. In the Middle East, the Iraqi invasion of Kuwait led to the involvement of the Arab League and the Gulf Cooperation Council. In Africa, war-torn Liberia proved to be a catalyst for unprecedented action by the Economic Community of West African States (ECOWAS), which set up the ECOWAS Cease-fire Monitoring Group (ECOMOG) in 1990. Liberia has also been the focus of attention for the Organization of African Unity (OAU). In addition, the collapse of the political structures in Somalia has been of concern to the OAU, the Arab League and the Islamic Conference. Moreover, the OAU is currently reconsidering its proposal to create a Mission for the Protection and Restoration of Trust in Burundi (MIPROBU) in view of the recent events in Rwanda. In Asia, the Association of South East Asian Nations (ASEAN) has played a role in the Cambodian peace process. In Europe, the disintegration of Yugoslavia and ensuing violent conflicts between Croats, Serbs and Muslims has been the testing ground for the European Union and the CSCE. Finally, the experience

trend toward reconsideration of the position of regional arrangements within the framework of the U.N. Charter.

This chapter provides an overview of the established principles guiding the relationship between the U.N. and the regional arrangements. In particular, attention is paid to the issues of definition, consistency and hierarchy. On the basis of these observations, the CSCE is subject to scrutiny in the next chapter. Finally, conclusions are drawn in view of the divergence between established principles and new realities.

B. *The Definition of a Regional Arrangement*

3. *The Dumbarton Oaks Proposals and the San Francisco Conference*

In the Dumbarton Oaks Proposals, Chapter VIII, Section C, the term "regional arrangement" remained undefined. Still, from its place within the overall framework of the Proposals, it could be inferred that the concept of "regional arrangement" was related to Chapters VI (Peaceful Settlement of Disputes) and VII (Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression).[150] Thus, it was understood that the

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of the Contadora Group, which was capable of brokering the Nicaraguan peace process, set in motion by the Esquipilas II Agreements of August 7, 1987 and followed by general elections on February 25, 1990 (monitored jointly by the U.N. and the OAS), has been illustrative of the enhanced position of regional arrangements.

This does not imply, however, that the increased involvement of such regional organizations or arrangements is related to a proportional increase in effectiveness. With the exception of the ECOWAS and Contadora Group experiences, the U.N. has been or become involved in all the above situations precisely because of a lack of effectiveness of regional efforts. This has raised new debate on the relationship between the U.N. and regional efforts, the appropriateness of regional action and the changing nature of the security-concerns which both the U.N. and regional organizations or arrangements are formulating. *See* Benjamin Rivlin, *Regional Arrangements and the UN System for Collective Security and Conflict Resolution: A New Road Ahead?*, 16 INT'L REL. 95, 103-04 (1992).

150. The *Dumbarton Oaks Proposals* states in full:

> 1. Nothing in the Charter should preclude the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided such arrangements or agencies and their activities are consistent with the purposes and principles of the Organization. The Security Council should encourage settlement of local disputes through such regional arrangements or by such regional agencies, either on the initiative of the states concerned or by reference from the Security Council.
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> 2. The Security Council should, where appropriate, utilize such arrangements or agencies for enforcement action under its authority, but no enforcement

concept of "regional arrangement" should be interpreted in functional terms. Nevertheless, various attempts were made at the San Francisco Conference to clarify this concept and to strictly define its limits.

The San Francisco Conference established a special committee on May 9, 1945, with a mandate to "analyse, classify and, if possible, amalgamate the Amendments submitted" with regard to the provisions of Chapter VIII, Section C.[151] Accordingly, amendments in relation to the lack of definition of the "regional arrangement" concept were submitted by Chili, Colombia, Costa Rica, Cuba, Ecuador, Egypt, New Zealand and Peru.[152] The Egyptian amendment contained the most explicit formulation of a "regional arrangement," the New Zealand amendment proposed a power of definition for the U.N. itself, and the Central and South American amendments contained various criteria for definition (such as duration, geographic proximity, economic relations and conformity of the arrangement to the Purposes and Principles of the U.N.).[153]

The Egyptian amendment became the subject of intense discussions since it stated that regional arrangements would be considered to consist of a permanent organization of States within a specified geographic area which:

> By reason of their proximity, community of interests or cultural, linguistic, historical or spiritual affinities, make themselves jointly responsible for the peaceful settlement of any disputes which may arise between them and for the maintenance of peace and security

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> action should be taken under regional arrangements or by regional agencies without the authorization of the Security Council.
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> 3. The Security Council should at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

Dumbarton Oaks Proposals, *supra* note 146, ch. VIII, § C. Section C, paragraph 1, after amendment, has become Article 52 of the U.N. Charter; Section C, paragraph 2 has provided the basis for Article 53 of the Charter; and Section C, paragraph 3 has been incorporated, in an almost identical wording, in Article 54 of the Charter. From the references in Section C, paragraphs 1 and 2, it is clear that regional arrangements have a role to play both in the peaceful settlement of disputes and enforcement action. *See* L. GOODRICH & E. HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 310-11 (rev. ed. 1949).

151. This was Committee III/4, which divided its respective tasks among Subcommittees. Of these, Subcommittee III/4/A was tasked with the Amalgamation of Amendments. *See* GOODRICH & HAMBRO, *supra* note 150, at 310. *See also* Saba, *supra* note 145, at 674.

152. Saba, *supra* note 145, at 675, 677.

153. *Id.* The French text of the proposal submitted jointly by Chili, Colombia, Costa Rica, Ecuador, and Peru is reprinted in Yepes, *supra* note 145, at 274-75.

> in their region, as well as for the safe-guarding of their interests and the development of their economic and cultural relations.[154]

Apart from setting forth the criteria which should be met by regional cooperation in order to be qualified as a "regional arrangement," the Egyptian amendment also introduced the idea that the "regional arrangement" concept should not be limited to its security-function.[155] Indeed, the Egyptian amendment was accompanied by the proposal that Section C be separated from the remainder of Chapter VIII, since it was held that the role of regional arrangements simply could not be strictly limited to the maintenance of peace and security.[156]

The Egyptian amendment was not submitted to a vote; while it "clearly defined obvious legitimate and eligible factors for a regional arrangement," it also failed to cover all the situations in which regional arrangements might become involved.[157] On the question of separation of Section C from the remainder of Chapter VIII, the Committee declined to formulate a decision,

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154. *See Interim Report to Committee III/4 by Subcommittee III/4/A on the Amalgamation of Amendments*, Doc. 533, III/4/A/9, 12 U.N.C.I.O. Docs. 845. In comparison, the French text reads as follows:

> Seront considérées comme ententes régionales, les organisations permanentes, groupant dans une région géographique déterminée, plusieurs pays qui, en raison de leur voisinage, de leur communauté d'intérêts ou leurs affinités linguistiques, historiques ou spirituelles, se solidarisent pour le règlement pacifique de tout différend pouvant survenir entre eux pour le maintien de la paix et de la sécurité dans leur région, comme pour la sauvegarde de leurs intérêts et le développement de leurs relations économiques et culturelles.

Id.

155. Saba, *supra* note 145, at 676.

156. According to the original Egyptian explanation of its definition of regional arrangements:

> Il ne serait pas juste d'appliquer les termes d'arrangements régionaux employés au Chapitre VIII, Section C, des propositions, aux alliances d'ordre purement militaire entre deux ou plusieurs puissances. Les alliances militaires n'ont rien de commun avec les arrangements régionaux: elles résultent de circonstances fortuites et ne se fondent généralement pas sur les affinités qui leur servent de base. Ces alliances, essentiellement temporaires, même lorsqu'elles sont conclues pour de longues périodes, sont l'expression de l'ancien principe de l'équilibre des puissances. La nouvelle Organisation se propose de maintenir la paix au moyen de mesures collectives et d'abandonner l'ancien principe.

Doc. 533, III/4/A/9, 12 U.N.C.I.O. Docs. 817.

157. *Summary Report of the Fifth Meeting of Committee III/4*, Doc. 889, III/4/A/12, 12 U.N.C.I.O. Docs. 701 (1945). *See also* GOODRICH & HAMBRO, *supra* note 150, at 311; Saba, *supra* note 145, at 677.

since it considered the matter as being excluded from its competence.[158] The amendments of the Central and South American States were also rejected without vote. New Zealand's amendment, being the only amendment submitted to a vote, was rejected on the ground that the condition of approval of regional agreements by the U.N. before they could become operational as "regional arrangements" would cause unnecessary delay in the proper functioning of such arrangements.[159] In short, the Committee did not consider a definition of the term "regional arrangement" necessary for proper functioning of the concept and thus left Chapter VIII, Section C unchanged on this particular issue.

2. *The Practice of the Organs of the United Nations*

The lack of definition in the text of the Charter thus opened the door to interpretation of the term "regional arrangement" through the practice of the organs of the U.N, in particular the Security Council. Both the Security Council and the General Assembly abstained for a long time from firm efforts to define "regional arrangements and agencies."[160] Whereas the Organization of American States (OAS) and the League of Arab States (or Arab League) were the most clearly defined regional organizations which could likely pass the test of Article 52, paragraph 1 in the early days, the U.N. still refrained from making decisions which could be interpreted as an implicit acknowledgement of the respective positions of both the OAS and the Arab League.[161]

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158. *Interim Report to Committee III/4 on the Work of Subcommittee III/4/A*, Doc. 335, III/4/A/5, 12 U.N.C.I.O. Docs. 833; *Summary of Report of the Third Meeting of Committee III/4*, Doc. 363, III/4/A/7, 12 U.N.C.I.O. Docs. 673 (1945). It should be noted that the Committee on Economic and Social Cooperation (Committee II/3), which did have competence on this question, decided against the regional approach in its areas of competence. *Summary Report of the Nineteenth Meeting of Committee II/3*, Doc. 780, II/3/53, 10 U.N.C.I.O. Docs. 196 (1945). *See also* GOODRICH & HAMBRO, *supra* note 150, at 311.

159. Saba, *supra* note 145, at 677.

160. GOODRICH ET AL., *supra* note 146, at 356.

161. E.g., the Charter of the OAS was signed at the Bogota Conference on April 30, 1948, and entered into force on December 13, 1951. Article 1 explicitly formulates the position of the OAS within the framework of the U.N.

> The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, territorial integrity and their independence. *Within the United Nations, the Organization of American States is a regional agency.*

(Emphasis added.) In addition, Article 4 states unequivocally that its essential purposes result from its principles and the fulfillment of its "regional obligations." Its purposes include the

Thus, the General Assembly invited the chief administrative officers of the OAS and the Arab League (and later the Organization of African Unity (OAU)) to attend its meetings as observers, notwithstanding explicit reference to the fact that such invitations did not constitute recognition of a regional arrangement status.[162] In addition, the Israeli contention that the Arab League could not be a regional organization because it was not accessible to all members in the region and based on racial exclusiveness was also refuted.[163]

The practice of the Organs of the U.N., vis-à-vis existing regional arrangements, was rather insignificant during the Cold War.[164] The Security Council in particular was prevented from developing the close relationship with existing regional arrangements as envisaged by the Charter.[165] The

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strengthening of peace and security, the prevention of possible causes of difficulty and the pacific settlement of disputes between its Member States, common action in the event of aggression, the solution of political, juridical and economic problems among them, and the promotion, by cooperative action, of economic, social and cultural development. The Charter of the OAS reaffirms its fundamental priciples (Chapter II) and the rights and duties of States (Chapter III), contains provisions for the pacific settlement of disputes (Chapter IV) and collective security (Chapter V), elaborates on economic standards (Chapter VI), social standards (Chapter VII) and cultural standards (Chapter VIII), establishes political and administrative Organs (Chapters X through XIII), anticipates the activities of Specialized Conferences and Specialized Organizations (Chapters XIV and XV) and contains provisions on the legal status and privileges and immunities of the OAS itself, its employees, the Representatives of Member-States in various organs and the Inter-American Specialized Organizations. Charter of the OAS, *supra* note 5, arts. 103-05; *cf*, U.N. CHARTER arts. 104-05. *See also* GOODRICH & HAMBRO, *supra* note 150, at 312-13. On the League of Arab States, based on the Pact of Cairo of March 22, 1945, *see* M. Khadduri, *The Arab League as a Regional Arrangement*, 40 AM. J. INT'L L. 756 (1946); Text of the Pact of the League of Arab States, DEP'T ST. BULL., May 1947, at 967-70.

162. For the discussions on the OAS, *see* U.N. GAOR, 6th Comm., 3d Sess., 70th & 71st mtgs. (1948). On the Arab League, *see* U.N. GAOR, 6th Comm., 5th Sess., 215th-217th mtgs. (1950); *Report of the Sixth Committee on Invitation to the Secretary-General of the League of Arab States*, U.N. GAOR, 6th Comm., 5th Sess., Annex 2, Agenda Item 58, at 6 (1950), *in* GOODRICH ET AL., *supra* note 146, at 356-57. *See also* REPERTORY OF PRACTICE OF UN ORGANS 442-43 (1955) [hereinafter REPERTORY].

163. *See* REPERTORY, *supra* note 162, at 446-47. *See also* Rivlin, *supra* note 149, at 100-01.

164. The only explicit recognition of a regional arrangement status granted by the Security Council during the Cold War came in relation to the violent decolonization process in the Congo during the early 1960's. Security Council Resolution 199 of December 30, 1964 (U.N. Doc. S/6128) encouraged the OAU to find a peaceful solution for the situation in the Congo. It recognized the OAU as a regional agency within the meaning of Article 52, paragraph 1 of the U.N. Charter. Despite its recognition of the geographical definition of a "regional arrangement," the Security Council did not establish any further criteria for definition. *See* GOODRICH ET AL., *supra* note 146, at 363.

165. *See* Rivlin, *supra* note 149, at 96.

paralyzation of the Security Council as a result of the veto right of the Permanent Members and the unwillingness of the two major antagonists of the Cold War, the United States and the U.S.S.R., to permit Security Council involvement in regional conflicts in which they were respectively implicated did little to improve the relationship between regional arrangements and the U.N.[166] Instead, regional arrangements were used by each superpower as instruments of hegemonic supremacy in a region.[167]

As a consequence of the Gulf War, renewed interest in the provisions of Chapter VIII prompted Secretary-General Perez de Cuellar to suggest, "[F]or dealing with new kinds of security challenges, regional arrangements or agencies can render assistance of great value," and he continued to state:

> [T]his presupposes the existence of the relationship between the United Nations and regional arrangements envisaged in Chapter VIII of the Charter. The diffusion of tensions between States and the pacific settlement of local disputes are, in many cases, matters appropriate for regional action. The proviso, however, is that efforts of regional agencies should be in harmony with those of the United Nations and in accordance with the Charter. This applies equally to regional arrangements in all areas of the globe, including those which might emerge in Europe.[168]

Although this statement did not define the term "regional arrangements," it was clear from the wording that the Secretary-General used a functional concept. Efforts aimed at the "diffusion of tension" and pacific settlement of "local disputes" were considered legitimate for regional action, provided that the principles and purposes of the U.N. Charter would be observed. From this, it could be inferred that the Secretary-General considered peaceful dispute settlement, peacekeeping and U.N.-authorized enforcement action to be proper

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166. In the words of Inis Claude, regional arrangements were used as "Jurisdictional refuges, providing pretexts for keeping disputes out of UN hands." *See* Inis L. Claude, *Implications and Questions for the Future*, 16 INT'L ORG. 843 (1965). *See also* Rivlin, *supra* note 149, at 96.

167. For the United States, the OAS provided the regional forum for, *inter alia*, the cases brought to the attention of the U.N. Security Council regarding Guatemala in 1954, Cuba in 1960 and 1962, Haiti in 1963, Panama in 1964 and the Dominican Republic in 1965. Similarly, the U.S.S.R. blocked the Security Council from considering the situation in Hungary in 1956 and Czechoslovakia in 1968 on the ground that it was the proper concern of the "socialist community" bound together in the Warsaw Pact. *See* Rivlin, *supra* note 149, at 96; GOODRICH ET AL., *supra* note 146, at 360-64.

168. *Report of the Secretary-General on the Work of the Organization*, 1990, at 21. The Report was issued in September 1990 during the Gulf Crisis. 1990 SECRETARY GEN. REP. 21.

means for action on the part of regional arrangements.[169] Even more significant in the particular context of European security was the implicit assumption of the Secretary-General that a regional arrangement had yet to emerge within Europe.

Shortly afterwards, the Soviet Union presented a memorandum to the General Assembly and the Security Council in which it suggested that the proper long-term course of action would be to organize "all-round co-operation" between the U.N. and "regional organizations" for the purpose of establishing a "regional security structure" in which the U.N. would perform a central role.[170] Interestingly, the use of the term "organizations" suggested a more limited definition of "regional arrangement." Indeed, it could very well be interpreted as referring to regional cooperation on a firm legal basis within a well-defined legal entity.

The Soviet memorandum was followed more than a year later by a General Assembly resolution which requested the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization to consider the "proposal on the enhancement of co-operation between the United Nations and regional organizations, as well as other specific proposals relating to the maintenance of international peace and security."[171] The Soviet memorandum contributed directly to the renewed interest of Member-States in reviving the provisions of Chapter VIII. In addition, the Security Council Summit of January 31, 1992, produced a request to the Secretary-General for the preparation of recommendations on ways to strengthen the role of the U.N. in preventive diplomacy, peacemaking and peacekeeping, including the "contribution to be made by regional organizations in accordance with Chapter VIII of the U.N. in helping the work of the Council."[172] The

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169. This would be in accordance with the provisions of Articles 52 and 53 of the U.N. Charter, which will be discussed in Parts IV.C.3 and IV.C.4.

170. *The United Nations in the Post-Confrontation World*, U.N. Doc. A/45/626, S/21869 (1990).

171. The General Assembly Resolution was adopted on December 9, 1991. *See* U.N. Doc. A/RES/46/58 (1991).

172. The U.N. Security Council Summit took place in New York on January 31, 1992. It was the first of its kind and assembled the Heads of State and Government of the 15 Member-States which were represented in the Security Council. Whereas the Presidential Statement issued at the conclusion of the Summit referred in very general terms to the possibility of developing a closer relationship between the U.N. and regional organizations, one of the Summit's participants (Prime Minister Martens of Belgium) addressed the issue specifically and called for "systematic" involvement of regional organizations in the actions of the Security Council. The use of the term "organizations" is similar to the Soviet memorandum's approach and indicative of the assumption that a "regional arrangement" or "agency" can only be the equivalent of a legally defined, established and operational regional entity. *See* U.N. SCOR, 47th Sess., 3046 mtg. at 69, 144, U.N. Doc. S/PV.3046 (1992).

use of the term "organizations" appeared to pay tribute to the legalistic view suggested by the Soviet memorandum. Indeed, the limitation of the definition of "regional arrangements" to "regional organizations" would imply a legal rather than a political view of regional cooperation within the framework of Chapter VIII. This would also strengthen the argument for a hierarchical interpretation of the Chapter's substantive provisions.

The request of the Security Council Summit resulted in the ground-breaking Agenda For Peace report, which dealt with the issue of regional arrangements in Part VII, paragraphs 60-65.[173] Apart from stipulating that the report did not purport "to set forth any formal pattern of relationship between regional organizations and the United Nations, or to call for any specific division of labour," but rather pointed to the potential that regional arrangements or agencies possess in many of the situations covered by the report,[174] it also contained the following explicit acknowledgement:

> The Charter deliberately provides no precise definition of regional arrangements and agencies, thus allowing useful flexibility for undertakings by a group of States to deal with a matter appropriate for regional action which also could contribute to the maintenance of international peace and security. Such associations or entities could include treaty-based organizations, whether created before or after the founding of the United Nations, regional organizations for mutual security and defence, organizations for general regional development or for cooperation on a particular economic topic or function, and groups created to deal with a specific political, economic or social issue of concern.[175]

Although, again, no precise definition of the term "regional arrangement" was given, this formulation has become the most specific contribution yet to the clarification of what the term *could* include. In short, the Secretary-General basically summarized a half-century of debates by enumerating all elements of contention and concluding that all sorts of regional undertakings between States could qualify as "regional arrangements or agencies," provided that "their activities are undertaken in a manner consistent with the Purposes and Principles of the Charter, and . . . their relationship with the United Nations,

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173. *An Agenda For Peace: Preventive Diplomacy, Peacemaking and Peacekeeping; Report of the Secretary-General pursuant to the Statement adopted by the Summit Meeting of the Security Council on January 31, 1992*, U.N. GAOR, 47th Sess., U.N. Doc. A/47/277 (1992) [hereinafter *An Agenda For Peace*], *reprinted in* 31 I.L.M. 953 (1992).

174. *Id.* at 971, ¶ 64.

175. *Id.* at 970, ¶ 61.

and particularly the Security Council, is governed by Chapter VIII."[176] Indeed, the current Secretary-General has been a strong protagonist of an increased role for regional arrangements and agencies in maintaining international peace and security, as well as strengthening cooperation and enhancing coordination between the U.N. and regional efforts.[177] In the words of the Secretary-General:

> The Security Council has and will continue to have primary responsibility for maintaining international peace and security, but regional action as a matter of decentralization, delegation and cooperation with the United Nations efforts could not only lighten the burden of the Council but also contribute to a deeper sense of participation, consensus and democratization in international affairs.[178]

3. *Concluding Remarks*

The reliance of the Security Council on specific regional efforts in a number of recent situations has, in all likelihood, not been related to the noble objectives suggested by the Secretary-General. Instead, the inability and/or unwillingness of Members of the Security Council to deal credibly and effectively with situations in Liberia, Somalia, former Yugoslavia and a number of CIS Republics seems more to the point.[179] Nevertheless, the concern over definition has become a non-issue: pragmatic considerations have come to prevail over theoretical consistency. Thus, the legal approach to regional cooperation within the framework of Chapter VIII, advocated until as recently as early 1992, seems to have been abdicated by the Security Council in favor of a more politically-flavoured vision. In other words, a regional arrangement has become less of a legal entity than a political concept. In view of the overall purposes which regional arrangements are deemed to serve, this may very well create the politically desired flexibility for regional efforts. At the same time, though, this development proceeds at the expense of the legally desired clarity of a

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176. *Id.* at 970, ¶ 63.

177. *See, e.g., Message of the Secretary-General to the Council of the Conference on Security and Cooperation in Europe*, meeting in Rome on December 1-2, 1993, which states unequivocally: "My wish to encourage the emergence of regional organizations and arrangements with the capacity to deal with regional problems is well known." *Secretary-General Says Regional Cooperation Is Essential In Efforts To Contain Ethnic And Political Strife*, FED. NEWS SERVICE, Dec. 2, 1993 [hereinafter *Message to the CSCE Council Meeting in Rome*]. *See also* Rivlin, *supra* note 149, at 110.

178. *An Agenda For Peace*, *supra* note 173, at 971, ¶ 64.

179. *See supra* note 149.

conceptual approach to international and regional peace and security.

C. *The Requirements of the Charter of the United Nations*

1. *The General Framework*

Chapter VIII of the U.N. Charter consists of three Articles that set forth the general framework for the relationship between regional arrangements or agencies and the United Nations. Article 52 contains provisions on the general conditions that are attached to action undertaken by regional arrangements or agencies,[180] as well as the specific conditions that relate to the relationship between the Security Council and Member-States entering into such arrangements or constituting such agencies in matters pertaining to the peaceful settlement of local disputes.[181] In this context, Article 52 is closely related to the provisions of Chapter VI, and in particular the provisions of Articles 33, 34 and 35.[182]

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180. The general conditions are formulated in U.N. CHARTER art. 52, ¶ 1, which states:

> Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

The conditions of appropriateness and consistency were already incorporated in the *Dumbarton Oaks Proposals*, *supra* note 146, ch. VIII, § C, ¶ 1. The discussion regarding the condition of appropriateness was closely related to the question of autonomy versus supervision, as well as to the issues of peaceful settlement of disputes and enforcement action. In the first 20 years of the U.N.'s existence, the question came up a number of times. Starting with Guatemala's contention in 1954 that its complaint of aggression by Honduras was a matter of exclusive consideration for the Security Council, and not the OAS, through the Cuban claim in 1962 that the OAS was not at liberty to establish conditions of membership and active participation autonomously, to the claim of Member-States of the OAU in 1964 that the American and Belgian interference in the conflict in the Congo amounted to a violation of the Charter's provisions on the "autonomy of action" for regional arrangements, these incidents clarified the issue of appropriateness to the extent that it depends on the circumstances of the specific case. In addition, it could be recognized that regional arrangements or agencies can set their Membership and participation requirements independently (without violation of the Purposes and Principles of the Charter), and that regional action would not be appropriate in a matter involving a state not party to the regional arrangement. In view of the current efforts of the European Union, the CSCE and NATO to contribute to a solution for the conflict in Bosnia, this last requirement might no longer be on solid ground. *See* GOODRICH ET AL., *supra* note 146, at 357-59.

181. *See infra* Part IV.C.3.

182. *Id.*

Article 53 deals with the situation in which enforcement action is carried out. It establishes a clear hierarchical relationship between the Security Council and the regional arrangements or agencies. In addition, Article 53 contains a linkage to Article 107 through its provisions on enforcement measures taken against an enemy state.[183] Finally, Article 54 contains the explicit requirement that the Security Council at all times be kept fully informed of activities undertaken or contemplated by regional arrangements or agencies for the maintenance of international peace and security.[184]

During the San Francisco Conference, several elements of the Dumbarton Oaks Proposals were the source of a strong divergence of views. Apart from the desirability of an explicit definition of the "regional arrangement" concept itself, which has been discussed in the previous section, the elements of consistency and hierarchy proved to be major points of discussion. Therefore, each of these elements will be considered in more detail.

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183. *See infra* Part IV.C.4.

184. Article 54 was, in substance, included in Chapter VIII, Section C, paragraph 3 of the *Dumbarton Oaks Proposals* and was adopted at the San Francisco Conference without dissent. Its obvious purpose is to provide the Security Council with the information necessary to fulfill its primary responsibility in the maintenance of international peace and security and to exercise the degree of control over regional efforts as envisaged in Articles 52 and 53. In short, the language of Article 54 seems to require full reporting by regional arrangements or agencies on current activities as well as those still under contemplation. Mention of this requirement is made only in Article 5 of the Rio Treaty, which provides:

> [The] High Contracting Parties shall immediately send to the Security Council of the United Nations, in conformity with Articles 51 and 54 of the Charter of the United Nations, complete information concerning the activities undertaken or in contemplation in the exercise of the right of self-defense or for the purpose of maintaining inter-American peace and security.

Rio Treaty, *supra* note 5, art. 5. No such provision can be found in the Charters of the OAS or OAU, or in the Pact of the Arab League, nor in the constituent documents of mutual security assistance arrangements such as NATO and WEU (Instead, in both the Treaty of Washington (1949, NATO) and the Treaty of Brussels (1948, WEU), acknowledgement is made of the obligations of the Member-States under the U.N. Charter and the primary responsibility of the Security Council in the maintenance of international peace and security. *See* Article 7 (NATO) and Article 5 (WEU), respectively). The OAS has a solid record of compliance with the requirement of Article 54, and more recently the resurgence of regional arrangements has led to a new stream of information coming from, inter alia, the Chairman-in-Office of the CSCE and the Presidency of the European Union. *See* Saba, *supra* note 145, at 701-03, 707-08; GOODRICH ET AL., *supra* note 146, at 368-69; S.C. Res. 896, U.N. Doc. S/1994/96, ¶ 2 (1994) (which specifically acknowledges the cooperation between the U.N. and the CSCE on matters pertaining to observer missions in Georgia).

2. *Consistency with the Purposes and Principles of the United Nations*

According to the Dumbarton Oaks Proposals, consistency of the regional arrangements or agencies and their activities with the Purposes and Principles of the Organization was a *conditio sine qua non* for the existence of such arrangements or agencies.[185] Indeed, lack of consistency would therefore

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185. The Purposes and Principles of the Charter are enumerated in Articles 1 and 2, respectively. According to Article 1, the Purposes of the United Nations are:

> 1. The maintenance of international peace and security through the taking of collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and the adjustment of international disputes or situations which might lead to a breach of the peace through peaceful means.
> 2. The development of friendly relations among States based upon the respect for the principle of equal rights and self determination of peoples.
> 3. The achievement of international co-operation in solving international economic, social, cultural or humanitarian problems, and the promotion and encouragement of respect for human rights and the fundamental freedoms.
> 4. To be a centre for harmonizing the actions of States in the attainment of these common ends.

In pursuit of the Purposes of Article 1, the U.N. and its Members are to act in accordance with the Principles of Article 2, which include:

> 1. Sovereign equality of all Member-States.
> 2. Fulfillment in good faith of obligations assumed under the Charter.
> 3. Peaceful settlement of international disputes.
> 4. Refraining from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the U.N.
> 5. Rendering every assistance in any action taken by the U.N. in accordance with the Charter, and refraining from providing assistance to any State against which preventive or enforcement action is taken.
> 6. Ensuring that Non-Members act in accordance with these Principles in so far as may be necessary for the maintenance of international peace and security.
> 7. Non-intervention in matters essentially within the domestic jurisdiction of any State.

U.N. CHARTER, *supra* note 3.

The formulation of Chapter VIII, Section C, paragraph 1 of the *Dumbarton Oaks Proposals* that "[n]othing precludes the existence . . . provided that" it is ground for the claim of the consistency requirement being a condition sine qua non for the validity of regional arrangements. The claim fits the underlying reasoning of the Charter that regional cooperation should be compatible with the normative standards enumerated in Articles 1 and 2, since regional efforts are to be complementary to the efforts of the U.N. in maintaining international peace and security. *See* Saba, *supra* note 145, at 687; GOODRICH ET AL., *supra* note 146, at 359.

invalidate the arrangement or agency created.[186]

The San Francisco Conference adopted this provision after some discussion. The prime concern of the Latin American States and the United States was the recognition of the inter-American system as a regional arrangement, with the granting of as much autonomy of action as possible.[187] Similar concerns were shared by those States belonging to the Arab League.[188] Thus, the discussion regarding the requirement of consistency took place against the background of the themes of globalism versus regionalism and autonomy versus hierarchy, and within the context of determining the proper scope of action for regional arrangements or agencies.

The incorporation of the consistency requirement raised questions shortly afterwards. Whereas it was observed that the closely related provision of Article 103 established only a hierarchy of obligations resulting from international agreements, the consistency requirement went beyond that observation.[189] If it was to be considered as determinative of the validity of regional cooperation, then the question of deciding on this matter would have to be considered. Though it seemed obvious that this would be a matter for an organ of the U.N. rather than the arrangement itself, it was not clear which organ would (or should) be qualified and/or acceptable. Between pragmatic

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186. *See* Saba, *supra* note 145, at 687.

187. The Inter-American System was developed through a number of Pan-American Conferences (Havana, 1928; Montevideo, 1933; Buenos Aires, 1936; and Lima, 1938), in which the Monroe-Doctrine, the Good Neighbour policy and the hegemonial position of the United States within the Western Hemisphere figured prominently. Efforts to create a legal structure in which regional cooperation would be based on sovereign equality of States took until the Bogota Conference of 1948, at the conclusion of which the Charter of the OAS was signed. The Charter incorporated already existing structures for cooperation in the areas of security, economic, social and cultural matters. In the interval between the Dumbarton Oaks Conference of October 1944 and the San Francisco Conference of April 1945, the American States held a Conference on peace and security during February and March, 1945, in Chapultepec, Mexico. The resulting Act of Chapultepec created the basis for the strong common position of the American States during the discussions and drafting of the Charter at the San Francisco Conference. For a more detailed discussion, *see* Saba, *supra* note 145, at 664-67; Yepes, *supra* note 145, at 269-81. It is significant that the text of the amendment proposed jointly by Chile, Colombia, Costa Rica, Ecuador and Peru during the deliberations of Committee III/4 included the explicit stipulation that the Pan-American System was declared compatible with the goals, ends and objectives of the U.N. and that consequently it would continue to function autonomously. *Id.* at 275.

188. The Arab League was made up of Saudi Arabia, Trans-Jordan, Egypt, Iraq, Lebanon, Syria and Yemen. *See* Saba, *supra* note 145, at 667-70, 690.

189. Article 103 of the U.N. Charter states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. CHARTER art. 103.

pragmatic and normative considerations lay waste a multitude of options. Unilateral declarations issued by Latin American and Arab States regarding the consistency requirement provided a subjective solution to the issue.[190]

The consistency requirement surfaced again during the early years of the U.N.'s existence. On two occasions, this requirement fuelled claims of invalidity of the regional arrangement concerned. In the case of Israel's contention that the Arab League was based on the principle of racial exclusiveness and that its activities in relation to the Palestinian problem were directed against the U.N. and thus inconsistent with the Purposes and Principles of the U.N., the claim was refuted without much discussion.[191]

A decade later, Cuba contended that certain resolutions adopted by the Punta del Este Conference of the OAS were inconsistent with the Purposes and Principles of the Charter.[192] In particular, Cuba argued that the Principles of peaceful coexistence, non-intervention and sovereign equality contained in the U.N. Charter were violated by the Conference's adoption of a declaration that the principles of communism were inconsistent with those of the inter-American system, a recommendation of free elections for governments that fail to practice representative democracy, and a declaration that the government of Cuba had voluntarily placed itself outside the inter-American system.[193] The Cuban contentions found strong support from the USSR, yet both in the General Assembly and the Security Council the predominant view seemed to be that the OAS resolutions were in accordance with the OAS Charter and, therefore, consistent with the U.N. Charter (and thus in compliance with the requirement of Article 52, paragraph 1). No formal decision was taken, thus leaving the issue of the proper organ unsolved.[194]

Since the Charter does not stipulate explicitly which organ is to determine whether the consistency-requirement of Article 52, paragraph 1 is met by regional arrangements or agencies and their activities, it seems proper to rely

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190. *See* Saba, *supra* note 145, at 690.

191. The Israeli claim was made when the General Assembly considered a proposal in 1950 to invite the chief administrative officer of the Arab League as an observer to its meetings. *See* U.N. GAOR, 5th Sess., Annexes, Agenda Item 58, at 1-2, U.N. Doc. A/C.6/336, *quoted in* GOODRICH ET AL., *supra* note 146, at 359.

192. Cuba's claim was submitted to the General Assembly and the Security Council in 1961.

193. Cuba invoked the Principles enumerated in Article 2, paragraphs 3-4; Article 2, paragraph 7; and Article 2, paragraph 1, respectively. "Peaceful coexistence" can be understood as the combination of Article 2, paragraph 3 (peaceful settlement of disputes) and Article 2, paragraph 4 (refraining from threat or use of force) and became a widely used catch-all in the phraseology of the Communist bloc. U.N. CHARTER, *supra* note 3, art. 2, ¶¶ 1, 3-4, 7.

194. *See e.g.*, U.N. GAOR 1st Comm., 16th Sess., 1230th-1243d mtgs. (1962); U.N. Doc. A/4882 (1961); U.N. Doc. A/5090 (1962); U.N. SCOR, 17th Sess., 991st-998th mtgs. (1962). *See also* GOODRICH ET AL., *supra* note 146, at 360.

on a teleological approach. Indeed, the Charter has been created as a framework for the maintenance of international peace and security; within that framework, primary responsibility is placed upon the Security Council.[195] Chapter VIII on regional arrangements contains provisions on the relationship between the Security Council and such arrangements or agencies in situations calling for peaceful settlement of local disputes and/or enforcement action. Therefore, it seems reasonable to assume that the consistency requirement, if it would be an issue of discussion, would be a matter proper for the Security Council.[196] This would also be in accordance with the more pragmatic observation that an effective coordination between the efforts of the U.N. and those of a regional nature in situations like Somalia, Bosnia or Georgia requires the determination of the Security Council regarding the feasibility of regional efforts and, therefore, indirectly the consideration of the consistency requirement.

3. *Priority of a Regional Arrangement in Peaceful Settlement of Disputes*

In the Dumbarton Oaks Proposals, reference was made to the role of regional arrangements or agencies in the settlement of local disputes. By stating: "The Security Council should encourage settlement of local disputes through such regional arrangements or by such regional agencies, either on the initiative of the States concerned or by reference from the Security Council," it was suggested that regional arrangements or agencies were appropriate fora for "local" dispute settlement, with a certain degree of autonomy in handling the case at hand.[197] From the text, it did not appear that the role of regional arrangements was subject to approval by the Security Council. Instead, the text seemed to suggest that the Security Council had the discretionary obligation to refer peaceful settlement of disputes to the appropriate regional arrangement or agency.[198] This would seem to be contradictory to the principle of prior

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195. *Cf.* U.N. CHARTER art. 24, ¶ 1, which states: "In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

196. Notwithstanding the practice of self-declared judgement on the consistency requirement of, *inter alia*, the OAS (Article 1 of OAS Charter unequivocally states that the OAS is a regional agency within the framework of the United Nations) and the CSCE (which is declared a regional arrangement in the Helsinki Summit Declaration, paragraph 25, and the Helsinki Decisions, Part IV, paragraph 2). *See supra* note 18 and accompanying text. *See also supra* note 161.

197. *See Dumbarton Oaks Proposals*, *supra* note 146, ch. VIII, § C, ¶ 1.

198. This interpretation can be derived from the use of the term "should."

consent required from the parties to the dispute.[199]

To avoid such an interpretation, the San Francisco Conference adopted a series of amendments which clarified the Dumbarton text and put it into a firm relationship with Articles 33, 34 and 35 of Chapter VI on the peaceful settlement of disputes. Thus, the provision of Article 52, paragraph 2 was added to clarify: "The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies *before referring them to the Security Council.*"[200] In addition, incorporating the Dumbarton text as Article 52, paragraph 3, changing the term "should" into "shall," and adding Article 52, paragraph 4 on the unimpaired applicability of Articles 34 and 35 completed the provisions on the role of regional arrangements in local dispute settlement.[201] The

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199. *Id.* Since it is a well-established principle that peaceful settlement of disputes is conditional upon the consent of the parties to the dispute, it would seem rather strange if the Security Council could refer a dispute to regional arrangements or agencies *regardless* of the consent of the parties; indeed, under Article 33, paragraph 2 and Article 36, paragraph 1, the Security Council has only been granted the authority to *recommend* "appropriate procedures or methods of adjustment." Therefore, a more logical interpretation would be that the Security Council, if it has before it a local dispute which has been called to its attention under Article 35, paragraph 1 by a Member-State, or Article 35, paragraph 2 by a Non-Member-State, may refer the parties to the appropriate regional arrangement or agency on the basis of their mutual undertaking, and within the limits of action to which the arrangement or agency is empowered (by the agreement(s)) establishing it. *See* GOODRICH & HAMBRO, *supra* note 150, at 314-15.

200. Emphasis added.

201. The importance of Article 52, paragraph 4 is clear from the text of the Articles to which it refers. Article 34 states in full: "The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security." This freedom of action fits the Security Council's responsibility under Article 24 of the Charter, and impairment of this provision by prohibiting the Security Council from investigating a dispute which may already have become the object of regional efforts would limit the Council's effective functioning in view of this responsibility.

> Article 35 provides for a variety of situations by stating:
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> 1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.
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> 2. A State which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.
>
> 3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles

linkage between Article 52, paragraph 2, and Article 33 was not far-fetched. Since Article 33, paragraph 1 provides that: "[T]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, *first of all*, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice," a clear picture emerged of the preferred division of labour between the Security Council and regional arrangements or agencies. The underlying assumption of the deference by the Security Council to regional agencies or arrangements in "local dispute-settlement" being that they were better suited to deal effectively with disputes of a local origin, the implicit understanding had to be that "local disputes" referred to disputes exclusively involving States which are parties to such agencies or arrangements.[202] Indeed, this interpretation would comply with Article 52, paragraph 4 on Articles 34 and 35 remaining unimpaired.[203]

Notwithstanding the requirement of the Charter that the settlement of local disputes be a matter for regional arrangements or agencies first, before being referred to the Security Council, it has become accepted that this role for regional arrangements or agencies does not derogate from the responsibility of the Security Council under Article 24. Indeed, in combination with the provisions of Article 33, paragraph 2; Article 34; and Article 35, paragraph 2, there appears to be a clear reversal of respective positions in situations where a Non-Member of the U.N and/or a Non-Member of the regional arrangement is party to the dispute, or in situations which, if continued, constitute a danger to the maintenance of international peace and security.[204]

On a number of occasions, the issue of priority for regional arrangements or agencies in the settlement of local disputes came to the attention of both the Security Council and the General Assembly. Within the OAS, this concerned cases brought by Guatemala in 1954,[205] Cuba in 1960,[206] and Haiti in

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11 and 12.

This Article is particularly relevant in view of its provisions regarding Non-Member States and the applicability of the Charter in such situations, as well as its stipulation that a dispute may be called to the attention of both the Security Council *and* the General Assembly. U.N. CHARTER, *supra* note 3, arts. 34, 35, 52.

202. *See* GOODRICH & HAMBRO, *supra* note 150, at 314.

203. *Cf.* note 201.

204. *See* GOODRICH & HAMBRO, *supra* note 150, at 315.

205. Guatemala requested a meeting of the Security Council in accordance with the provisions of Articles 34 and 35 on the claim that aggression from Nicaragua and Honduras constituted a situation for consideration of the Security Council under Article 39. Despite strong Soviet support, the majority view was that the OAS was nevertheless in the best position to ascertain the facts and recommend appropriate measures. A draft resolution requesting urgent consideration and reporting by the OAS to the Security Council (introduced by Brazil and Colombia) was defeated by a Soviet veto. U.N. Doc. S/3236/Rev.1 (1954). The issue was

1963.[207] In addition, cases brought by Lebanon in 1958[208] and Somalia in 1964[209] were connected to the Arab League and the OAU, respectively. From the review of these cases, it could be concluded:

> [T]here has been general agreement that a party to a regional arrangement has the right to have its complaint considered by the Security Council or the General Assembly; at the same time, there is general agreement that, consistent with the general philosophy of the Charter, an attempt should be made to achieve a settlement through regional arrangements and other means of the parties' own choice before appealing to the United Nations.[210]

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put to rest when the Council refused to place a renewed claim from Guatemala on its agenda. *See* REPERTORY, *supra* note 162, at 448-58.

206. In 1960, Cuba claimed that it had the right to submit a complaint concerning aggression on the part of the United States to the Security Council without resorting first to the regional organization. The United States held the view that the Security Council should only act as a last resort. The Security Council decided to adjourn consideration of the question pending a report from the OAS. *See* U.N. Doc. S/4395 (1960). It is stated that Members of the Council supported the decision on the grounds that the OAS already had the matter under consideration, the Charter provisions on the priority accorded to regional arrangement in the settlement of local disputes were mandatory, and the absence of complete information impaired substantive action by the Council. Contrary to this decision of the Security Council, the General Assembly adopted the position that the competent U.N. organ (*in casu* the Security Council) could take action without requiring that parties to the dispute first make use of regional arrangements or waiting for such arrangements to act. *See* G.A. Res. 1616, U.N. GAOR, 15th Sess., 995th plen. mtg., Agenda Item 90 (1961); for the debates, U.N. SCOR, 15th Sess., 874th-876th mtgs. (1960); U.N. GAOR, 1st Comm., 15th Sess., 1100th, 1106th-1107th mtgs. (1960); U.N. GAOR, 909th-910th plen. mtgs. (1960), *quoted in* GOODRICH ET AL., *supra* note 146, at 362.

207. The complaint of Haiti against the Dominican Republic was brought before the Security Council in May 1963. The prevailing view was that, while any Member of the OAS had the right to bring a controversy to the attention of the Security Council, action should be taken only when efforts to achieve a solution through the regional approach had failed. *See* U.N. SCOR, 18th Sess., 1035th, 1036th mtgs. (1963).

208. In 1958, Lebanon claimed intervention in its affairs by the United Arab Republic (Syria and Egypt); while it agreed to deferment to the Arab League, it reserved its right to request immediate convocation of the Security Council. *See* U.N. SCOR, 13th Sess., 818th mtg. (1958); U.N. Doc. S/4018 (1958); U.N. Doc. S/4023 (1958).

209. Somalia brought a complaint against Ethiopia to the attention of the Security Council in February, 1964. Like Lebanon, it agreed to defer consideration of the complaint to the regional level. The Security Council was later notified that the OAU had solved the dispute. U.N. Doc. S/5542 (1964); U.N. Docs. S/5557, S/5558 (1964).

210. *See* GOODRICH ET AL., *supra* note 146, at 363.

Indeed, on the balance between the priorities accorded to regional arrangements or agencies and the authority retained by the Security Council in matters pertaining to the peaceful settlement of disputes, it is suggested that the Security Council takes a position:

> which will protect and guarantee the autonomy, the individuality, the structure, and the proper and effective working of regional agencies, so that they may deal with situations and disputes which are appropriate for regional action—provided there is no undermining of authority of the Security Council or of the Member States' right to appeal to it whenever they consider that the defense of their rights or interests requires such an appeal, or that a particular situation or dispute, even if appropriate for regional action, might endanger international peace and security.[211]

4. *Priority of the Security Council in Enforcement Actions*

From the Dumbarton Oaks Proposals, it was clear that the negative experience of Article 21 of the Covenant of the League of Nations had been taken into account when drafting the relationship between regional arrangements and the Security Council in situations requiring enforcement action. Thus, Section C, paragraph 2, stated: "The Security Council should, where appropriate, utilize such arrangements or agencies for enforcement action under its authority, but no enforcement action should be taken under regional arrangements or by regional agencies without the authorization of the Security Council."[212] It reflected the widely accepted general principle that regional arrangements should only be used for enforcement action under the authority and under the authorization of the Security Council. This resulted from the view held by a majority of the Members that central Security Council control would be a *conditio sine qua non* for preventing the return of rival military alliances.[213]

The wording of Section C, paragraph 2, was incorporated in Article 53, paragraph 1, with the substitution of the term "should" for "shall" and the addition of a notable exception to the rule of Security Council monopoly of

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211. Statement made by the Representative of Ecuador on the occasion of the Security Council's consideration of economic measures ordered by the Ministers of Foreign Affairs of Member States of the OAS against the Dominican Republic in 1960. U.N. SCOR, 15th Sess., 893d mtg. ¶ 63 (1960), *quoted in* GOODRICH ET AL., *supra* note 146, at 363.

212. *Dumbarton Oaks Proposals*, *supra* note 146, ch. VIII, § C, ¶ 2.

213. This view was strongly held by, among others, the U.S. Secretary of State Cordell Hull. *See* GOODRICH ET AL., *supra* note 146, at 364.

force. Indeed, within the framework of the Charter, the wording of Article 53 appeared to be consistent with the provisions of Article 2, paragraph 4 (containing the prohibition of the threat or use of force by States), Article 24, paragraph 1, (on the primary responsibility of the Security Council for the maintenance of international peace and security), Articles 33, 34 and 35 on the peaceful settlement of disputes, and the general principles of the relationship between regional arrangements or agencies and the Security Council. In view of the collective security objective of the U.N. Charter, and the provision of Article 51 on the inherent right of collective self-defense of Member-States, the grant of authority to the Security Council in Article 53 seemed internally consistent.

Nevertheless, it was considered necessary to add an exception to the second sentence of Section C, paragraph 2; this exception in fact amounted to adding a whole category of arrangements to the framework of Chapter VIII.[214] Weaving the provision of Article 107[215] into the Dumbarton text resulted in Article 53, paragraphs 1-2, stating:

> 1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the governments concerned,

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214. The exception was the result of extended and confused discussions during the San Francisco Conference. A split developed between States whose prime concern was the danger of renewed aggression (such as France and the Soviet Union) and States which had a prime interest in having an effective general security mechanism with provisions for autonomy of regional organization, and not treating the former enemy states as a lasting security problem. The Conference, in fact, adopted a provision which was inconsistent with the original intent of preventing the renewal of traditional military alliances. Indeed, a number of early postwar treaties invoked implicitly or explicitly the exception of "regional arrangements directed against renewal of enemy aggression." *See, e.g.*, the Treaty of Alliance and Mutual Assistance between the Soviet Union and France of December 10, 1944, DEP'T ST. BULL., Jan. 1945, at 39; the Treaty of Friendship and Alliance between France and the United Kingdom of March 4, 1947 (so-called Treaty of Dunkirk), 9 U.N.T.S 187. *See also*, RUSSELL, *supra* note 146, at 706-12.

215. Article 107 of the U.N. Charter reads as follows: "Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action." U.N. CHARTER, *supra* note 3, art. 107.

> be charged with the responsibility for preventing further aggression by such a state.
>
> 2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

Accordingly, the question arose of what was meant by "enforcement action" other than the action authorized under Article 107. In general, it was assumed that the term "enforcement action" in Article 53 referred to the measures taken under Articles 41 (measures not involving the use of armed force) and 42 (action by air, sea or land forces), thus reaffirming the link between Chapter VII actions and the priority accorded to the Security Council in Article 53.[216]

Through a series of practical developments, the term "enforcement action" has been granted a more limited interpretation. Similar to the cases concerning the peaceful settlement of disputes, the early 1960's proved to be the testing-ground for the interpretation of "enforcement action."[217] From the Soviet-requested Security Council meeting in relation to the economic measures against the Dominican Republic, adopted by the Foreign Ministers of the Member-States of the OAS in 1960,[218] through the previously discussed complaint of Cuba in relation to measures taken by the Punta del Este Conference,[219] to the

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216. *See* GOODRICH ET AL., *supra* note 146, at 365. *See also supra* note 158, 10 U.N.C.I.O. Docs. 507-08 (1945).

217. This observation is not surprising; consistent with the view of the two main antagonists of the Cold War, regional arrangements or agencies were considered instruments of hegemonial policy in their respective spheres of influence. Moreover, the gridlock in the Security Council as a result of the veto right made regional arrangements more than just an option by default. The attractiveness of acting through regional arrangements was very much related to the effectiveness of regional efforts. In the case of the OAS, this would ultimately result in a reversal of position for the United States (from strongly in favour of OAS action in the early 1960's to a strong dislike of OAS action in the 1980's).

218. The Soviet Union argued that the measures adopted by the Foreign Ministers of the OAS Member States required Security Council approval in order to acquire legal force and render it effective, since it concerned measures as indicated in Article 41, which was the exclusive domain of the Security Council. The Soviet position was countered with the arguments that "enforcement action" in Article 53 contemplated the exercise of force which would not be legitimate except with Security Council authorization, and that Article 53 did not apply to non-military measures as indicated in Article 41. *See* U.N. SCOR, 15th Sess., 893rd-895th mtgs., U.N. Doc. S/4491 (1960).

219. The Cuban complaint was initially refused for consideration by the Security Council. Later, the Cuban request for an advisory opinion of the International Court of Justice was denied by the Security Council on the grounds that it concerned a political question, that it had already been decided that economic measures did not fall under "enforcement action," and that the exclusion of participation from OAS meetings did not constitute enforcement action. *See* U.N.

establishment of the Inter-American Force by the OAS in relation to the Dominican crisis of May 1965,[220] the conclusion could be drawn that "enforcement action" under Article 53 does not entail economic measures indicated in Article 41 of the Charter, nor peacekeeping operations in the nature of UNEF and ONUC.[221]

5. *Concluding Remarks: Recent Trends*

In general, the development of peacekeeping as a Security Council instrument has been in accordance with the interpretation discussed in the previous section. Nevertheless, since the publication of the Agenda For Peace proposals for a more assertive posture of the U.N. (specifically equipping it with a wider range of options in the security spectrum), there has been a different trend in the development of this instrument.[222] The increasing

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SCOR, 17th Sess., 991st mtg. at 28 (1968); U.N. Doc. S/5095 (1962); U.N. SCOR, 17th Sess., 9992d-998th mtgs. (1962).

220. The Dominican crisis developed during May and June, 1965. On May 6, 1965, the Meeting of Consultation of the Ministers of Foreign Affairs of the OAS decided to establish an Inter-American Force for the purpose of cooperating in the establishment of normal conditions in the Dominican Republic. U.N. Doc. S/6333 (1965). The Soviet claim that this constituted Article 53-type "enforcement action" was not shared by the majority, which pointed out that the force had a conciliatory purpose; therefore, Article 52 rather than Article 53 was deemed applicable. *See Statement of the Representative of Malaysia*, U.N. SCOR, 20th Sess., 1222d mtg. at 66-68 (1965). *See also*, GOODRICH ET AL., *supra* note 146, at 366.

221. The United Nations Emergency Force (UNEF) was set up in relation to the Suez-crisis of 1956. The United Nations Operation in the Congo (ONUC in French) was created in 1960. In both situations, claims were made by France and the Soviet Union that the expenses necessary for the Operations could not be those of the United Nations itself; this resulted in the *Certain Expenses of the United Nations* Advisory Opinion of the ICJ of July 20, 1962. After ample consideration, the ICJ concluded that neither in the case of UNEF nor of ONUC could there have been "enforcement action" under Article 53, since the mandates of both UNEF and ONUC made that clear. *See* Certain Expenses (Adv. Op.), 1962 I.C.J. at 164-65, 171, 177.

222. The trend resulting from the *Agenda For Peace* report is very closely related to the views of the Secretary-General in this particular matter. His strongly protagonist view on the role of regional arrangements in conflict resolution is based on a firm belief that local disputes are better solved in a local or regional framework. The desirable division of labour amounts to a peace-making role for the regional arrangement and a peacekeeping one for the U.N. In other words, the U.N. can delegate the implementation of sanctions against aggressors, as well as the pursuit of an effective political solution to a regional arrangement. In doing so, the U.N. prevents itself from becoming overburdened by its expanding involvement in conflict resolution. At the same time, the Secretary-General has been keen to note the difficulties associated with a larger role for regional arrangements. These consist, *inter alia*, of a lack of necessary structures and procedures, financial limitations, and, most important of all, a lack of experience. See

involvement of regional actors, combined with an increasing willingness of the Security Council to authorize the limited use of force,[223] has changed the character of the instrument significantly. Indeed, the synergy thus created between regional cooperation and the U.N. has been conducive to the development of the CSCE as a regional arrangement under Article 52 of the Charter. Whether this development is in conformity with the general requirements of the Charter's provisions will be addressed in Part V.

V. THE CSCE AS A REGIONAL ARRANGEMENT

A. *Introduction*

The rapid disintegration of the former Eastern bloc after 1989 and the subsequent unraveling of social, economic and political structures in the former Soviet Union and Yugoslavia between 1990 and 1992 resulted in a perception by the Western European countries that the wide array of problems arising from the unforeseen turn of events required solutions on a regional level. Security concerns have dominated the resulting attempts by Member States of the European Union and NATO to accommodate the changes in the political setting within a flood of newly-created institutional frameworks.[224] The

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U.N. Doc. SG/SM/4718 (1992); U.N. Doc. SG/SM/4727/Rev.1 (1992); Rivlin, *supra* note 149, at 110. *See also Message to the CSCE Council Meeting in Rome*, *supra* note 177.

223. *See* Rivlin, *supra* note 149. The most recent example has been the close cooperation between NATO and the U.N. regarding the sieges of Sarajevo and Gorazde. NATO traditionally has not been considered as a "regional arrangement" under Article 52, nor does it perceive itself as such. *See* Treaty of Washington, *supra* note 5, art. XII. But it fits the proposition of the Secretary-General description in paragraph 61 of the *Agenda For Peace* report. NATO's active involvement in the Bosnian crisis is illustrative for the Security Council's increasing reliance on regional efforts in support of decisions taken under Chapter VII.

224. The discussions regarding the proper changes to be made within the framework of the European Communities and NATO were initiated in 1991 during the negotiations on the Treaty on European Union, NATO's North Atlantic Council Meeting in Copenhagen (June) and the NATO Summit in Rome (November), and have continued since. Accordingly, changes have been implemented, the most recent of which related to the Conference on the European Stability Pact (held under the auspices of the European Union in Paris, May 26-27, 1994), the creation of the Partnership For Peace (PFP), and the initiation of the Common Joint Task Forces (CJTF) concept at the NATO Summit in Brussels, January 10-11, 1994. *See EC: Union Council Discusses Balladur Plan*, AGENCE EUROPE, Dec. 7, 1993; *EC: Council Decides On Joint Action For Launching Of Stability Pact*, AGENCE EUROPE, Dec. 31, 1993; *Progress Made On Common Action For European Stability Pact*, EUROPEAN INFORMATION SERVICE (Euro-East), No. 18, Jan. 27, 1994 (which includes the *Summary Report on the Stability Pact, Annex to the Conclusions of the European Council* (Brussels, Dec. 10-11, 1993)); and the *Concluding Document of the Inaugural Conference for a Pact on Stability in Europe*, May 27, 1994 (on

ongoing conflicts on the peripheries of the European continent,[225] as well as the ceaseless rage of intolerance and cruelty on the Balkans, are illustrative of the flawed assumption that institutionalization of cooperation equals expansion of the problem-solving capacity of the Organization itself.

Through the adoption of the Helsinki Decisions, the CSCE has become the third actor on the stage. With its artificially inserted, hollow-ringing assertiveness specifically directed at the growing security concerns of a number of its Participating States,[226] the CSCE has been equipped with a more institutionalized framework. It includes instruments for conflict prevention, crisis management and conflict resolution.[227] Furthermore, the CSCE has been declared a regional arrangement under Article 52 of the Charter of the United Nations in an apparent attempt to bolster the CSCE's credibility as an operational entity.[228] Thus, the self-declared status of a regional

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file with author). On the Partnership For Peace, *see Declaration of the Heads of State and Government Pursuant to the North Atlantic Council Meeting in Brussels, Jan. 10-11, 1994*, 42 NATO REV. 30-33 (1994) [hereinafter *Brussels Summit Declaration*]; *Invitation to the Partnership For Peace*, *id.* at 28; and *Framework For The Partnership For Peace*, *id.* at 29-30. *See also* Lawrence T. DeRita, *Beyond the Partnership For Peace: An Action Plan for the NATO, Prague and Moscow Summits*, HERITAGE FOUNDATION BACKGROUNDER NO. 973, Jan. 7, 1994.

225. Currently, conflicts in Republics of the CIS exist in Moldova (separation of Trans-Dneistr-region), Tajikistan (insurgencies), Georgia (separation of South-Ossetia and Abkhazia-regions) and Azerbaijan (unification of enclave of Nagorno-Karabakh with Armenia). Russian forces have intervened in Moldova (Joint Moldovan-Dneistrian-Russian Operation, established in 1992, monitoring cease-fire), Georgia (Joint South-Ossetian-Georgian-Russian Operation, monitoring cease-fire since 1992; short-lived military intervention in Abkhazia during the siege and fall of Sukhumi and a Joint CIS Peacekeeping Force under Russian command since June 1994); and Tajikistan (Joint CIS Peacekeeping Force under Russian command). CIA Directorate of Intelligence, *Worldwide Peacekeeping Operations 1994*, EUR-94-10001, Feb. 1994. *See also* Maxim Shashenkov, *Russian Peacekeeping in the 'Near Abroad'*, 36 SURVIVAL 46, 51-56 (1994); John Lepingwell, *The Russian Miliary and Security Doctrine in the 'Near Abroad'*, 36 SURVIVAL 70, 75-77 (1994).

226. In particular, France, Russia, the United Kingdom, Hungary, Austria, Germany, and The Netherlands all took the lead in some area of the Helsinki Decisions relating to the new CSCE role in crisis management. *See infra* Part V.C.

227. *See* Helsinki Decisions, *supra* note 15, at 1396-99 (CSCE High Commissioner on National Minorities), 1399-1402 (Early Warning, Conflict Prevention and Crisis Management (Including Fact-Finding and Rapporteur Missions and CSCE Peacekeeping), Peaceful Settlement of Disputes).

228. *See* Helsinki Summit Declaration, *supra* note 9, at 1392, ¶ 25; Helsinki Decisions, *supra* note 15, at 1403, ¶ 2.

arrangement has prompted the CSCE into both vigorous debate and remarkable action.[229]

The debate within the CSCE regarding the implications of its regional arrangement status has been strongly flavoured with pragmatic considerations.[230] The restrictions of its new status on the scope of action which the CSCE could undertake have been defined in terms of political expediency rather than legal doctrine.[231] Moreover, action undertaken by the CSCE in relation to the conflict between Armenia and Azerbaijan over the enclave of Nagorno-Karabakh, the war in former Yugoslavia and the Russian intervention in a number of conflicts raging in neighbouring Republics has illustrated the practical limits of the CSCE's problem-solving capacity regardless of its regional arrangement status.[232]

This chapter deals with the legal implications of the CSCE's regional arrangement status. Set against the preceding chapter's observations on regional arrangements under Article 52 of the U.N. Charter, the thrust of the declaration in the Helsinki Decisions seems to fit the purposes for which regional arrangements in general were endorsed and incorporated within the framework of the U.N. The general principles pertaining to regional arrangements have

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229. Debates on the proper use of the newly created instruments have taken place both within the CSCE Council of Ministers and the Committee of Senior Officials (CSO), especially in view of the developments in the former Yugoslavia and the CIS Republics. Subsequent action taken by the CSCE has included the suspension of Yugoslavia's (Serbia and Montenegro) rights within the CSCE framework, the sending and/or permanent stationing of observer missions to various areas of conflict (Serbian regions, Macedonia, and CIS Republics) and consideration of Russian requests for CSCE endorsement of Russian peacekeeping operations in various CIS Republics. *See CSCE Council Summary of Conclusions of the Stockholm Meeting*, *supra* note 17; *CSCE and the New Europe—Our Security is Indivisible; Decisions of the Rome Council Meeting*, Dec. 1993, Doc. CSCE/4-C/Dec. 2; Robinson, *supra* note 17; *CSCE split over Russian peacekeeping*, AGENCE FRANCE PRESSE, Nov. 30, 1993; [Report on Remarks of] *Russian Minister on Nationalism, Peacekeeping and Nuclear Nonproliferation*, BBC Summary of World Broadcasts, SU/1862/S1, Dec. 3, 1993; *CSCE to Boost Presence in Breakaway Georgian Region*, AGENCE FRANCE PRESSE, Mar. 4, 1994; John J. Maresca, *Russia's Emerging European Policy*, WALL ST. J. EUR., Sept. 6, 1994. *See also* BLOED, *supra* note 123, at 49.

230. *See also infra* Part V.C.2.

231. One example of this divergence can be found in the provisions of the Helsinki Decisions relating to CSCE peacekeeping. In contrast to the legal interpretation of the framework of Chapter VIII of the U.N. Charter, the provisions of Chapter III, in particular paragraph 22, seem to limit the scope of CSCE peacekeeping on political grounds. Whereas under the provisions of Article 53, paragraph 1, of the Charter regional arrangements may be utilized for enforcement action under the authority of the Security Council, the CSCE is prohibited from entailing enforcement actions. *See* HERACLIDES, *supra* note 17, at 89-100; Gajus Scheltema, *CSCE Peacekeeping Operations*, 3 HELSINKI MONITOR 7 (1992); & Rob Siekmann, *Commentary: CSCE versus UN Peacekeeping*, 3 HELSINKI MONITOR 18, 19 (1992). *See also infra* Part V.C.

232. *See supra* notes 225, 229.

been set out in the previous chapter. This included the lack of definition of a regional arrangement, as well as a survey of the requirements of the U.N. Charter regarding the relationship between regional arrangements and the United Nations.

Specific application of these general principles to the position of the CSCE will be the subject of Part IV.C.5. Attention will be paid to the instruments with which the CSCE has been equipped to perform its functions as a regional arrangement. These include mechanisms for early warning, conflict prevention, crisis management (including fact-finding and rapporteur missions and peacekeeping), and peaceful settlement of disputes. Finally, Part V.C. will provide a Summary of Conclusions.

B. *Helsinki II: Reversal of the Process*

1. *The Origins of the Reversal*

At the heart of the CSCE's regional arrangement status lies a debate which has been determinative of the changes the CSCE has gone through since the adoption of the HFA in 1975. The origins of the debate can be traced to the founding days of the CSCE, when various proposals were submitted for the institutional framework of an East-West dialogue on European security matters.[233] In short, these were illustrative of the recurring dilemmas between a legal or non-legal approach on the one hand, and a strong institutional framework versus a weaker version on the other. Combined with the options of an Alliance-based approach, a U.N.-linked concept or an independent variant, there was a multitude of alternatives available.[234] Among them was the

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233. On the political level, proposals from East and West were exchanged through a series of Declarations issued between 1966, when the Warsaw Pact published its *Declaration on Strengthening Peace and Security in Europe* [hereinafter the *Bucharest Declaration*], and 1972, when NATO's *Bonn Communiqué* was issued. At the same time, close scrutiny of these Declarations on the academic level resulted in a series of articles which included additional suggestions. In general, the level of institutionalization suggested in these articles went beyond the one emerging from the series of Declarations. *See e.g.* Zbigniew Brezinski, *The Framework of East-West Reconciliation*, 46 Foreign Affairs 256 (1968); *America and Europe*, 49 FOREIGN AFF. 11 (1970); Benjamin S. Rosenthal, *America's Move*, 51 FOREIGN AFF. 380 (1973). For a detailed discussion of the various suggestions made on both levels, *see* SIZOO & JURRJENS, *supra* note 13, at 24-41.

234. Specific proposals regarding the institutionalization of the East-West dialogue were reminiscent of an earlier approach taken by the British Labour Government in 1969 and could be discerned in suggestions for an organization based on the two military alliances (NATO and the Warsaw Pact), an institutional framework with organizational and procedural links to the U.N., or the same framework without the U.N. link. Within each variant, there was a

suggestion that the juridical embodiment of the proposed East-West dialogue would incorporate an organical link to the U.N. through the provisions of Chapter VIII of the Charter.[235] Clearly, this suggestion was disregarded promptly.

The non-legal, non-institutionalized approach incorporated in the HFA has gradually been replaced by a different view of the CSCE. Through the Charter of Paris (1990), the Berlin Emergency Mechanism (1991), the Moscow Mechanism (1991), the Prague Document of Further development of CSCE Institutions and Structures (1992), and the Helsinki Decisions (1992), a more institutionalized entity has emerged which can no longer be regarded as a process. At the same time, no clear legal entity has surfaced which could be defined as an international organization in the traditional sense. In fact, this strangely hybrid character of the CSCE has been the result of the balancing of the dilemmas referred to earlier.

The regional arrangement status of the CSCE has been a contentious issue since the Prague Council Meeting of January 1992.[236] Originating from proposals submitted by Malta[237] (with strong support from Germany), the regional arrangement status can be regarded as both a functional concept

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variety of options for the actual structure of the framework. *Id.*

235. Suggestions for a U.N.-linked approach were primarily made on the academic level, but had been anticipated to some extent on the political level. Indeed, the second paragraph of Article 11 of the Warsaw Treaty (1955) included an anticipatory provision on the establishment of a collective security system in Europe. The implicit assumption that this system had to be defined in terms of an organic link with the U.N. was noted by a Soviet commentator. He pointed at the collective measures provided for in the U.N. Charter, with the reminder that any formula for regional mutual assistance and enforcement sanctions required consistency with the provisions of the U.N. Charter and the prerogatives of the Security Council. This was perceived as a suggestion of an implied right of veto for the Permanent Members of the Security Council by Western commentators. Not surprisingly, their suggestions regarding the establishment of a link between a European security framework and the U.N. were less explicit and less defined. The most detailed suggestion consisted of the establishment of inter-agency and/or inter-secretariat agreements or arrangements, with an active participation of the U.N. in the proposed system through its organs and specialized agencies. It should be noted that even with the Helsinki Decisions in place, there is still a strong divergence between the proclaimed "operationalization" and the actual institutional implementation of decisions in this respect. *See* S.I. Beglov, *European Security System: Content and Ways of Ensuring It*, INT'L AFF., Nov. 1971, at 64-88; F.A.M. Alting von Geusau, *NATO and Security in the Seventies* 103 (1970), *quoted in* SIZOO & JURRJENS, *supra* note 13, at 24-41.

236. At the Prague Council Meeting, the question of declaring the CSCE to be a regional arrangement under Article 52 of the U.N. Charter was closely intertwined with the proposals regarding a role for the CSCE in peacekeeping. Since these proposals were set aside until Helsinki-II, the decision on a regional arrangement status was also postponed. *See* HERACLIDES, *supra* note 17, at 29.

237. *See* CSCE Doc. CSCE/HM/WG1/7 (1992).

and a self-serving declaratory judgement of the CSCE's position within the realm of European security. As a functional concept, the regional arrangement status is closely intertwined with the "operationalization" of the CSCE. As a declaratory judgement, regional arrangement status has been instrumental to the political legitimization of growing CSCE-activity.[238] More important, however, is the fact that both views should be consistent with the requirements of the provisions of the U.N. Charter.[239]

2. *Implications of the Reversal*

Before there can be any determination of consistency with the requirements of the Charter, it needs to be established that the CSCE is, in fact, a regional arrangement in definitional terms. The most flexible definition has been provided by the U.N. Secretary General's enumeration in paragraph 61 of the Agenda For Peace report.[240] It includes treaty-based organizations (e.g., the OAS), regional organizations for mutual security and defense (e.g., NATO), organizations for general regional development or for cooperation on a particular economic topic or function (e.g., ECOWAS), and groups created to deal with a specific political, economic or social issue of current concern (e.g., the Contadora Group). Strictly speaking, the CSCE fits none of these descriptions.

At the same time, it has been observed that the U.N. Security Council has taken a pragmatic rather than a formal position with regard to regional cooperation.[241] Political expediency and opportunism have contributed to an increasing willingness of the Security Council to consider the advantages of mutual efforts. Thus, the Security Council has endorsed the ECOWAS peacekeeping operation in Liberia, despite the fact that the ECOWAS mandate is purely economic and therefore ought to exclude involvement in political

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238. Among the arguments articulated by Germany and Malta, there was one closely related to this perception. In their view, regional arrangement status would give the CSCE greater political clout and international prestige, which would support a stronger profile for the CSCE. Moreover, it would strengthen the claim that the CSCE was already *de facto* a regional arrangement. *See* HERACLIDES, *supra* note 17, at 112. The German support for the Maltese proposal was consistent with its protagonist position regarding a more assertive and active CSCE.

239. The German argument that for all practical purposes the CSCE was already a regional arrangement was necessarily premised on the view that the criteria of Chapter of the U.N. Charter VIII were clearly met.

240. *See An Agenda for Peace*, *supra* note 173, at 970, ¶ 61.

241. *See infra* Part IV.B.2.

conflict resolution.[242] Similar considerations have been held applicable regarding the involvement of the European Union and the CSCE in the conflicts in former Yugoslavia.[243]

If the implicit recognition of the CSCE as a regional arrangement through the actions of the Security Council is combined with the views, comments and practice of the Secretary-General, historical precedent, and the understanding that the definition of a regional arrangement is flexible provided that the requirements of the Charter (consistency and hierarchy) are met, then there appears to be a solid basis for the claim that the CSCE is, in fact if not in definition, a regional arrangement under Article 52 of the U.N. Charter. The unilateral statement of the Helsinki Summit Declaration and the Helsinki Decisions is not unprecedented and has not been regarded as contrary to the provisions of Chapter VIII of the U.N. Charter.[244] Moreover, the CSCE is firmly based upon its Decalogue of Principles, which is clearly in compliance with the consistency requirement.[245] Finally, the CSCE has been equipped with instruments which contribute to its problem-solving capacity.[246] In more concrete terms, the CSCE has been equipped with instruments of conflict-prevention, crisis-management and conflict-resolution to enable it to *function* as a regional arrangement.

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242. The legal rationale for the ECOWAS Operation (ECOMOG) has been met with varying degrees of skepticism and criticism, but nevertheless has been accepted as a political reality. In the words of one commentator, the ECOWAS action was an *ad hoc* response:

> The two justifications were the protection of ECOWAS-country citizens and the protection of Liberians against Liberians. It was called peacekeeping, began more like an enforcement measure, then alternated between peacekeeping and enforcement. There was no consent of the Liberian State, because the State had disintegrated, but there was a process within ECOWAS which involved the Liberian parties.

Clearly, the action taken by ECOWAS is questionable if strict adherence to the provisions of the Charter is considered proper; at the same time, the U.N. has been strongly supportive of the action taken on a regional level because of its political impact. *See Statement of the President of the Security Council*, U.N. Doc. S/22133 (1991); U.N. Doc. S/PV.2974 (1991). *See also* Rivlin, *supra* note 149, at 102.

243. In 1991, neither the European Community (through its European Political Co-operation mechanism, now the Common Foreign and Security Policy of the European Union) nor the CSCE were strictly speaking a regional arrangement or had a full-fledged political mandate. Still, the U.N. Security Council supported the contributions of both entities because it was unwilling to become involved itself. *See* Weller, *supra* note 6, at 577-81, 600-07.

244. *See* the unilateral statements of the OAS and Arab League, *supra* note 196, and Saba, *supra* note 145, at 676, respectively.

245. *See* the argument on the consistency of the OAS Charter's Principles of the Security Council in its decision on the Cuban claim to the contrary, *infra* Part IV.C.2.

246. *See* CLAUDE, *supra* note 148. *See also supra* note 224.

Despite these observations, there remains one thorny issue to be resolved. According to the Helsinki Decisions, the CSCE cannot engage in enforcement action, notwithstanding its status as a regional arrangement.[247] This appears to be contradictory to the stipulation of Article 53, paragraph 1, regarding the utilization of regional arrangements for enforcement action under the authority of the Security Council.[248] However, the wording of Article 53 seems to warrant a less rigid interpretation. The text of Article 53, paragraph 1, provides for utilization of such arrangements by the Security Council "where appropriate." The discretionary element incorporated in the text, therefore, does not seem to imply that regional arrangements are required *per se* to engage in enforcement action. In other words, engagement in enforcement action is no *conditio sine qua non* for possessing regional arrangement status. Therefore, it may be concluded that the CSCE can indeed be considered as a regional arrangement under Article 52 of the U.N. Charter. Accordingly, its instruments are of interest.

C. *The CSCE Instruments: "Tools of Change"*

To provide the CSCE with a proper set of tools for the "management of change," the Helsinki Decisions have laid the groundwork for an elaborate scheme of action which has granted the CSCE an opportunity to strengthen its profile in the European security-context.[249] Despite the agreement achieved in Helsinki, the CSCE's management tools have not been prominent. On the other hand, the CSCE has been able to demonstrate the usefulness of some of its new instruments, at least to some extent.[250]

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247. *See* Helsinki Decisions, *supra* note 15, at 1400, ¶ 22.

248. *See infra* Part IV.C.4.

249. *See* Helsinki Decisions, *supra* note 15, at 1399-1402, ch. III.

250. Among the most notable features of the CSCE's new tool kit are the Observer Missions, which can be regarded as a variant of CSCE Peacekeeping, and the Rapporteur Missions. In 1993, eight Observer Missions were mounted in Serbia (for the regions of Kosovo, Sanjak and Vojvodina), Macedonia, Estonia, Latvia, Moldova, Georgia, Tajikistan and Nagorno-Karabakh. The Observer Mission to Serbia was expelled in retaliation for the expulsion of Yugoslavia (Serbia/Montenegro) from the CSCE. The Observer Mission in Georgia (which monitors a cease-fire agreement between rebel forces and government troops in the South Ossetia region) has recently been expanded. *See CSE to Boost Presence in Breakaway Georgian Region*, *supra* note 220. Rapporteur Missions within this framework are distinct from the Rapporteur Missions under the *Moscow Mechanism* and have been in use since the adoption of the *Prague Document*, *supra* note 67, at 986. *See also*, HERACLIDES, *supra* note 17, at 29. Outside of this framework, yet closely related to it, the CSCE High Commissioner on National Minorities has made an additional contribution through his visits to Estonia, Latvia, Lithuania, Albania and Rumania. *See Recommendations by the CSCE High Commissioner on National Minorities, Mr Max van*

The Helsinki Decisions' scheme has its origins in the institutionalization process set in motion by the Charter of Paris.[251] From the proposals forwarded at the Prague Council Meeting in January 1992, it could be inferred that there was a general perception among the Participating States that the existing Mechanisms were insufficient for dealing with the increasingly complex set of political, economic and social problems which had been sweeping the European continent.[252] Whereas these Mechanisms are premised on response and reaction, there appeared to be a need for anticipatory structures, as well as a preference for expansion of the action spectrum in view of the changing character of security threats.[253] Nevertheless, compromise has been the exclusive trademark of the CSCE's development in this respect.[254]

The heavy emphasis on procedures by some States has been consistent with their dislike of structural institutionalization of the CSCE.[255] Similarly, the strong emphasis of other States on the effectiveness of newly-provided instruments has been in accordance with views on a more substantive role

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der Stoel, upon his visits to Estonia, Latvia and Lithuania, 14 HUM. RTS. L. J. 216 (1993). Regarding Albania and Rumania, *see id.* at 432-37.

251. *See supra* Part II.D.

252. The existing Berlin, Moscow, Vienna and Valletta Mechanisms (related to emergency situations, the human dimension mechanism, the CSBM regime with regard to unusual military activities, and peaceful settlement of disputes, respectively) were not sufficient to deal with the string of conflicts erupting shortly after the adoption of these mechanisms in 1991. Accordingly, the Prague Council Meeting became the setting for Proposals on Peacekeeping (suggested, *inter alia*, by Austria, the CSFR, Hungary, Poland, Canada and Norway), a Court for Arbitration and Conciliation (France), a High Commissioner for Minorities (The Netherlands), steering groups for crisis situations and consensus-minus-one (Germany), the role of the Conflict Prevention Centre (CPC) in relation to the Committee of Senior Officials (CSO) and regional arrangement status (Malta), an economic forum (the United States), and an expanded role for the Office for Free Elections (OFE) (Italy, the United States, Austria, Hungary and Poland). *See* Rob Siekmann, *Some Thoughts about the Development of CSCE Instruments in the Field of Peace and Security*, 3 Helsinki Monitor 10, 11-13 (1992); HERACLIDES, *supra* note 17, at 29. *See also* Prague Document, *supra* note 67, at 987-95.

253. *See* McGoldrick, *supra* note 8.

254. This is not surprising given the fact that decision-making within the CSCE is to a large extent still premised on consensus. Indeed, decision-making by consensus requires compromise.

255. E.g., Hungary and the United Kingdom. On institutional issues within the CSCE context, the United Kingdom has taken a position similar to the one it held during the negotiations on the Treaty on European Union. *See* Robert Wester, *The Intergovernmental Conference on Political Union: National Positions; United Kingdom, in* FRITZ LAURSEN & SOPHIE VANHOONACKER, THE INTERGOVERNMENTAL CONFERENCE ON POLITICAL UNION: INSTITUTIONAL REFORMS, NEW POLICIES AND INTERNATIONAL IDENTITY OF THE EUROPEAN COMMUNITY 189-205 (1992) [hereinafter INTERGOVERNMENTAL CONFERENCE]. *See also*, HERACLIDES, *supra* note 17, at 36.

for the new CSCE.[256] The resulting accommodation of both ends of the spectrum has resulted in provisions which bear semblance of this Great Compromise between appearance and effectiveness. As a result, some instruments have been rendered empty and ineffective.[257] Others have been made more practical and acceptable.[258]

The Helsinki Decisions contain an elaborate framework of provisions on Early Warning and Preventive Action,[259] the Political Management of

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256. E.g., Germany and France. The German position can be traced to the Moscow Conference on the Human Dimension of September 1991, when Foreign Minister Genscher strongly articulated the need for interventionism in regard of human rights violations. Germany has been in favor of a stronger, more assertive CSCE since. It does not, however, share the strong French desire for a full-fledged legal entity. The French view on a full legalization of the CSCE is closely related to its desire to provide new impetus to a "Pan-European Security Treaty," through which the CSCE could gain a dominant role in the European security spectrum at the expense of NATO. Similar to the position of the United Kingdom, the French and German positions are reminiscent of their views during the negotiations on the Maastricht Treaty. *Id.* at 34-35; INTERGOVERNMENTAL CONFERENCE, *supra* note 246, at 49-63, 115-27. *See also supra* notes 148, 224.

257. The current framework for mounting a CSCE peacekeeping operation contains criteria of such number and nature that it is at least questionable whether this instrument is a viable one. *See* Helsinki Decisions, *supra* note 15, at 1400-1402, ch. III, ¶¶ 17-55. *See also* HERACLIDES, *supra* note 17, at 172.

258. The provisions on Fact-Finding and Rapporteur Missions are an example of this. Originally submitted by Austria, Poland and Slovenia, the initial version was very ambitious, containing a clear and functional distinction between both types of missions. The Rapporteur Missions were to be equipped with a mandate set by the CSO, upon request of a Participating State and after a decision taken by consensus. In emergency situations, Fact-Finding Missions should be dispatched by the CIO upon the request of at least six Participating States in relation to a particularly serious threat to *any* CSCE commitment. These proposals were too detailed, too permissive of activation and therefore contrary to the interests of a number of Participating States. Ultimately, the watered-down version placed enough obstacles in the way of the effectiveness of such a Mission to make it acceptable to all Participating States. *See* Helsinki Decisions, *supra* note 15, at 1400, ch. III, ¶¶ 12-16. *See also* HERACLIDES, *supra* note 17, at 88-89.

259. The provisions on Early Warning and Preventive Action are closely related to the position of the HCM. They are a novum to the CSCE because of their anticipatory nature. Regular, in-depth political consultations "within the structures and institutions of the CSCE" between the Participating States, combined with the early warning provided by the HCM to the CIO and CSO, are envisaged to identify potential crises in their developing stage. This would enable the CSCE to take preventive action, rather than respond to a crisis. The CSO holds primary responsibility in this regard, and its attention may be drawn to such situations through the CIO, *inter alia*, by any State directly involved in the dispute; a group of 11 States not directly involved in the dispute; the HCM in situations he deems escalating or exceeding his scope of action; the CC/CPC following the use of the Vienna Mechanism; or by the use of the Moscow or Valletta Mechanisms. *See* Helsinki Decisions, *supra* note 15, at 1399, ch.

Crisis,[260] Instruments of Conflict Prevention and Crisis Management,[261] and the Peaceful Settlement of Disputes.[262] This framework is closely related

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III, ¶¶ 3-5.

260. The CSO has overall CSCE responsibility for managing a crisis with a view to its resolution. The CSO may initiate a variety of options, including the recommendation of steps to be taken by the State or States concerned, or the recommendation of other procedures and mechanisms to solve the dispute peacefully. Alternatively, the CSO may seek independent advice and counsel from experts, institutions and international organizations. It may even consider concerted action, which could entail, *inter alia*, a negotiated settlement, the dispatch of Fact-finding or Rapporteur missions, or the initiation and/or promotion of the exercise of good offices, mediation or conciliation. The CSO may delegate tasks to the CIO, the Troika, an *ad hoc* steering group of Participating States, the CC/CPC or such other institutions as it may determine appropriate (in practice, the newly-created Permanent Committee). The CSO will establish the precise mandate for action, including provisions for regular reporting and consultation. This leaves unaffected the freedom of the delegate to determine how to proceed, with whom to consult, and the nature of any recommendations to be made. In addition, it is explicitly stated that all Participating States concerned in the situation will fully co-operate with the CSO and the agents it has designated. Whether this is a binding obligation or a so-called "wishful thinking" provision is not clear. *See* Helsinki Decisions, *supra* note 15, at 1399-1400, ch. III, ¶¶ 6-11.

261. Crisis management lies at the heart of the "operationalization" process of the CSCE and is closely intertwined with its regional arrangement status. From a political point of view, the "presence on the ground" aspect of crisis management is consistent with the intention to make the CSCE an effective, credible and viable actor in the security scene. Nevertheless, for that same presence it is implicitly dependent on other actors (NATO, WEU, the CIS) rather than its Participating States in their individual, sovereign capacity. From a legal point of view, this has raised questions regarding out-of-area-operations and the relationship between U.N. peacekeeping and CSCE peacekeeping. The instruments for crisis management encompass Fact-finding Missions, Rapporteur Missions and CSCE Peacekeeping. With regard to the first two instruments, it should be noted that they are also considered as instruments for conflict prevention. Originally very ambitiously worded, the provisions regarding the dispatch of these missions have been subject to criticism because of their vagueness. Nevertheless, from these provisions it is clear that these missions are dispatched by the CSO or the CC/CPC on the basis of a consensus decision, that the mandate of the mission is set by either of these two organs, that the Participating State(s) will cooperate fully with the mission on its territory, that the report(s) of the mission will remain confidential until discussed, and that the expenses of the mission will be distributed over all Participating States, except where the mission is provided on a voluntary basis. *See* Helsinki Decisions, *supra* note 15, at 1400, ch. III, ¶¶ 12-16.

262. The peaceful settlement of disputes is of primary concern to the CSCE as a regional arrangement. Since the Prague Council Meeting, the idea of a Court of Conciliation and Arbitration has been strongly favored by France, consistent with its view on full-fledged legalization of the CSCE. Since no agreement could be reached in Helsinki, the Helsinki Decisions have provided guidance for subsequent negotiations. As a result, a legally binding document concerning the peaceful settlement of disputes has been adopted at the Stockholm Council Meeting of December, 1992. This so-called Stockholm Convention has not only introduced a Court of Conciliation and Arbitration within the CSCE ranks, it has also marked a remarkable reversal in the non-legal

to the provisions of Chapter I (the strengthening of CSCE institutions and structures), Chapter II (the CSCE High Commissioner on National Minorities, HCM), and Chapter IV (Relations with international Organizations, Non-Participating States and the Role of Non-Governmental Organizations). From this last Chapter, it can be discerned that Chapter III is governed by the understanding that the CSCE is a regional arrangement under Article 52 of the U.N. Charter.[263]

Since the CSCE has not been granted a political mandate to engage in enforcement action, the CSCE does not require prior authorization from the Security Council before taking action under Chapter III of the Helsinki Decisions. Indeed, according to the analysis of section IV.C.3., the CSCE has priority over the U.N. in the peaceful settlement of local disputes. However, in all likelihood this means in practical terms a relatively independent position for the CSCE with regard to all its instruments except peacekeeping. Because of the instrument itself, as well as the explicit formulation regarding assistance to be rendered by existing Organizations to a CSCE peacekeeping operation,[264]

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character of dispute resolution. In addition, there has been an enhancement and simplification of the Valletta Mechanism, as well as the creation of the possibilities to resort to either directed conciliation by the Council or the CSO, or to reciprocal declarations of advanced acceptance of conciliation. Moreover, the CSCE procedural *grundnorm* of consensus has been further challenged by introducing the "minus-the-disputants" element in directed conciliation by the Council or CSO. *See Decision on Peaceful Settlement of Disputes, including the Stockholm Convention on Conciliation and Arbitration within the CSCE* (Dec. 15, 1992), CSCE Doc. CSCE/3-C/Dec.1, *reprinted in* 32 I.L.M. 551 (1993); McGoldrick, *supra* note 8, at 175; HERACLIDES, *supra* note 17, at 105-11, 176-79.

263. *See* Helsinki Decisions, *supra* note 15, at 1403, ch. IV, ¶ 2.

264. Under the subheading of *Co-operation with regional and transatlantic organizations*, the Helsinki Decisions' provisions on CSCE peacekeeping include the suggestion:

> The CSCE may benefit from resources and possible experience and expertise of existing organizations such as the EC, NATO and the WEU, and could therefore request them to make their resources available in order to support it in carrying out peacekeeping activities. Other institutions and mechanisms, including the peacekeeping mechanism of the Commonwealth of Independent States (CIS), may also be asked by the CSCE to support peacekeeping in the CSCE region.

Helsinki Decisions, *supra* note 15, ch. III, ¶ 52. Decisions by the CSCE to seek such support would be made on a case-by-case basis, after prior consultations with the Participating States which belong to the organization concerned (paragraph 53). However, procedures for the establishment, conduct and command of CSCE peacekeeping operations would remain unaffected in such a case (paragraph 54). In other words, the political supervision would be a CSCE matter, whereas the operation itself might very well be carried out by NATO, WEU or the CIS. This last-minute compromise of the Helsinki Summit has already run afoul in its first test: so far, CIS peacekeeping under the guise of CSCE peacekeeping has been rejected by a majority of the Participating States. *See Press Briefing by Grigory Karasin, RF Foreign Ministry Spokesman,*

current practice suggests close coordination between the CSCE and the U.N., with ultimate responsibility in the Security Council.[265] This implies that Chapter III is limited to the extent that there remains a hierarchical relationship between the CSCE and the U.N. Security Council, which could become an obstacle to politically sensitive actions on the part of the CSCE.

CSCE Peacekeeping provides the CSCE with a major instrument for political conflict resolution. As such, it is analogous to modern-day U.N. peacekeeping operations.[266] A very detailed scheme sets forth the criteria for mounting a CSCE peacekeeping operation, and provides for the structure(s) of the operation, financial arrangements and cooperation between the CSCE and regional or transatlantic organizations. From these provisions, it is clear that the U.N. peacekeeping experience has been "codified" in the Helsinki Decisions.[267]

OFFICIAL KREMLIN INT'L NEWS BROADCAST, FISC, Mar. 11, 1994; *CSCE to Boost Presence in Breakaway Georgian Region*, *supra* note 229.

265. *See supra* note 149.

266. U.N. peacekeeping operations have traditionally not been part of the political conflict resolution itself, but have served as a facilitating instrument to that end. Recently, the U.N. Security Council has demonstrated a greater willingness to adapt the mandates of peacekeeping operations according to the needs of a particular situation, including the authorization for use of force (e.g., the mandate for UNPROFOR in connection with military supervision of humanitarian operations in Bosnia). U.N. Doc. S/24540, ¶ 9 (1992).

267. The decision to dispatch a CSCE peacekeeping operation is taken by the Council or the CSO on the basis of consensus and upon the request of one or more of the Participating States. The mandate for such an operation is then set by the CSO. The operation can be set up for purposes of supervising and maintaining cease-fire agreements (e.g., in CIS Republics), monitoring troop withdrawals (e.g., in the Baltic States), supporting the maintenance of law and order (this has to be interpreted as *not* involving the use of force), assisting refugees and providing humanitarian and medical aid (e.g., in the Balkans). CSCE peacekeeping cannot entail enforcement action. Furthermore, it requires the consent of the parties concerned, is to be conducted impartially, cannot be a substitute for negotiated settlement and is therefore limited in time. An operation can only be mounted if certain conditions have been met; these include, *inter alia*, the establishment of an effective and durable cease-fire, an agreement on the necessary Memorandum of Understanding with the Parties concerned, guarantees for the safety at all times of all personnel involved, and a sound financial basis. The political control of the mission is the prerogative of the CSO. In turn, the CSO will assign overall operational guidance to the CIO assisted by an *ad hoc* group established at the CPC. The *ad hoc* group will provide the operational support for the mission and will monitor it. The operational command in the mission area will rest with a Head of Mission. *See* Helsinki Decisions, *supra* note 15, at 1400-02, ¶¶ 17-56. For a detailed overview of the negotiations, *see* HERACLIDES, *supra* note 17, at 89-100. In practice, the political control of the mission is exercised by the Permanent Committee, and a *Mission Support Section* at the CPC has replaced the *ad hoc* group mechanism. (The establishment of a permanent centre for operational support is more efficient than the creation of support units on an *ad hoc* basis). H.G. Scheltema & P.W. Gorissen, *CVSE, conflictpreventie*

In many ways, these provisions reflect an illusory approach. As a result of too many Participating States being in favor of CSCE peacekeeping with too little common agreement on how to construct a viable framework for it, CSCE peacekeeping has become hostage to practical realities. In fact, it has become almost a management task in itself, rather than a management tool. Moreover, the current framework raises pertinent questions with regard to the actual functioning of such an operation. Even more important, the recent trend emerging from U.N. Security Council decisions on peacekeeping operations equipped with a mandate to use force if prevented from the discharge of its duties renders CSCE peacekeeping at least questionable *prima facie*.

First, if a CSCE peacekeeping operation cannot be equipped with the same mandate, then it carries no advantage over U.N peacekeeping. In fact, its favorable position on the regional level would carry no weight for lack of substantive meaning. Second, if strict adherence would be paid to the enumerated conditions for approval of an operation, it would be very unlikely that one could actually be established. In addition, even assuming that these conditions would be met, the "contracting out" possibility to NATO, WEU or the CIS may complicate the operation significantly both in political and legal terms. In short, the concept of CSCE peacekeeping may have met with verbal approval since the adoption of the Helsinki Decisions; in practice it has been more of a problem than a solution. Ultimately, this could indeed prove to be the symbolization of the predicament for the CSCE as a regional arrangement.

PART III: CONCLUSIONS

War, peace and a quest for security have been the key words for the European continent since the collapse of the Berlin Wall in 1989. With the euphoria over the dawn of a new international order having faded and the Spirit of Paris having become a distant reminder of the simplicity of assumption, the European political architecture has become unpredictable and unstable, and therefore unreliable. This development has not only produced an "inter-institutional landscape" which entails a list of acronyms too long for its own viability, but also has marked the stepping stone to changes in a restless remnant of the Cold War.

For more than twenty years, the Conference on Security and Cooperation in Europe has been synonymous with political dialogue, normative standards

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en crisisbeheersing: een tussenstand [CSCE, conflict prevention and crisis management: an update], 163 MIL. SPECTATOR 171, 176 (1994).

and bloc-to-bloc confrontation. Despite the odds, the CSCE has accommodated itself within the niches of a European security regime throughout periods of strong confrontation and little cooperation. Its comprehensive set of normative commitments has served as a beacon in troubled waters. In short, the CSCE has certainly made a normative, if not factual, contribution to the "Old Order."

The CSCE seems to have been less prepared for the "New Europe" than it envisioned itself to be in the Charter of Paris. It has been ill at ease with the recurring dilemmas that its conceptual definition of normative standards tends to create. Indeed, the long jubilated Decalogue of Principles has become subject to unprecedented discussion. Accordingly, the CSCE has gone through a process of gradual changes in its defining elements in order to redefine its position within the European security structure.

Through the adoption of the Berlin, Moscow, Valletta and Vienna Mechanisms, the CSCE has set a first step towards redefinition. The CSCE has changed its emphasis from dialogue and response to action and anticipation. The Prague Document attempted to clarify and strengthen the "New CSCE" in more explicit terms. Ultimately, this has resulted in the adoption of a framework for action incorporated in the Helsinki Decisions. Remarkable for what it left out rather than for what it included, the Helsinki Decisions have been regarded by some as a major turning point for the CSCE. Not only do they attempt to define the CSCE in organizational terms (instead of procedural terms), they also demonstrate a heretofore unknown eagerness to become a viable "manager of change" within the European security structure. In this respect, the CSCE has made an attempt to lift its position to a political level beyond its means.

The Helsinki Decisions have not been sufficient to firmly establish a prominent position for the CSCE in this respect. Accordingly, Decisions of the Stockholm and Rome Council Meetings have attempted to remedy the flaws in the organizational structure and to redefine its legal position. With a view to continuing challenges to its political conflict resolution capacity, the CSCE Participating States have demonstrated less resolve.

In sum, the CSCE has acquired a hybrid character which can no longer be defined as a process, yet is not a legal entity. Claims to the contrary notwithstanding, the CSCE seems suspended between developing into an international organization and remaining a non-legal or quasi-legal arrangement for security issues. Indeed, the regional arrangement status under Article 52 of the U.N. Charter does not provide the CSCE with a legal definition of itself. Instead, it confers legal authority under international law for the use of the Tools of Change. Thus, the regional arrangement status in itself is not sufficient to define the CSCE's legal position as an entity. The upcoming Budapest Summit may not be able or even willing to clarify this issue; at the same time, the Summit presents an opportunity for the Participating States to prevent the CSCE from drowning in the quagmire of Acronyms. Like a parent steering a child, the Participating States can also guide the CSCE into a new direction.

The Child of the Cold War, therefore, may become the Adolescent of the New Europe after all: still unsure of its direction, but mature enough to be aware of the unrelentless attraction emanating from its implied Promise.

THE BEST OF ALL POSSIBLE WORLDS? MAASTRICHT AND THE UNITED KINGDOM

Ian Ward[*] [**]

INTRODUCTION

In 1758, Voltaire wrote *Candide*, in which the young hero is whisked around the world in a series of increasingly ludicrous and tortuous adventures in the company of Pangloss, a "metaphysico-theologo-cosmolo-nigologist." Despite every possible misfortune, prompted by the blind optimism of a rationalism run riot, Candide remains convinced that all will be well. The saving grace is the fact that, despite every appearance to the contrary, he does live in "the best of all possible worlds."[1]

As an analogy with the present condition of European Community politics, Candide's fate is an appropriate one. Post-Maastricht Europe too, we are assured, will be the best of all possible worlds. Despite every appearance to the contrary—the repeated difficulties that ratification of the Treaty has experienced in certain member states, the volubility of anti-Maastricht criticism, and the virtually uniform condemnation of the Treaty provisions by political and legal commentators—the immanent "righteousness" of an integrated European order has preserved the idealised inevitability of Maastricht. Maastricht has become so much more than just a constitutional or political issue. It has become

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1. Voltaire, *The Critique of Pure Reason*, Candide (Harmondsworth, 1947). Like so many eighteenth century Europeans, he questioned the blind faith of Enlightenment rationalism. Twenty-one years later, Immanuel Kant published the first of his three *Critiques* for precisely the same reason. Kant seriously doubted whether pure logic would, or even could, lead mankind to its unavoidable destiny, or to use Hegel's concept, the "overcoming" of itself. Where Kant produced a substantive metaphysics which would gear the following two centuries of critical philosophy, Voltaire penned one of the most enduring and biting satires in modern literature.

an image. As *The Times* commented, "The shimmering vision of a new European order enshrined in the Maastricht treaty is a mirage, forever just out of reach."[2] Rather like Coleridge's Xanadu, everybody is convinced that Maastricht represents something that is incontrovertibly desirable, but somehow the vision remains forever just out of range of reality. On exactly the same day, another influential UK newspaper, *The Guardian*, suggested that the Danish people, on the eve of their second referendum for ratification of the Treaty, were being "asked to vote for Maastricht because, like Everest, it is there . . . . The question, stripped of all detail and legalities, has become one of simple, emotional response."[3]

The hard political realities and repercussions of the Maastricht Treaty have been far greater than was ever originally envisaged, and, as will be suggested shortly, have shaken the present British government to its foundations. The potential constitutional and legal repercussions are no less considerable. Maastricht presents a new and fundamentally ill-determined constitutional order. Rarely have academic commentators been so united in condemning a legal document. The Maastricht Treaty is, in simple terms, a desperately inept and thoroughly confusing document.

The purpose of this article is to investigate the Treaty as a constitutional and legal document and to suggest why constitutional and legal commentators have been so scathing in their criticism. At the same time, a collateral purpose is to present a paradox. Whilst so many anti-Maastricht campaigners in the UK have, at times almost hysterically, railed against the explicit and implicit threats to constitutional sovereignty and the democratic failings of the Treaty, it may well be that the Treaty itself represents the most damaging development in the process of European integration since the very inception of the European Community. In other words, the one thing that might prevent further integration is the very document that was designed to facilitate it.

The first part of the article investigates the politics of Maastricht from the standpoint of the UK. One purpose is to discuss the extent to which the Maastricht issue has impacted the UK constitution and the domestic political scene. A second collateral purpose is to introduce the specific concessions that the UK secured at Maastricht and to suggest their possible repercussions, both in the UK and in the Community as a whole. The second part of the article then considers the particular legal effect of the Treaty, or more accurately, its legal failings. It suggests that, rather than resolving the increasing difficulties which lawyers experience in trying to operate within the dual system of EC and domestic law and the inevitable anomalies which result, the Treaty only

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2. Janet Bush, *Recession is Greater Threat to Maastricht than the Danish Vote*, THE TIMES (London), May 17, 1993, at 42.

3. THE GUARDIAN, May 17, 1993, at 19.

serves to exacerbate these anomalies and to shroud the Community legal order in even greater confusion.

I. THE POLITICS OF MAASTRICHT

i. *Discord in Zion*

During the 1650's, another decade when politicians clung even more tenaciously to a succession of unquestioned ideals callibrated by a semiotic of blind optimism, Oliver Cromwell would reassure the increasingly bewildered and bemused members of the various Parliaments that there is "always discord in Zion." There has been much discord in Westminster in recent months for two reasons: first, the concern over whether there should be a European Union; and second, and perhaps most importantly, at least in the context of this essay, whether the Maastricht Treaty is the way to go about it.

The power of the European ideal was revealed strikingly in 1990, when it effectively destroyed the Thatcher premiership. Regardless of questions of political ideology, Margaret Thatcher's reign as Prime Minister was, in the context of British politics, no ordinary premiership. Thatcher had remained virtually unchallenged at the head of government for eleven years.[4] The issue which finally lost Party support, and most importantly Cabinet support, was Europe. Until Thatcher questioned, not the existence of Xanadu, but the actual desirability of getting there anyway, she had enjoyed comfortably the longest and probably the most secure premiership in recent history.[5] One mistake (at least one that mattered) destroyed Thatcher with a speed and force which left political commentators reeling.[6] But no one was allowed to stand in the way of the "best of all possible worlds." In fact, the resignation of Sir Geoffrey Howe, the only Minister to have served throughout all three administrations since 1979, precipitated Thatcher's spectacular fall from grace.

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4. For a commentary on her control of Cabinet government, *see* Peter Clarke, *Margaret Thatcher's Leadership in Historical Perspective*, 45 PARLIAMENTARY AFF. 12 (1992).

5. It has been suggested that little more than a year earlier, Thatcherism had "achieved its apotheosis." The Thatcher administrations had been characterized by the hiring and firing of Ministers with almost breathtaking alacrity. It seemed that there was nothing that Thatcher could do that would upset anyone enough to protest. Even the recent constructive dismissal of Chancellor Lawson, over the desirability of entering a European monetary system, seemed to pass with little more than a polite murmur of interest. *See id.* at 11, 15.

6. *See* R. K. Alderman & Neil Carter, *A Very Tory Coup: The Ousting of Mrs. Thatcher*, 44 PARLIAMENTARY AFF. 125 (1991) (referring to her "spectacularly abrupt" departure "as though an immovable institution had been overthrown"). *See also* Clarke, *supra* note 4, at 16 (describing Thatcher's fall from power as "staggeringly sudden").

Howe's resignation speech in the House of Commons, which, with a stunning understatement, he suggested was due to a "growing difference" of opinion over Europe, provided, as one commentary suggests, "both the issue and the trigger" for the cataclysmic events of the following weeks.[7]

Not only did Howe's resignation precipitate Thatcher's demise, it also reawakened fundamental divisions within the Conservative Party over the role of the UK in Europe. His resignation letter suggested that the divisions within government, even at Cabinet level, had been barely papered over for the previous five years. The resignations of senior Ministers Heseltine, Lawson and Ridley, he added, had all been forced by the European issue.[8] When Heseltine returned to challenge Thatcher for the leadership of the Party and the Premiership, he did so by highlighting the European issue. Although Thatcher won the first ballot by a bare four votes, it was a wholly Pyrrhic victory. Heseltine failed to secure the leadership of the Party and the country, but he returned to a new Cabinet of committed pro-Europeans, which was led by the most committed of all, Prime Minister Major and Foreign Secretary Hurd.[9]

The inheritance, however, has proved to be something of a poisoned chalice. The first three years of John Major's premiership have been dominated by the Maastricht issue, in a way in which it is hard to find a comparison. Since the 1992 election, which reduced the Conservative Party majority in the House of Commons to just nineteen, Major has been faced with an intransigent minority of between twenty and thirty Euro-sceptics who have displayed and articulated a constant willingness to destroy the Government before accepting the Maastricht Treaty.

The piloting of the Maastricht bill through Parliament more than once threatened to sink the Major boat on precisely the same "submerged rock of Europe" that sank Thatcher.[10] The first overt sign of difficulties was the rebellion of twenty-six Tory MPs in the "Paving Motion" in November 1992. The "Motion" was a not-to-be-repeated bluff, called by Major on the European principle, in an effort to bully the Party into line. Having repeatedly made clear that a defeat in the motion would lead to his and possibly even the government's resignation, Major, with a threadbare Parliamentary majority of nineteen MPs, won the vote by an even more threadbare majority of just three, by 319-316. The previous days, during which it had looked at times as though defeat was inevitable, had witnessed "whipping" measures of almost

7. *See* Alderman & Carter, *supra* note 6, at 128.
8. *See id.* at 128-29.
9. *See id.* at 128-39 (commentary on the party elections).
10. *See* Clarke, *supra* note 4, at 16.

unparalleled ferocity.[11] Such was the strength of rebel feeling, and the incontrovertibility of their argument, that Major was forced, paradoxically, to take the stand that the vote was purely and simply a confidence vote, and moreover, that given the presence of the principle of subsidiarity in the Maastricht Treaty, the actual bill itself was of "very little significance."[12] It was a curious *volte-face*.

The vexed issue of subsidiarity and the UK approach to it will be considered in the next section of this article. The "Paving Motion," far from being the end of the issue, was, in fact, only the beginning. The continued travails of the Major administration in securing the passage of the bill, and the repeated *volte-face* suggesting that the bill really does not matter anyway, is considered in section iii.

ii. *The Politics of Compromise: Subsidiarity and the F-Word*

On assuming the leadership of the Party and the country in 1990, Major was well aware that carrying the Conservative Party along the road to ratification of the Treaty represented a considerable hurdle. The demise of his predecessor was a sobering illustration of what might befall a Prime Minister who failed to play the European card with dexterity. One of the more interesting characteristics of Major's Premiership is his habit of "pulling rabbits out of hats."[13] Thus, it was at Maastricht, when everyone prophesied an inevitable doom, that Major was able to stand, apparently alone (although, in fact, he

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11. The UK's humiliating withdrawal from the European Exchange Rate Mechanism, after a failed attempt to bolster the pound sterling had swallowed a quarter of the country's gold reserves, provided the Euro-sceptics with precisely the opportunity they sought. Rather than having to campaign solely on the principled issues of sovereignty and federalism, which alone were able to spawn considerable Party discontent, the Sceptics were also able to point to a stark and recent example of precisely how the European ideal as enshrined in the Maastricht Treaty simply did not work. For a commentary on the nature of Tory Euro-scepticism and its policy of waiting for the inevitable practical deficiencies in working through the common economic policies enshrined in Maastricht, *see* S. Bulpitt, *Conservative Leaders and the Euro-Ratchet: Five Doses of Scepticism*, 63 POL. Q. 258 (1992). The subsequent collapse of the entire EMS system has, of course, born out the validity of this approach. For an account of the "Paving Motion," *see* David Baker et al., *Whips or Scorpions? The Maastricht Vote and the Conservative Party*, 46 PARLIAMENTARY AFF. 151 (1993).

12. *See* Baker et al., *supra* note 11, at 156.

13. As one commentator has observed, Major has developed the habit of "giving the impression of drowning . . . in the tumultuous seas of publicity-mongering politics; and then emerging, when people thought he had drowned, bringing the results he had promised to obtain." *See* Editorial Note, *The Deeper Meanings of Mr. Major's Second Victory*, 28 GOV'T. & OPPOSITION 4 (1993).

enjoyed the important, but considerably less provocative, support of Portugal and Denmark), and to demand the removal of the word "federalism" from the Treaty and the inclusion of the principle of subsidiarity, and to secure the UK "opt-out" from the Social Chapter.[14] The effect of the Social Chapter "opt-out," in particular its potential ramifications in domestic politics, is considered in the next section.

The other two concessions that Major wrung from the Maastricht summit have far wider implications. The removal of federalism represented the removal of the central pillar of the originally intended constitutional redesign that the Treaty was supposed to present and facilitate. The Final Draft of the Treaty on Political Union, as drafted by the Dutch Presidency, modified at the Maastricht summit, and produced in December 1991, stated in Article A of the Common Provisions that the "Treaty marks a new stage in the process leading gradually to a Union with a federal goal."[15]

For many pro-Europeans, and for the vast majority, it is fair to say, a fully federal Europe has always been the Holy Grail. It was certainly the original and often asserted ambition of the founding father of the Community, Jean Monnet. At Maastricht, all member states, save for the UK, Portugal and Denmark, subscribed to the ideal and advocated its inclusion in the Treaty. However, the Final Draft was accurate in every detail except one—it was not final. When the final version of the Treaty emerged in the following February, Article A, though still describing a "Union," had been changed to read that "[t]his Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe in which decisions are taken as closely as possible to the people."[16]

The change was significant in two respects. First, and most obviously, it had removed the F-word: "federalism." Only too aware of the difficulties that he would face in trying to present a Treaty acceptable to his country, and much more importantly to his Party, Prime Minister Major furthered his vital hopes of steering domestic legislation through Parliament by removing federalism. Perhaps only a symbol, it was a vital one nonetheless. In a vein deliberately reminiscent of his predecessor, Major at least appeared to champion the interest of the British over that of the Europeans.[17]

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14. And contingently from the European Monetary System. For a general introduction to these "opt-outs," *see* Charles Bidwell, MAASTRICHT AND THE UK (PACE 1993).

15. Europe Documents No. 1750/1751, Final Draft of the Treaty of Political Union Prepared by the Dutch Presidency, at 3.

16. For the text of the Treaty and a commentary on its provision, *see* Bidwell, *supra* note 14.

17. It has been suggested that Thatcher's approach to European politics was "to rampage from summit to summit as a sort of fishwife Britannia demanding her money back." *See* Clarke, *supra* note 4, at 15.

The second change is important in that it reflected the elevation of the principle of subsidiarity into one of the central Provisions of the Act. Subsidiarity was thus the second great "victory" for Major on his return from Maastricht. At least that is true of Major's interpretation of subsidiarity. If, on the other hand, the German or French, or indeed everyone else's interpretation of subsidiarity is correct, then it is, on the contrary, potentially Major's most serious mistake. Subsidiarity is at least as much, if not more, of a political than a legal concept.[18] The Oxford English Dictionary defines subsidiarity as "the principle that a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level." So far so good. Unfortunately, interpretation, and thus potentially implementation, of subsidiarity has spawned a myriad of potential meanings which has belied the apparent simplicity of its original definition.

The principle of subsidiarity had been originally submitted by the European Commission for inclusion in the Tindemans Report on European Union in June 1975. It was not, however, adopted. The principle returned in the highly integrationist 1984 "Draft Treaty Establishing the European Union," drafted by the European Parliament. Although it was not formally adopted in the 1986 Single European Act, its inclusion in Article 130R(4) in the area of environmental affairs, represented the arrival of subsidiarity as a respectable European policy ideal; at this stage, it was cherished by integrationists as one of the pillars of a fully federated European order.

Amongst the strongest advocates of subsidiarity were the Germans, whose own federal constitution included subsidiarity, and from whom the principle was essentially grafted. For the Germans, subsidiarity is federalism. The then Dutch President of the Council, Ruud Lubbers, declared, "I respect subsidiarity. As you know, for the Germans, the word for this is federalism."[19]

Integrationists were thus, as one commentator has observed, somewhat "surprised," if not perturbed, by the sudden enthusiasm for subsidiarity articulated by an increasingly skeptical UK government. The more firmly the Thatcher and Major administrations dismissed the idea of federalism, the more keenly it seemed to approve the principle of subsidiarity. Whereas the German-Dutch-French interpretation of subsidiarity maintains that the Community should undertake actions which can be better achieved or attained at a supranational level, the British interpretation maintains that subsidiarity

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18. The potential legal repercussions are discussed later in Part II, section ii of this article.

19. The application of subsidiarity in the Treaty document even received the enthusiastic approval of U.S. Secretary of State James Baker, who identified subsidiarity as "that which we in the United States call federalism." *See* A. Teasdale, *Subsidiarity in Post-Maastricht Europe*, 64 THE POL. Q. 189 (1993).

means Community action can *only* be undertaken when it is necessary or essential for the securing of the objectives in question.

Both sides prepared their own drafting of the principle for inclusion in the Treaty. The result was Article 3b, a classic piece of Euro-fudge which was hoped to be "just about acceptable to everyone." However, as one commentator has observed, it "satisfied nobody completely."[20] Article 3b reads:

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot *be sufficiently achieved* by the member states and can therefore, by reason of the scale or effects of the proposed action, *be better achieved* by the Community.[21]

The inclusion of the two interpretations produces an immanent and unavoidable confusion in the text. The potential legal repercussions are considered subsequently, where it is suggested that the interpretation will ultimately have to be decided by the European Court of Justice, even though *prima facie* the issue is potentially non-justiciable. It cannot be said with any particular confidence that the Court will rule in Major's favour. Subsidiarity remains one of the pillars of the Treaty and the envisaged "new" European order. It is, thus, an enduring pity that the requirements of political expediency necessitated a deliberately obtuse definition of the term in the Treaty document. In the words of one political commentator: "The absence of clear guidelines . . . tends to suggest that the reason why the definition of subsidiarity in the Maastricht Treaty is so vague is precisely because there can be little agreement at a political level on the substance of the concept in the European Community today."[22] The failure at Maastricht to present subsidiarity as a definitive political and legal concept, and more than just an ephemeral ideal, is symptomatic of a Treaty that singularly fails in its greatest original ambition: to present a comprehensive and workable new political and legal order.

iii. *The Politics of Sovereignty: The Amendment Debate*

Prime Minister Major's Maastricht concessions have returned to haunt him. The repercussions of subsidiarity on the political and the legal order in Europe may well prove to have a long-term debilitating effect, and are

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20. *Id.* at 191.
21. Maastricht Treaty art. 3b (emphasis added).
22. Teasdale, *supra* note 19, at 191.

considered shortly. The more immediate ghost, and one which took virtually the entire parliamentary year to exorcise, was the Social Chapter Protocol or "opt-out." In fact, the UK also secured an opt-out which permits it to reconsider at a later date whether or not it wishes to join a common currency. It was, however, Major's third great "victory," the Social Chapter Protocol, which stole the limelight and almost proved to be his undoing.

The Social Chapter, regardless of its ideological content, as a piece of legislation, is uniformly denounced, even by its supporters, as immanently at odds with the principle constitutional pillars of the Treaty. In the supposedly non-federal Union, the most glaring problem is the contradiction between the de-centralising status, or at least intention, of subsidiarity and the irreducibly centralising nature of the Social Chapter.[23] From a particular UK perspective, the articles of the Social Charter in large part reverse much of the employment legislation which had been piloted through Parliament by the Conservative governments during the 1980's. It was this that drove Major's insistence that the UK should opt out of the Social Charter. Inspired by such success at protesting so loud and so long about the desirability of a new European order, and then opting out of one of the most important parts, other countries immediately followed suit, opting out of whichever bits seemed least desirable.[24] The effect of the Protocol in law is considered below.

The more immediate political effect in the UK has been considerable. Whilst the Protocol preserved existing employment legislation, and could be championed by John Major as another example of "batting for Britain," it provided a critical weapon for his opponents. Not the least of the peculiarities in the passage of the Maastricht legislation has been the joint enthusiasm of all major political parties for it. Back in the nineteenth century, the revered constitutionalist Walter Bagehot highlighted the "duty" of the Opposition to oppose.[25] Yet, the only issue upon which the Opposition has shown itself willing to challenge the government is the Social Chapter Protocol.

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23. For a scathing criticism of the ideology and the practicalities of the Social Charter, *see* Christopher Lingle, *The EC Social Charter, Social Democracy and the Post-1992 Europe*, 14 W. EUR. POL. 129 (1992).

24. Including the Danes, who wished to maintain existing legislation on the acquisition of second homes, and the Irish, who wished to maintain the constitutionality of their abortion clause, Article 40.3.3 of the Irish Constitution. But none were as central to the original ambitions of the Treaty as the Social Charter.

25. Repeatedly over the past 12 months, the Opposition has steadfastly refused to defeat the government, and at least potentially, bring it down. Such is the transcendental power of the European ideal. *See generally* Colin Turpin, BRITISH GOVERNMENT AND THE CONSTITUTION: TEXT, CASES AND MATERIALS 445 (2d. ed. 1990) (for the role of the Opposition in the UK Constitution).

The varied and frequently inconsistent attempts to do so have centred around the tabling of various amendments to the European Amendment Bill which would require inclusion of the Chapter in domestic law. The tabling of successive amendments (numbers 27 and 74 prior to passage of the bill, and finally amendment 2 prior to ratification, all of which were designed to replace the former and to reduce the possibilities of the government evading inclusion of the Chapter) saw the passage of the bill descend into ever deeper and more labyrinthine procedural technicalities.

Amid various accusations of skullduggery, the government managed to negotiate the potential disasters, not least by bluffing the Commons, through the Attorney-General, that none of the amendments were anyway workable and were thus unenforceable at law.[26] The government's success in having the Social Chapter opt-out discussed only after Royal Assent effectively secured its eventual passage. In response, the Opposition rather truculently refused their last opportunity to defeat the government by abstaining from the vote on Third Reading. The Opposition neither approved nor disapproved the bill, which duly received the Royal Assent on July 20, 1993.

However, the doubts surrounding the legal status of the second Amendment remained. Though the European Amendment Bill had already passed into law, Amendment 2 to section 7 of the Bill called for inclusion of the Social Chapter prior to ratification of the Treaty. Again, there was much debate with regard to the alleged legal authenticity of such an amendment, and again the Government, through the Attorney-General, was adamant that such an amendment could not effect the ratification which pertained to an international treaty and was a matter of executive action.[27] However, regardless of these political niceties, the amendment vote that, if passed, threatened to launch a series of time-consuming legal actions in both the domestic and European courts, presented a major political hurdle. On July 22, 1993, amidst scenes which one national newspaper described as "mass hysteria," the Government scrambled through Amendment 2, tabled by the Labour opposition, which sought to include the Social Protocol in legislation prior to ratification.[28]

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26. The Deputy Speaker's resultant refusal to accept the tabling of either amendments 27 or 74 at Committee Stage even resulted in a vote of "No Confidence" in his position. The motion was rejected by 450-81, but the fact that there had not been such a motion for 21 years graphically illustrated the strength of feeling of many MPs, who felt that the last chances of defeating both the government and the bill were vanishing in a mire of procedural technicalities.

27. *See* Baker et al., *supra* note 11, at 163.

28. The vote tied at 317-317, and only the convention of the Speaker's casting vote in support of the Government secured its passage. There were 15 Conservative rebels voting with the opposition and eight abstentions. In a second supplementary division, on a motion tabled by the Government confirming acceptance of the Treaty as it then stood, however, the Government suffered a humiliating defeat by 316-324, with all 23 rebels voting with the

As the confidence of the government has oscillated, so too has the official approach to the Maastricht Treaty. At certain moments, it secures the British "role in the centre of Europe." On other occasions, when defeat has seemed likely, particularly over a Social Chapter, the government, rather like the little boy who refuses to play and threatens to take his ball home if he doesn't win, attitude has been that the bill does not matter anyway because the Treaty can be ratified through executive action. These exclamations, of course, do little except incense opponents and, more interestingly, open up again the vexed and ever-returning problem of sovereignty.

The fact that international treaties can be ratified by executive action is not doubted. However, the legal status of such treaties in domestic courts of law is certainly doubted. Furthermore, the suggested irrelevance of the bill, apart from rather obviously begging the question of why the government is so desperate to secure its passage, casts very serious doubts on the orthodox accommodation of European law and UK sovereignty. This orthodoxy was immediately tested in the action taken by Lord Rees-Mogg, questioning the power of Parliament to ignore its earlier wishes. Before discussing this action, it is necessary to briefly consider what is said in the supposed orthodoxy.

Unaccustomed to any degree of political or legal federation, the UK, on accession to the Community in 1972 and thus to the Community legal order, was faced with a particular dilemma with regard to the issue of sovereignty. The orthodox theory, which developed following the accession

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opposition. The repeated assertion that the Government would ignore the wishes of the House anyway and ratify through executive action proved to be a critical mistake and served only to harden rebel opposition. The Amendment Act required the passing of such a supplementary motion. Throughout the day, much speculation hung on the voting intentions of nine Ulster Unionist MPs who, after much cajoling and various unconfirmed promises of political reforms in the Province, agreed to support the Government. They also did so on the 23rd. It was subsequently discovered that, in the general "hysteria" of the Chamber, the tellers had counted incorrectly on the first Amendment vote, and the Government had, in fact, won anyway at 318-317 and did not require the Speaker's casting vote. *See* Anthony Bivens, *The Maastricht Debate: Major Faces the Ultimate Challenge,* THE INDEPENDENT, July 23, 1993. Prime Minister Major's response, the only conventional response following such a defeat, was to immediately table a confidence motion for the following day, which was deliberately drafted to demand acceptance of the Treaty legislation at the same time as expressing confidence in the government. The scarcely veiled threat was that continued opposition to the legislation would result in the collapse of the government. As one newspaper put it, the rebels' "bluff was called," and the government secured its motion of confidence by 339-299, having earlier defeated the retabling of Labour's opposition Amendment by 339-301. The quotation used repeatedly by newspapers on the morning of the 24th was Lord Wellington's statement that the events of the 22nd and 23rd had been "a damned close thing." Given the Government standing in the polls, it was rather more prosaically suggested that "Turkeys rarely vote for Christmas." *See* THE GUARDIAN, July 24, 1993, at 1-3, 21.

to the Community in 1972, was of a "dual constitution" with two sets of laws—domestic and European—subject to the principle of Parliamentary sovereignty.

The practicalities of this accommodation might have been questionable, and no one really imagined the possible scenario of exercising this sovereignty and leaving the Community, but in theory all was relatively neat and tidy. The thesis was famously articulated in *McCarthy's v. Smith*, where Lord Denning stressed that domestic courts would interpret domestic legislation in accordance with the principles and intent of European law. Where there was any conflict, the court would resolve it in favour of European law, which was, as a matter of principle, prior. This priority was enshrined in domestic law, by the European Communities Act, Section 2. It was thus prioritised by Parliament, and only Parliament's contrary intention, explicitly stated by statute, could alter this priority.[29]

There was much praise for Denning's accommodation or, as one commentator termed it, "Lord Denning's dexterous revolution."[30] There was also much criticism.[31] The "dual" nature of the UK Constitution has remained the orthodoxy in domestic courts. In *Factortame 1*, Lord Bridge made a very sharp distinction between EC law and domestic law, and described them as wholly separate sources of law, although both were subject to the sovereignty of Parliament.[32] The thesis has been recently approved by Lord Oliver in *Litster* and Lord Justice Glidewell in *Webb*.[33]

But what if Parliament no longer prioritises European law? Or indeed, what if Parliament had decided to prioritise the Social Chapter and enshrine it in statute? According to the Attorney-General, the government could ignore Parliament and ratify the Treaty as an executive action; however, this makes Denning's view of sovereignty difficult to accept. Lord Rees-Mogg's action was a direct challenge to Denning's accommodation. First, it suggested that Parliament in 1993 ignored the prior intention of Parliament in 1978, which required that any subsequent legislation altering section 6 of the 1978 European Parliamentary Elections Act should express the explicit contrary intention

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29. [1979] 1 All E.R. 325; 1981 Q.B. 180.

30. *See* T. Allen, *Parliamentary Sovereignty: Lord Denning's Dexterous Revolution*, 3 OXFORD J. LEGAL STUD. 22 (1983). *See also* T. Allen, *The Limits of Parliamentary Sovereignty*, PUB. L. 617 (1983).

31. Allen was somewhat ambiguous in his observations, conceding that the accommodation was "attractive," but suspecting that Parliament had fettered its discretion by seeming to require explicit repudiation of the 1972 Act. Allen, *supra* note 31, at 25-26. For a less compromising critique, *see* G. Anav, *Parliamentary Sovereignty: An Anachronism?*, 27 COLUM. J. TRANSNAT'L L. 647 (1989).

32. Regina v. Transport Secretary, Ex p. Factortame Ltd., [1989] 2 W.L.R. 1021-22.

33. Litster v. Forth Dry Dock and Engineering Co. Ltd., [1990] 1 App. Cas. 546; Webb v. EMO Cargo Ltd., [1992] 2 All E.R. 43.

of Parliament. Second, in similar vein, it implied that the ratification of the Social Chapter Protocol was itself unlawful in European law as established by the Treaty of Rome, and was thus unlawful in UK domestic law as counter to Parliament's wishes in 1972, which had established European law as fundamental domestic law. Regardless of the constitutional niceties created by Lord Denning, the Divisional Court would not exercise what it deemed to be a power of constitutional review and duly dismissed the application.[34] But in academic circles the doubts remain.

These doubts with regard to Lord Denning's accommodation, which were expressed long before the Rees-Mogg action, have encouraged alternative variations on the theory of sovereignty. Most recently, Professor MacCormick has suggested that the accommodation of the traditional Diceyan view of unitary sovereignty was fine as a transitional model for its "times" (i.e., the 1970's), but is no longer valid.[35] MacCormick's view of a plural sovereignty in the UK, as developed from a Hartian as opposed to purely Austinian-Diceyan view of sovereignty, is the only existing theory that can adequately accommodate the inclusion of a Maastricht Treaty ratified by government, with or without Parliamentary support.[36]

Essentially the same thesis, in a much less developed form, has been presented by Professor Koopmans as a means for redefining the "federalism debate."[37] The fact that the Treaty was enshrined in domestic law does not detract from the fact that the government, on advice from the Attorney-General, determined the Treaty could be ratified. Thus, and most importantly, it could effectively become part of domestic law, regardless of whether it was backed by domestic legislation, due to the principle of supremacy of European law. MacCormick similarly notes that the increasing strength of the principle of supremacy of European law, subject to no superior sovereignty, can only establish an independent sovereignty of equal status to a domestic one.[38] If we are, as MacCormick suggests, "beyond the sovereign state," then it does

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34. *See* Regina v. Secretary of State for Foreign & Commonwealth Affairs, ex parte Rees-Mogg, THE GUARDIAN, July 30, 1993, at 4. The court also dismissed a third challenge to the Amendment Bill, which suggested that the transference of royal prerogative powers to EC institutions would be unconstitutional.

35. *See* N. MacCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1 (1993).

36. *See id.* at 16 (suggesting that it seems obvious that no state in Western Europe is any longer a sovereign state. None is in a position such that all the power exercised internally in it, whether politically or legally, derives from purely internal sources. Equally, of course, it is not true that all the power which is exercised either politically or normatively is exercised by, or through, or on the grant of, one or more organs of the European Community.).

37. *See* T. Koopmans, *Federalism: The Wrong Debate*, 29 COMMON MKT. L. REV. 1047 (1992).

38. *See* MacCormick, *supra* note 35, at 4.

rather beg the question of why the UK insisted on the removal of federalism from the Treaty and why subsidiarity is supposed to assist domestic sovereignty. One way or the other, the attitude of the UK government towards the ratification of the Treaty, with or without Parliamentary legislation, does demand a very long, hard look at the position of the UK within a "new" constitutional order that has been so substantially modified to accommodate the continuing orthodoxy of unitary Parliamentary sovereignty.

II. THE JURISPRUDENCE OF MAASTRICHT

i. *The Lawyer's Dilemma*

Whilst the constitutional repercussions of the amendment issue, and on a wider scale, the status of UK sovereignty within the Community, have been sources of much fascination to constitutionalists, confusion has been no less evident at the cutting edge of the legal system in the domestic courts. Many principles of European Community law, from a largely alien civil law tradition, have proved to be both confusing, and at times, wholly unsuitable to judges, who have, on a number of occasions, quite openly failed to implement European law.[39] The full effectiveness of European law and directives is another of the hallowed principles of European law, and has a direct impact on the vexed issue of division of competences, generated by the continuing advocacy of the theory of constitutional "duality."

The failure of the UK, and indeed other member states, to *fully* implement directives has been a cause of anxiety to both academic observers and to the judges in the European Court. The failures, in large part, stem from an unsureness about where the competence of European law ends and that of domestic law begins. Maastricht represented an opportunity to reinforce and to regularise the application and exercise of European Law. Its failure to do so has led to widespread condemnation among academic observers.[40]

The principle of effectiveness, as enshrined in Article 5 of the EC Treaty, requires that:

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Commu-

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39. One commonly cited example is the principle of proportionality. For a discussion of this principle and its somewhat patchy application in UK courts, *see* S. Boyron, *Proportionality in English Administrative Law: A Faulty Translation*? 12 OXFORD J. LEGAL STUD. 237 (1992).

40. These criticisms are considered below, in the final part of the essay.

> nity's task. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

Suitably vague, the Article can be made to mean just about anything that one wishes, and has been. The principle of effectiveness thus has been solely developed by the jurisprudence of the European Court of Justice, which has determined, to the extent that they are at all defined, the divisions of competence.[41] The three most important recent decisions which have illustrated the increased determination of the Court to ensure full effectiveness are *Von Colson*, *Marleasing* and *Francovich*. In *Von Colson*, the European Court held that Article 5 imposed an obligation on domestic courts to interpret implementing legislation in light of the wording and purpose of the directive.[42]

Von Colson was further developed in *Marleasing*, where the Court entrenched a doctrine that has become known as "indirect effect" in that 1) although horizontal direct effect may be denied, the individual may take action against a member state that fails to fully and effectively implement a directive and thereby causes the individual to suffer in relation to another private individual or body, and 2) effective implementation requires an interpretation of both subsequent and prior domestic legislation, in line with the objectives and purpose of the directive.[43] And, recently in *Francovich*, the Court further suggested that the failure to effectively implement a directive leaves a member state government liable for damages caused thereby. By granting such a private law remedy against a public law body, the Court clearly intended to fully arm the litigant in any action against a member state that fails to implement a directive.[44]

Needless to say, the reception of these principles in the domestic UK courts has been somewhat mixed. Two early cases, *Duke* and *Finnegan*, chose to ignore *Von Colson* by construing the narrow interpretation of a Community directive, and claiming sole competence.[45] As one commentator has noted, the *Von Colson* decision was greeted by the UK courts with a mixture of

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41. For a commentary on Article 5, *see* Temple Lang, *Community Constitutional Law: Article 5 EEC Treaty*, 27 COMMON MKT. L. REV. 645 (1990).

42. Case 14/83, Von Colson v. Land Nordrhem-Westfalen, 1984 E.C.R. 1891.

43. For a commentary on these two particular aspects of *Marleasing*, *see* commentary in J. Stuyek & P. Wyhnek, 28 COMMON MKT. L. REV. 205 (1991).

44. Case 6/90, Francovich v. The Republic, 1992 I.R.L.R. 84. For a thoughtful commentary on *Francovich* and its implications, *see* J. Steiner, *From Direct Effects to Francovich: Shifting Means of Enforcement of Community Law*, 18 EUR. L. REV. 3 (1993).

45. Duke v. Reliance, [1988] 1 App. Cas. 546; Finnegan v. Clowney YTP Ltd., [1990] 2 App. Cas. 407.

confusion and disbelief.[46] The restatement and restrengthening of the Court's resolve in *Marleasing* has certainly clarified the position. In three subsequent cases, *Litster*, *Pickstone* and *Factortame 1*, the UK courts have followed the European Court's directions, even though they have been forced to refrain from applying domestic UK law where required to ensure full effectiveness.[47]

Perhaps the most controversial of these decisions was *Factortame*, where the European Court held that Article 5 made it incumbent upon domestic judicial systems to grant interim injunctions, temporarily displacing domestic legislation, if the absence of such a remedy in domestic law was the only reason for a failure to "effectively" implement a directive.[48] The situation may now be clearer, but that has not stopped a number of commentators who have expressed regret over the very obvious confusion that now exists regarding domestic sovereignty and the rule of law.[49]

Two recent decisions have further illustrated the confusion now existing in both the UK courts and amongst academic commentators. In *Webb*, the House of Lords confessed to being quite unclear as to the extent to which they should interpret existing UK law to be in line with an EC directive. Their reasoning and refusal to implement has been the subject of considerable academic criticism.[50] In *Kirklees*, the House of Lords again seemed to be

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46. *See* G. De Burca, *Giving Effect to European Community Directives*, 55 MOD. L. REV. 215 (1992).

47. Litster v. Forth Dry Dock and Engineering Co. Ltd., [1990] 1 App. Cas. 546; Pickstone v. Freemans Plc., [1989] 1 App. Cas. 67.

48. Case 221/89, [1991] 3 All E.R. 769. For a commentary on the implications of *Factortame*, *see* N. Gravells, *Disapplying an Act of Parliament Pending a Preliminary Ruling: Constitutional Enormity or Community Law Right?*, PUB. L. 582-583 (1989).

49. Professor Curtin has regretted the "unhappy impasse with regard to the direct enforcement of Community law [which] clearly jeopardizes the fundamental principle of a Community based on the rule of law." *See* D. Curtin, *Directives: The Effectiveness of Judicial Protection of Individual Rights*, 27 COMMON MKT L. REV. 709, 711 (1990). *See also* D. Curtin, *The Decentralised Enforcement of Community Law Rights. Judicial Snakes and Ladders*, *in* CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW 33, 48 (D. Curtin & D. O'Keeffe eds., 1992); De Burca, *supra* note 46, at 223-27. Lewis and Moore have similarly expressed their doubts at the possible effects that the *Francovich* decision in particular is likely to have in domestic courts. C. Lewis & S. Moore, *Duties, Directives and Damages in European Community Law*, PUB. L. 151 (Spring 1993) (commenting particularly on the inconsistent response in UK courts to the *Von Colson-Marleasing-Francovich* line of cases).

50. Webb v. EMO Air Cargo (U.K.), Ltd., [1992] 2 All E.R. 43. *See* Lewis & Moore, *supra* note 49, at 156-57. *See also* N. Gravells, *European Community Law in the English Courts*, PUB. L. 45 (1993); A. Tanney, 29 COMMON MKT L. REV. 1021 (1992).

quite unclear with regard to the allocation of competences and again failed to fully implement a Community directive.[51]

This confusion with regard to the application of unfamiliar principles—and the next such principle will undoubtedly be subsidiarity—is most extreme in the area of administrative law, remedies and procedures. The increasing disparity and inconsistency between EC administrative law and the administrative law of member states has caused increasing disquiet amongst both academics and judges.

Foremost amongst those demanding a regularisation between EC and member state domestic administrative law has been Professor Juergen Schwarze, who has repeatedly advocated the unification of administrative procedures in their effect on member states and the unification of administrative procedures within member states. Schwarze explicitly suggested that the unification of administrative remedies and procedures would be the most important step towards a new European constitutional order, the responsibility for which should not and could not be left to the European Court alone.[52]

Moreover, a series of recent rulings in the European Court of Justice have suggested that the unification of administrative law is high on the judicial agenda.[53] One such example is *Heylens*, a case which very effectively illustrates the existing disparity between EC and domestic administrative law, and its concurrent effect on the rights of individuals. In *Heylens*, the European Court held that administrative bodies making decisions which materially affect rights in European law are obliged to make available the reasons for those decisions. Such a "duty" was, the Court said, a fundamental pillar of "effective judicial review."[54]

In UK domestic law, in contrast, there is no common law right to give the reasons for decisions. In a recent case, *Ex p. Cunningham*, the Court of Appeal held that any argument to the contrary was untenable. The decision, however, was more remarkable for the comments of Lord Donaldson, Master of the Rolls, who expressed considerable regret at the apparent disparity between the effect of rights in domestic law and those in EC law.[55] In a subsequent

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51. Kirklees BC v. Wickes Building Supplies Ltd., [1992] 3 W.L.R. 170. *See* A. Robertson, *Effective Remedies in EEC Law before the House of Lords*?, 109 LAW Q. REV. 27 (1993).

52. *See* J. Schwarze, *Tendencies Towards a Common Administrative Law in Europe*, 16 EUR. L. REV. 3 (1991). *See also* I. Ward, *The Case for a Unified Administrative Law Within the European Community*, 10 COMP. L. 101 (1993).

53. *See* Case 136/79, National Panasonic Case, 1980 E.C.R. 2033; Case 155/79, AM & S, 1982 E.C.R. 1575; Case 222/86, Heylens, 1987 E.C.R. 4097.

54. *Id.*, Judgment points 14 and 15.

55. R. v. Civil Service Appeals Board, ex. parte Cunningham, [1991] 4 All E.R. 310. For a commentary on *Heylens* and *Cunningham*, *see* I. Ward, *Reasons for Decisions - A Way Forward*?, 45 ADMIN. L. REV. 283 (1993).

judgment shortly after, Lord Donaldson was even more explicit in his condemnation of the iniquities that had developed in domestic administrative law.[56]

There is, quite clearly, an increasing consensus that the development of European law is now outstripping the capability of domestic legal orders to integrate effectively by a means of *ad hoc* precedential applications. As is suggested in the final section of this article, what is now demanded is, if not a federal legal order, a more expressly quasi-federated legal order.

The juridical ambition has been tangibly altered during the last decade. The European Court, always a prime dynamic of integration in the Community, has become increasingly more pro-active, and has done so with the clear, if tacit, approval of other Community institutions. The tension that this has created, most recently and most vividly illustrated in *Webb* and *Kirklees* in the UK, has now reached the stage where the constitutional order must be revised to accommodate these tensions. This was originally one of the essential ambitions of the Maastricht federalists. The transformation of Maastricht from a constitutional to a purely political document essentially negated this ambition, and resulted in a Treaty which singularly failed to assume these responsibilities. The competency issue, as reflected in the European Court of Justice's approach to the problem of full effectiveness, remains as vexed as ever. It is suggested in the following sections that these problems are likely to worsen as the Court comes to consider the justiciability of subsidiarity and of the Protocols.

ii. *Impending Problems: The Justiciability Issue*

Quite apart from the existing tensions in the present European legal order, the Maastricht Treaty establishes a number of potential judicial tensions of its own, primarily through its introduction of subsidiarity and also, to a certain extent, by its liberal use of Protocols. The essentially political nature of subsidiarity has already been stressed. Although it inevitably has a constitutional character, it is first and foremost a political principle. It is also, as has been noted, in the Maastricht Treaty at least, a very ill-defined concept.

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56. M. v. Home Office, [1992] 4 All E.R. 139 (commenting that the disparity is anomalous, and, in my judgment, wrong in principle). Such judicial disquiet has been articulated by other senior members of the Bench between the pages of academic journals. *See* Lord Mackenzie Stuart, *Recent Developments in English Administrative Law - the Impact of Europe?*, *in* DU DROIT INTERNATIONAL AU DROIT DE L'INTEGRATION, LIBER AMORICUM P. PESCATORE 411 (F. Caportori ed., 1987), and also his earlier essay, *Legitimate Expectations and Estoppel in Community Law and English Administrative Law*, LEGAL ISSUES IN EUROPEAN INTEGRATION 53 (1983), and Lord Slynn, *But in England there is no . . .*, *in* W. FUERST, 1 FESTSCHRIFT FUER WOLFGANG ZEIDLER 397 (1987).

A number of academic commentators have already taken note of its potentially confusing effect on existing European law. Moreover, many have also questioned whether, given its obviously political origins, it is justiciable anyway. Nicholas Emiliou recently observed that amongst lawyers, the only "general agreement" is "that there is no agreement on the definition" of subsidiarity.[57] The most swingeing legal critique to date has come from Professor Toth, who suggests that "the principle of subsidiarity, adopted from the Constitutions of Federal States, is not only not part of pre-Maastricht Community law but that it is totally alien to and contradicts the logic, structure and wording of the founding Treaties and the jurisprudence of the European Court of Justice."[58] The centrepiece of Professor Toth's critique is the implication in the Treaty that subsidiarity is to be applied only with regard to concurrent jurisdiction. This implication is wholly counter to the existing jurisprudence of the European Court, which has consistently held that the application of subsidiarity in the European legal order can only be with regard to exclusive jurisdiction.

This problem is exacerbated by the precise wording of Article 3b, which suggests that subsidiarity can only be used to allocate the exercise of already existing competences. This is the direct result of defining the Treaty as establishing a European Union that exists alongside, rather than in place of, the existing Community order. Thus, rather than solving the increasingly damaging problem of competences, Article 3b merely serves to further confuse legally as well as politically.

Professor Toth also echoes the position suggested earlier that despite what the UK government may wish or say, the thrust of subsidiarity is centralising. The fact that the UK demanded the removal of federalism from the Treaty, thus emasculating it as a constitutional document, does not make subsidiarity any less federal; it just makes its exercise a wholly unpredictable event.

Above all, Professor Toth is keen to impress that subsidiarity is a political, and not a legal, principle. So much, he suggests, is clear from the wording and intent of the Treaty. It is not, therefore, intended to be justiciable. The European Court will undoubtedly be approached as to the exercise of the principle, but it is quite possible that it will refuse to exercise any judicial powers to direct its application. If so, subsidiarity will become one of the greatest white elephants in Community history.[59]

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57. N. Emiliou, *Subsidiarity: An Effective Barrier Against 'the Enterprises of Ambition'?*, 17 EUR. L. REV. 383 (1992).

58. A. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 COMMON MKT. L. REV. 1079 (1992).

59. *Id.* at 1079-1105.

Even the most supportive commentaries on the subsidiarity principle suggest that whilst it can play a key role in the allocation of competences and the democratisation process of a constitutional order, it can really only do so in a federal order, or one that is at least designed with a comparable degree of coherence. Thus, Deborah Cass has suggested that subsidiarity will be justiciable and the European Court will be willing to exercise its judicial authority in interpreting the principle.

Because the principle is shorn of its familiar federal guise, its resolution by the Court is difficult to predict and may well prove to be quite inconsistent, as it adopts an essentially *ad hoc* approach to whether principle should be affected so as to centralise or to decentralise, depending on each given case. The Court, as she suggests, may have to exercise its jurisdiction. If it fails to do so, it will be implicitly resigning the ultimate supremacy of European law, a principle which it has developed and placed at the very heart of the European order.[60] This position is supported by Emiliou who, whilst suggesting that the principle is *prima facie* probably not justiciable, suspects that the Court will have to, as a matter of policy, assume jurisdiction. Either way, in its present form, subsidiarity "will inevitably destroy the credibility of the Court of Justice which, given its jurisprudence, is arguably the Community's most effective institution."[61]

As was observed earlier in this article, subsidiarity has always been designed by politicians, with the exception of the UK government, to be a centralising and unifying principle. Yet, what subsidiarity does not do is solve any of the vexed problems of competency, which is what it was originally intended to do. Subsidiarity has never played that role, even within a federal system. It is only effective and workable as a political concept, not a legal one. The fact that politicians have chosen to use subsidiarity as a legal constitutional instrument is regrettable.[62]

According to Jacques Delors, one of its strongest advocates, subsidiarity represents a key "way of reconciling what for many appears to be irreconcilable," which is the emergence of Monnet's vision of a United States of Europe, whilst maintaining what he describes as "loyalty to one's homeland." According to Delors, subsidiarity will realise the pluralist vision of sovereignty, as advocated by MacCormick and Koopmans, by determining the delimitation of competences at the same time as enshrining the primacy of European law.[63]

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60. *See* D. Cass, *The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community*, 29 COMMON MKT. L. REV. 1107 (1992).

61. Emiliou, *supra* note 57, at 403.

62. *Id.* at 400-05.

63. *See* Jacques Delors, Address at the Opening Session of the 40th Academic Year of the College d'Europe, Bruges 17 (Oct. 1989).

A properly established coherent federal order must adopt a principle of plural sovereignty. As Nicholas Emiliou has observed, subsidiarity, being a principle geared purely to delimit competences, is associated with the separation of powers principle, as favoured in European and federal constitutional theory. It is not designed to sit comfortably with theories of unitary sovereignty. The presence of subsidiarity in the Treaty, and its probable justiciability, renders the UK orthodoxy of sovereignty, as articulated by Lord Denning, even less tenable.[64] How the UK courts will react to subsidiarity is, of course, another uncertain issue. Given the problems experienced in attempting to effect other principles of European law, such as proportionality and legitimate expectations, the answer is anyone's guess. So far, when the House of Lords has encountered the principle as delineated in Article 130R(4), it has adopted a decentralising definition of subsidiarity and reserved the competence of the member state.[65] If the European Court was to consistently adopt the more centralising approach envisioned by European politicians, then one can only anticipate further confusion in domestic UK courts. This is certainly Professor Hartley's suspicion.[66]

Thus, an immediate threat of action in the European courts regarding the justiciability of the Social Chapter Protocol in both domestic UK and in European law is a very real one. Certainly it has been suggested that the European Court might look unfavourably on the Protocol not least because it so fundamentally undermines the *acquis communautaire* which was itself enshrined in the Treaty. Indeed, the Protocols, in a rather contradictory fashion, are expressly made to be subject to the *acquis communautaire* and the existing "provisions" of the Treaty.

It has also been noted that the European Court has a long history of arrogating such a review jurisdiction to itself, even where not foreseen in the Treaties.[67] It has also been suggested that both the European Court and the UK courts might find the opt-outs, both from the Social Chapter and from the European Monetary Union, to be of questionable legality. Monetary Union, in particular, is explicitly stated in the Treaty to be a centralising measure,

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64. Emiliou, *supra* note 57, at 385-88.

65. *See* R. v. London Boroughs Transport Committee, ex p. Freight Transport Association Ltd. and others, 1 C.M.L.R. 5 (H.L. 1991) (U.K.).

66. T. Hartley, *Constitutional and Institutional Aspects of the Maastricht Agreement*, 42 INT'L & COMP. L. Q. 213, 217-18 (1993).

67. *See* D. Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 30 COMMON MKT. L. REV. 17, 18-19, 22-23 & 44-66 (1993). *See also*, A. Arnull, *Does the Court of Justice have Inherent Jurisdiction?*, 27 COMMON MKT. L. REV. 683 (1990) (discussing the Court's arrogation of such powers in the past).

which can only be effected across the Community.[68] At first glance, it seems unlikely that the UK courts will be prepared to act so obviously as a court of constitutional review and to duly render the Maastricht bill unlawful. However, the real problems will arise if the courts choose to refer the matter to Europe. Given the purely domestic matter of the legislation, they would not immediately need to do so, and may well find it expedient not to do so.

iii. *The New "Constitution"*

The original ambition for Maastricht was for it to provide a draft constitution for a new federal European order. In this, it was an unreserved failure. The essential weaknesses of the Treaty, which have been discussed already in this article, include: the abandonment of federalism and the failure to employ a coherent recognisable alternative; the inclusion of a deliberately ill-defined principle of subsidiarity, the judiciability of which remains wholly uncertain; and the widespread use of Protocols, which on a number of occasions opt out of such central tenets of European policy that they represent a very real threat to the *acquis communautaire* that the Treaty was supposed to enshrine. All of these were political concessions, demanded largely by the UK, at the same time as it campaigned so vigorously both in Westminster and across Europe for its "central role" in Europe. Rarely has any development in the Community's short history been met with such widespread condemnation from so many legal and constitutional commentators.

Professor Toth's relatively restrained, though uncompromising critique, not only criticises the fundamental irrationality of the subsidiarity principle, but also extends it to cover the Treaty as a whole. He suggests:

> Rather than being a unitary, precisely drafted instrument, it is an amalgamation of three different types of—fairly poorly drafted—legal texts which fit ill together, over-arched by an introductory part of yet another kind. . . . Above all, it does not allocate competences between the Union and the Member States clearly and systematically—the only context in which the principle of subsidiarity can work.[69]

Professor Deirdre Curtin, on the other hand, is considerably less restrained. In her opinion, "[t]he popular analogy which has been coined, that of the

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68. *See* Emiliou, *supra* note 57, at 397. The centrality of a common monetary policy within the Maastricht ambition explains why European leaders refuse to abandon the present EMS, although the width of current money-bands render the spirit of monetary union effectively dead.

69. Toth, *supra* note 58, at 1103.

construction of a 'temple'. . . implies a degree of architectural stability and aesthetic finish which is both inaccurate and pretentious."[70] There is, she suggests, "more of a 'bricoleur's' amateurism than a master brick-layer's strive for perfection and attention to detail."[71] The determination of the European Council to maintain its position as the "inter-governmental organ *par excellence*" has continued to deny the Community the existence of a true democratic structure and, with it, a true democratic constitution. The power of the Council unavoidably gives the lie to the notion of a single institutional framework so dear to Maastricht ideology. The refusal of the Council to clarify the issue of competences and to redefine or even extend Article 5 prevented any hope of harmonizing the legal order or legal procedures. The Protocols, the justiciability or otherwise of which has already been considered, gave the lie to the ideology itself, and merely served, not to advance the idea of *acquis communautaire*, but to retard it.[72]

According to Professor Curtin, the Treaty was flawed from its very inception because it proceeded without any clear idea as to where it wanted to go and with no constitutional blueprint which might have served to guide it. It is, in her opinion, a politicians' fudge, the effects of which can only retard the process of European integration, and in the short term plunge the legal order, already straining for a constitutional lead, into still deeper confusion.[73] One of the more curious facets of the Treaty is its insistence that it represents a Union, in addition to the existing European Community (as it is inexplicably renamed).[74]

The implication is thus to resign any ambitions to represent any new order, least of all a justiciable one. The constitutional order is thus to remain unchanged. So, according to Article F, is the Community's case law. Yet the jurisprudence of the European Court of Justice quite clearly adopts successive Treaties as integral components of the European Community. The Community constitution is, quite simply, the Treaty structure. The ascription of a whole series of non-justiciable constitutional rules is not the least of the Treaty's peculiarities.[75] Professor Curtin's critique appeared in the 1993 volume of the highly influential *Common Market Law Review*. The previous issue of the same *Review* contained a series of similarly critical essays on Maastricht, including those mentioned earlier by Toth and Cass.

That such a mainstream journal should present a series of such articles is itself a point worth noting. The guest editorial position stressed the state

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70. Curtin, *supra* note 67, at 24.
71. *Id.*
72. *See id.* at 24-26, 66-69.
73. *Id.* at 18-19.
74. It was previously, of course, the European Economic Community.
75. Curtin, *supra* note 67, at 20-21.

of utter confusion in which post-Maastricht Europe now finds itself with regard to constitutional issues.[76] In conclusion, Professor Curtin suggested:

> The result of the Maastricht summit is an umbrella Union threatening to lead to constitutional chaos; the potential victims are the cohesiveness and the unity and the concomitant power of a legal system painstakingly constructed over the course of some 30 odd years. And yet the European Parliament and the national parliaments (and the people in three Member States) are presented with this *fait accompli* and bullied into believing that only 'bad Europeans' would reject it . . . a process of integration, if it has any meaning at all, implies that you can't take one step forward and two steps backward at the same time.[77]

This is a strength of language which should not be ignored. It is suggested, moreover, that it is a language which very effectively reflects the sense of frustration and disillusionment that is currently prevalent amongst European lawyers.

CONCLUSION

Maastricht represented an opportunity to restructure the legal and constitutional order in Europe. Its failure to do so will continue to reduce the effect of the integrational process. As recent decisions in the UK domestic courts demonstrate, judicial confusion continues, and the full effectiveness of EC law in domestic courts remains uncertain. The political compromises described in the first part of this article effectively negated any possibilities of producing a new constitutional order that could reflect the accelerating pace of social and, indeed, political integration in certain sections of the Community.

Although it was originally intended to describe the new "constitution" of Europe, Maastricht, in the end, became a purely political statement of alarmingly vague intent—an ideal without substance. On the one hand, it proudly granted "citizenship" to the "peoples of Europe;" on the other, it carefully avoided giving them any rights which could be legally enforceable.[78] Thus,

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76. T. Koopmans, *Federalism: The Wrong Debate*, 29 COMMON MKT L. REV. 1047 (1992).

77. Curtin, *supra* note 67, at 67.

78. *See* C. Closa, *The Concept of Citizenship in the Treaty on European Union*, 29 COMMON MKT L. REV. 1137 (1992) (stressing how far the final concept fell short of its initial ambitions, and how legally naked the 'citizen' of Europe stands).

one of the central "pillars" of the new Europe, the much vaunted citizenship of the Community which is bestowed upon the new European, is no more protected in law—national or international—than citizenship of Iraq, Bosnia or the moon.

Maastricht cannot be termed a constitutional or legal document. Yet by its many sins of omission, the potential effect of the Maastricht Treaty on constitutional and legal matters is considerable. In Professor Toth's opinion, making specific reference to the inclusion of the principle of subsidiarity in the Treaty, "[i]t will weaken the Community and slow down the integration process. It will suit those who would like to see the Community move not towards but away from a truly Federal structure."[79] It is submitted that this observation could be applied to the Treaty as a whole. Far from guiding the Community a step further towards a centralised federal order, the Maastricht Treaty could well prove to be the most serious setback so far. It certainly does little to integrate a new European order and does much to disintegrate what already exists.

There is much now at stake. According to Professor Curtin, not least at stake is "[t]he whole future and credibility of the Communities as a cohesive legal unit which confers rights on individuals."[80] Maastricht's failures render the next "Maastricht," predicted for 1996, to be of even greater importance. If the Community is to be reset on course, it must be done then. Above all, in place of inter-governmental strengthening, the Community must reinforce existing democratic structures. Most importantly, the Community must recognise the need for a more uniform legal order within a clearer, if need be, more overtly, federal constitution. Europe still needs a new constitutional order—after Maastricht, more than ever.

79. Toth, *supra* note 58, at 1105.

80. Curtin, *supra* note 67, at 67.

AN INTRODUCTION TO DIRECT FOREIGN INVESTMENT IN MEXICO

A CONTEMPORARY AND HISTORICAL LEGAL ANALYSIS OF MEXICAN DIRECT FOREIGN INVESTMENT LAWS AND POLICIES AND THEIR RELATION TO THE NORTH AMERICAN FREE TRADE AGREEMENT

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I. INTRODUCTION

Throughout most of the twentieth century, Mexican political thought has centered on achieving self-sufficiency. The perceived need for self-determination via isolationism resulted from years of oppression under Spanish rule and was augmented by United States aggression in the 1840's.[1] Today, however, Mexico is rapidly changing its political thought and is on the verge of becoming a major player in the arena of international trade.

Mexico's sudden shift from an isolationistic, tightly regulated economy toward a more open, free-market economy is largely the result of the work of one man, President Carlos Salinas de Gortari. In 1988, President Salinas was elected the sixty-fourth President of the United States of Mexico[2] and began serving the single six-year term allowed Presidents under the Mexican Constitution.[3] In early 1989, he announced two goals: first, the pursuit of economic recovery through an economic reform program, and second, the

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1. JAMES E. HERGET & JORGE CAMIL, AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM 1-19 (1978).

2. Ignacio Gomez-Palacio, *The New Regulation on Foreign Investment in Mexico*, 12 HOUS. J. INT'L L. 253 (1990).

3. *See Constitución Politica de los Estados Unidos Mexicanos*, tit. II, ch. III, art. 83, *reprinted and translated in* Doing Business in Mexico, Part I, App. II (Andrea Bonine-Blanc & William E. Mooz, Jr., eds., & Norman Lopez Burton et al. trans., 1994)[hereinafter Constitution].

modernization of the country, society, and political debate of Mexico.[4] Determined to transform Mexico into a modern nation capable of competing in an increasingly competitive, global market, President Salinas implemented major economic reforms that have taken Mexico and North America, as a whole, by storm.

II. MEXICO'S LEGISLATIVE AND EXECUTIVE BRANCHES IN A NUTSHELL

A. *The Constitution*

The Mexican Constitution, formally entitled the Political Constitution of the United States of Mexico (Constitution),[5] establishes a governmental structure very similar to that of the United States. Like the United States, Mexico's government is divided into federal and state governments, each of which are administered by their respective legislative, judicial and executive officials.[6] Although the states theoretically retain all powers not expressly granted to the federal government in the Constitution, reality demonstrates that the federal government's authority is wide reaching—even more so than its United States counterpart.[7]

B. *The Legislative Branch*

Mexico's federal Congress consists of Senators and Deputies elected from the several states and the federal district. Each state and the federal district elects two Senators and a varying number of Deputies, depending on the population of the represented area.[8] Enactment of legislation mirrors that of the United States Congress. Each bill must pass both Congressional houses by a majority vote before being sent to the President, who may either veto or promulgate the bill.[9] If the President vetoes the proposed bill, Congress may override the veto by a two-thirds vote in each house.[10] Even though Congress maintains the power to override a Presidential veto,

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4. Louis Rubio, *Mexico in Perspective: An Essay on Mexico's Economic Reform and the Political Consequences*, 12 HOUS. J. INT'L L. 235, 236 (1989).

5. The current Mexican Constitution went into effect on May 1, 1917.

6. The President, Governors and federal and state legislators are elected through universal suffrage of men and women.

7. Herget, *supra* note 1, at 19.

8. *Id.*

9. *Id.*

10. *Id.*

the extent of this power is quite limited. For example, in the area of direct foreign investment, federal legislation, although enacted by the Mexican Congress, does little more than "rubber stamp" Mexican presidential recommendations.[11] For congressional legislation to become effective, it must first be approved and promulgated by the president, and then published in the Diario Official de la Federación (*Diario Official*).[12]

C. *The Executive Branch*

The real power behind the Mexican government lies in the executive branch.[13] The undisputed power of the executive branch derives from "long standing practice, statutory and constitutional provisions, and a well-institutionalized tradition of near-absolute political power associated with the office of the president."[14] Fundamental executive powers include the power to engage in foreign relations, control the armed services, issue regulations, appoint and remove public officials, initiate and veto legislation, and numerous others.[15]

Article 89(1) of the Constitution expressly grants the President the power to "promulgate and execute the laws enacted by the Congress of the Union, providing for their exact observance in the administrative sphere to its exact observance."[16] More simply, this language has been interpreted to grant the President the "power to enact general rules in the form of regulations (reglamentos) . . . [that] have the purpose of explaining and supplying detailed rules for the application of specific laws . . . ."[17] The importance of these regulations cannot be over-emphasized, for a valid regulation has the same force and effect of law as the federal statute to which it refers.[18]

The only real limitations on the President's authority to issue regulations are that they must complement and develop the law, not contravene it. These limitations were set forth by the Mexican Supreme Court as follows:

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11. Sandra F. Maviglia, *Mexico's Guidelines for Foreign Investment: The Selective Promotion of Necessary Industries*, 80 AM. J. INT'L L. 281, 283-84 (1986).

12. *Id.* The *Diario Official* is Mexico's version of the United States' Code of Federal Regulations and is the only official repository of Mexican federal legislation. *Id.* at 284 n.19.

13. Herget, *supra* note 1, at 20.

14. *Id.*

15. *Id.*

16. Constitution, *supra* note 3, tit. III, ch. III, art. 89.

17. HARRY WRIGHT, FOREIGN ENTERPRISE IN MEXICO 16 (1971).

18. Herget, *supra* note 1, at 23.

> Article 89, paragraph 1 of our main Law, confers [upon] the President of the Republic three capacities: a) That of promulgating the laws issued by the Congress of the Union; b) That of executing said laws; and c) That of providing in the administrative sphere to its exact observance, i.e., the regulatory capacity. This last capacity allows the Executive to issue general and abstract provisions, whose purpose is the execution of the Law, *developing and complementing* [emphasis added] in detail the provisions included in the legislation issued by the Congress of the Union. . . . [The regulation] is an alternate norm that has its measure and justification in the law. . . . [T]he regulation provides the general and abstract media, that must be used to apply the law to concrete cases.[19]

As evidenced by the Court's ruling, the office of the President maintains various legislative as well as traditional executive functions. It is the interplay between these two roles that makes the President the unquestioned ruler in both Mexican domestic and foreign affairs.

III. MEXICAN DIRECT FOREIGN INVESTMENT POLICIES AND LAWS: A CRITICAL PERSPECTIVE

Throughout Mexico's history, Mexican policy towards direct foreign investment has closely paralleled the nation's ever changing economic status, balance of payments on foreign debt, and political attitude towards foreign capital. Together, these three dynamic variables created a state of uncertainty for investors eager to invest in Mexico.

This paper examines five key stages in Mexico's history of direct foreign investment, including Mexico's (1) pre-1973 foreign investment policy, (2) 1973 Foreign Investment Law, (3) 1989 Foreign Investment Regulations, (4) 1993 Foreign Investment Law, and (5) participation in the 1994 North American Free Trade Agreement.

A. *Pre-1973 Direct Foreign Investment Policy*

After achieving independence in 1810, Mexico set out on a long road toward attaining its own national identity. During these developmental years, Mexican identity was shaped dramatically by U.S. military aggression

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19. *Tesis 404*, Apendice al Semanario Judicial de la Federación, Tercera Parte 709 (Segunda Sala 1985), *quoted in* Gomez-Palacio, *supra* note 2, at 259.

in the 1840's, followed by foreign economic domination near the end of the century. These two phenomena set the tone for Mexican trade policy for the next 100 years.

Mexico's first attempt to implement a national foreign investment strategy began during the rule of President Porfirio Diaz (1880-1910) and continued until the end of the 1920's.[20] Diaz's foreign investment model relied heavily on the exportation of primary-goods and insistence that the government play a passive role, thereby allowing the economy to be shaped by free market forces.[21] Mexican officials were not prepared for the result of this economic model, which was the actual domination of the Mexican economy by foreign investors.[22] This "domination" played a leading role in causing the Mexican Revolution of 1911 and the subsequent overthrow of President Diaz.[23]

In 1917, Mexico adopted a new Constitution[24] which imposed restrictions on foreign investment. Paramount among the restrictions were the following: (1) Article 27 nationalized Mexico's mineral, water, and land resources and created a "restricted zone" which forbade foreigners from owning land within 100 kilometers of the Mexican borders and 50 kilometers of its seacoasts; (2) Article 123 transformed labor law into constitutional law; and (3) the infamous "Calvo Clause" that mandated that foreigners conducting business in Mexico waive their right to assert their status as foreign citizens as a defense to legal actions arising from their business dealings in Mexico.[25]

In accord with the new Constitution and the prevailing national sentiment encouraging self-sufficiency, the Mexican government assumed greater control over Mexico's economic destiny and implemented several

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20. Lawrence E. Koslow, *Mexican Foreign Investment Laws: An Overview*, 18 WM. MITCHELL L. REV. 441, 444 (1992).

21. Fernando Sanchez Ugarte, *Mexico's New Foreign Investment Climate*, 12 HOUS. J. INT'L L. 243, 244 (1990).

22. Foreign investment was particularly heavy in the railroad, construction, and mining sectors, and, to a lesser extent, in public utilities, banking, real estate, manufacturing and commerce. By 1911, foreign investors owned 24% of Mexican land and owned over 50% of Mexico's total wealth. Of all foreign investment in Mexico, French and British investors each held slightly less than 30% and U.S. investors held slightly less than 40%. Herget, *supra* note 1, at 13-14.

23. *Id.* at 16.

24. *See* Constitution, *supra* note 3. The 1917 Constitution replaced the previous Constitution of 1857.

25. Charles T. Dumars, *Liberalization of Foreign Investment Policies in Mexico: Legal Changes Encouraging New Direct Foreign Investment*, 21 N.M. L. REV. 251, 259 (1991).

new strategies. These strategies included nationalizing[26] some economic sectors while subjecting others to a new economic plan known as "Mexicanization."[27] Together, these strategies virtually closed a number of industrial sectors to foreign participation.[28]

On July 7, 1944, Mexico's President increased restrictions on foreign investment by promulgating the Emergency Decree of 1944 (Decree).[29] The Decree's purpose was twofold: (1) to improve the current state of the Mexican economy by solidifying Mexican ownership of key industrial sectors; and (2) to guard against the anticipated movement of United States post-war profits into Mexico, thereby avoiding a large currency imbalance.[30] To achieve these objectives, the Decree implemented constraints on the creation, modification, liquidation, and transfer of stock in any Mexican corporation comprised of foreign investors, thus giving the government the authority to regulate the participation of foreign investors in domestic businesses.[31] Overall, the Decree paved the way for further restrictions on investment which lasted until President Salinas promulgated the 1989 Foreign Investment Regulations.

B. *1973 Foreign Investment Law*

In 1973, the Mexican Congress passed the Law to Promote Mexican Investment and to Regulate Foreign Investment, commonly known as the

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26. For example, in the late 1930's, President Lazaro Cardenas nationalized U.S. oil companies in Mexico and created *Petroleos Mexicanos* ("PEMEX"). *Id.* at 259-60.

27. "Mexicanization" is the process which raised the minimum percentage of Mexican ownership in a company to at least 51%. *Id.* at 260.

28. These sectors included: sulphur mining, oil and gas exploration and production, petrochemical production, mining, transportation, fishing and forestry, radio and television broadcasting, electric power generation, and automotive parts manufacturing. Jorge Camil, *Mexico's 1989 Foreign Investment Regulations: The Cornerstone of a New Economic Model*, 12 HOUS. J. INT'L L. 1, 6-11 (1989).

29. This Decree granted the Minister of Foreign Relations (Minister) wide discretion regarding the regulation of foreign capital. The Decree denied foreigners permission to acquire a majority ownership in forestry, cattle raising, industry, real estate, and agriculture. In 1945, the Minister compiled a list of specific industries which required a minimum 51% Mexican ownership. The Decree further required any new or existing investor to convert its business association to a "joint venture," and to comply with the above ownership percentages. *Id.*

30. *Id.* at 6.

31. ALEXANDER C. HOAGLAND, JR., COMPANY FORMATION IN MEXICO § B (1980).

1973 Foreign Investment Law (Law).[32] The Law's stated purpose was "[t]o promote Mexican investment and regulate foreign investment in order to stimulate a just and balanced development and consolidate the country's economic independence."[33] Enactment of the Law represented Mexico's official acknowledgment that (1) import replacement[34] policies alone were not sufficient to solve its serious economic problems; (2) Mexican manufacturers needed to produce export-oriented products and capital goods; and (3) Mexico needed foreign assistance to improve technology, stimulate investment in new industries, and manufacture goods for export.[35]

1. *Restrictions on Foreign Investment*

In order to achieve maximum breadth of application, Article 2 of the Law broadly defined "foreign investment" as (1) foreign corporations; (2) foreign individuals; (3) foreign companies without corporation status; and (4) Mexican business enterprises with a majority of foreign capital or in which foreigners are empowered, by any title, to control the management of the business.[36]

The Law also reserved certain industries exclusively for the Mexican government,[37] while reserving others exclusively for Mexicans or for Mexican companies with an "exclusion of foreigners clause."[38] Any industry not falling within one of the two enumerated lists was subject to

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32. *Ley para Promover la Inversion Mexicana y Regular Inversion Extranjera, Diario Official, reprinted and translated in* DOING BUSINESS IN MEXICO, Part I, app. II (Andrea Bonine-Blanc & William E. Mooz, Jr., eds., & Norman Lopez Burton et al. trans., 1994) [hereinafter Law]. This law was a codification of policies initiated by the emergency Decree of 1944 as well as numerous regulations and special laws enacted since 1944. Herget, *supra* note 1, at 65.

33. Law, *supra* note 32, art. 1.

34. The policy of "import replacement" was devised to encourage Mexican manufacturers to change from "the establishment of plants for the mere assembly or final processing of imported parts or intermediate products, into real manufacturing facilities." Wright, *supra* note 17, at 84.

35. Koslow, *supra* note 20, at 445.

36. Law, *supra* note 32, art. 2.

37. These industries included: petroleum and other hydrocarbons; basic petrochemicals; exploitation of radioactive minerals and the generation of nuclear energy; mining; electricity; railroads; telegraphic and wireless communications; and other activities established in specific laws. *Id.* art. 4.

38. These industries included: radio and television; urban and interurban automotive transportation and transportation on federal highways; domestic air and marine transportation; exploitation of forestry resources; gas distribution; and other activities established in specific laws or in regulations issued by the executive branch of the federal government. *Id.*

either a set capital percentage of permissible foreign ownership or the general forty-nine percent catch-all applicable to most industries.[39]

2. *Administration of the 1973 Law*

In order to implement the Law and supervise foreign investment, Congress established the National Commission of Foreign Investment (FIC), which held broad discretionary power over whether and to what extent to allow foreign investment.[40] The FIC's chief function was to establish rules and guidelines and to adjudicate issues raised under the Law.[41] More specifically, the FIC had the authority to: (1) increase or decrease the percentage of foreign investment in different geographical or economic areas; (2) permit higher levels of foreign ownership in "exceptional circumstances;" (3) approve or disapprove any new foreign investment in a new or previously existing business; (4) consult with and coordinate the action of various agencies and branches of the Mexican government on foreign investment matters; (5) establish criteria and requirements concerning foreign investment; and (6) exercise other powers granted by the Law.[42]

Foreign investors seeking majority ownership in a Mexican business enterprise needed prior approval from the FIC.[43] The FIC reserved the right to allow majority foreign ownership upon a showing that the particular investment met some or all of the seventeen characteristics listed in Article 13. As a general rule, the seventeen characteristics emphasized that the investment: (1) complement national investment strategies, such as increasing exports; (2) provide new employment opportunities for Mexican workers; (3) contribute to the development of economically less developed regions; (4) respect the country's social and cultural values; and (5) assist in the country's technological research and development.[44]

In 1982, after nine years of arbitrary decision-making by the FIC,

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39. Industries limited to a set percentage of foreign ownership included: secondary petrochemicals (40%); manufacture of automotive components (40%); exploitation and use of minerals (49%) (but exploitation of national mining reserves was limited to 34%); and those established in specific laws or regulations issued by the executive branch of the federal government. *Id.* art. 5.

40. The Commission was composed of the Ministers of the Interior, Finance and Public Credit, Foreign Affairs, National Resources, Industry and Commerce, Labor and Social Welfare, and the Presidency. *Id.* art. 11.

41. Herget, *supra* note 1, at 65.

42. Law, *supra* note 32, art. 12.

43. *Id.*

44. *Id.* art. 13.

Mexico's economy slumped due to falling oil prices.[45] The net effect of this slump was a sizeable increase in Mexico's external debt, higher inflation, substantial capital flight, and a decline in Mexico's GNP.[46] Faced with mounting economic problems, the FIC began a new strategy aimed toward increasing foreign investment via a gradual relaxation of Mexico's restrictive foreign investment policies.

C. *1989 Foreign Investment Regulations*

1. *Significant Steps Preceding Enactment of the 1989 Regulations*

Under the leadership of President Miguel de la Madrid,[47] Mexico began reopening its doors to foreign investment. For the purpose of encouraging foreign investors to return to Mexico, President Madrid introduced the following measures:

(1) February 1984: Mexican government eliminated the forty-nine percent ceiling on certain "priority sectors;"
(2) December 1985: Mexican government allowed foreign investors currently holding majority ownership interests in Mexican business enterprises to raise their ownership interests to 100%;
(3) September 1986: FIC eliminated investment restrictions for small-to-medium sized business (those with less than U.S.$60 million in annual sales, and fewer than 250 employees); and
(4) September 1986: FIC began a debt for equity swap program, generating U.S.$2.9 billion in only thirteen months.[48]

These four measures were soon followed by Mexican debt-renegotiation with the International Monetary Fund (IMF) and other commercial lenders.[49] In August 1986, Mexico became the ninety-second Contracting

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45. Koslow, *supra* note 20, at 447.

46. In 1982, Mexico's GNP declined 0.5% and in 1983 it declined 5.3%. Gomez-Palacio, *supra* note 2, at 253. During the 1980's, Mexico's national debt exceeded U.S.$100 billion. *Salinas Assesses State of Nation*, HOUS. CHRON., Nov. 2, 1989, at A10.

47. Miguel de la Madrid Hurtado was president of Mexico from December 1, 1982 to November 30, 1988.

48. *Foreign Investment Regulations*, Int'l Rep., Mexico Serv., May 25, 1989, at 3-5.

49. In exchange for the IMF restructuring Mexico's debt, Mexico agreed to reduce tariffs, liberalize foreign investment, reduce public spending, institute tax reform, privatize state-owned enterprises, and reform domestic price controls. Constance A. Hamilton, United States International Trade Commission, *Review of Trade and Investment Liberalization*

Party to join the General Agreement on Tariffs and Trade (GATT).[50] By joining GATT, Mexico agreed to: (1) bind its tariff schedule to a maximum level of fifty percent; (2) limit surtaxes applied to general tariffs in nine sectors and totally eliminate the surtax in eight years; (3) comply with Article VII of GATT in its customs valuation procedures and eliminate its official pricing system by December 1987; and (4) gradually eliminate its import permit requirements.[51] In 1989, Mexico's new industrial policy[52] received considerable confidence from foreign investors as a result of a new debt agreement, called the "Brady Plan." By agreement, the Brady Plan allowed reductions in principal and interest and the granting of new loans to developing countries, which limited public sector spending, encouraged foreign investment, and minimized subsidies to domestic industries."[53]

2. *Key Provisions of the 1989 Foreign Investment Regulations*

In 1989, President Salinas issued the Foreign Investment Regulations (Regulations)[54] with the ultimate objective of promoting foreign investment, thereby modernizing the Mexican economy, creating jobs, fostering competition, inducing technology transfer, increasing exports, and

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Measures By Mexico and Prospects For Future United States-Mexican Relations, "Phase I: Recent Trade and Investment Reforms Undertaken by Mexico and Implications for the United States," Investigation No. 332-282, USITC Publication 2275, April 1990, ch. 1, at 1-3.

50. Dumars, *supra* note 25.

51. *Id.* at 255.

52. Mexico's national industrial policy seeks to: 1) enable the national industry to grow by developing a competitive export sector; 2) establish industrial development balanced with the adequate use of regional resources; 3) promote and protect Mexico's foreign trade interests; and 4) increase the number of productive jobs as well as improve social welfare. Ugarte, *supra* note 21, at 248.

53. Dumars, *supra* note 25, at 258. The Brady Plan gave banks three options: 1) reduce the principal on outstanding Mexican loans by 35% with an interest rate equal to the London Interbank Offer Rate (LIBOR) plus 13/16% collateralized with United States Treasury Bonds; 2) lower the interest on outstanding Mexican loans to 6.25%, collateralized as above; or 3) make new loans equal to 25% of the current debt with an interest rate equal to LIBOR plus 13/16%. Debt reduction resulting from the first two options totaled approximately U.S.$14.75 billion, and new loans made available under the third option reached U.S.$1.5 billion between 1990 and 1992. *Id.*

54. *Reglamento de la Ley para Promover la Inversion Mexicana y Regular Inversion Extranjera*, 427 *Diario Official* 11, May 16, 1989, *reprinted and translated in* DOING BUSINESS IN MEXICO, Appendix IV (Michael W. Gordon ed., 1991) [hereinafter Regulations]. The Regulations' proper title is "The Regulations of the Law to Promote Mexican Investment and Regulate Foreign Trade."

advancing Mexico's ability to compete internationally."[55] To accomplish these objectives, President Salinas sought to streamline foreign investment procedures by clarifying the often arbitrary and complicated existing procedures and removing much of the FIC's broad discretion.[56] The Regulations had the immediate effect of repealing all previous administrative investment regulations and decrees, as well as the general resolutions of the FIC.[57] The Regulations did not, however, repeal the 1973 Law.[58] As a result, any business acquisition or involvement not covered by the new regulations remained subject to the forty-nine percent cap on foreign ownership.

The Regulations made five major changes to Mexico's foreign investment policy. First, they abrogated the forty-nine percent limit on direct foreign investment in "unclassified activities."[59] According to the Regulations, the FIC was required to grant automatic approval of up to 100% foreign ownership if the following criteria were satisfied:

(1) Investment in fixed assets could not exceed U.S.$100 million;
(2) Investment could only be funded by foreign capital;
(3) Industrial projects could not be located in Guadalajara, Mexico City, or Monterey;
(4) Aggregate foreign exchange balances had to be anticipated to balance over the first three years of the project;
(5) Investment had to create permanent jobs and establish worker training and personnel development programs; and
(6) Investment was required to employ technology complying with environmental requirements.[60]

All projects not satisfying the above criteria (including those within the Restricted Area) were still required to submit to the FIC; however, the FIC was required to issue a formal response within forty-five days or approval would be deemed granted. [61]

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55. David B. Hodgins, Comment, *Mexico's 1989 Foreign Investment Regulations: A Significant Step Forward, But is it Enough?*, 12 HOUS. J. INT'L L. 361, 366 (1990).

56. Koslow, *supra* note 20, at 447-48.

57. *Id.* at 447.

58. *Id.*

59. "Unclassified activities" are those business activities which have no percentage limit on foreign investor control. These activities may be contrasted with activities which are: reserved exclusively to the state; reserved exclusively for Mexican citizens; or limited to a set percentage of permissible foreign ownership.

60. Hodgins, *supra* note 55, at 366.

61. Regulations, *supra* note 54, art. 2. The new regulations should streamline existing FIC approval procedures, which in the past took months to complete.

Second, the Regulations permitted foreign investors, with prior approval of the FIC, to acquire up to 100% ownership in areas normally reserved exclusively to Mexicans or limited to forty-nine percent.[62] Ownership rights obtained in these fields were acquired through the employment of a twenty-year temporary trust.[63] Generally, use of temporary trusts was permitted only for companies in financial distress or which required substantial capital for modernizing or expanding facilities.[64] Although the Regulations encouraged use of the temporary trust mechanism to stimulate foreign investment, foreign investors were nonetheless required to seek approval from the Ministry of Commerce & Commercial Promotion (SECOFIN) to do the following:

(1) Obtain a majority interest in the capital stock of a company protected by Mexican law against majority ownership;
(2) Maintain the right to dispose of more than fifty percent of the total capital of a company; or
(3) Maintain the right to exploit the company's assets.[65]

Third, the Regulations created a new type of stock called neutral shares or "Series N,"[66] which permitted foreign investors, through a trust, to share in the gains and dividends but not the voting rights of the stock.[67] The issuance of Series N stock marked a significant change from Mexico's prior investment law because it provided foreign investors access to all stocks listed on the Mexican stock exchange.

Fourth, the Regulations established specific criteria to govern all real estate trusts within Mexico's "restricted zone."[68] These trusts granted

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62. Koslow, *supra* note 20, at 450.

63. Regulations, *supra* note 54, arts. 23, 26. Unlike the United States, the Mexican legal system does not have trusts law. In Mexico, natural persons are prohibited from acting as trustees; therefore, the role is filled exclusively by Mexican domestic banking corporation.

64. Regulations, *supra* note 54, art. 23. These temporary trusts enabled foreigners to participate in 1) air and maritime transportation; 2) gas distribution; 3) mining activities; 4) secondary petrochemical production; 5) and automotive parts manufacturing. Bill F. Kryzda, *Mexico's New Foreign Investment Law and NAFTA*, *in* NAFTA: CRITICAL BUSINESS AND LEGAL ISSUES, § VIII at 14 (AM. CONF. INST., March 17-18, 1994).

65. Regulations, *supra* note 54, art. 10(I)(II)(III).

66. *Id.* arts. 13-15. FIC approval was necessary to obtain Series N stock. Also, Series N stock could only be issued by companies agreeing to use their stock proceeds to establish new activities or expand existing activities. *Id.* art. 14.

67. Koslow, *supra* note 20, at 453.

68. As noted earlier, Mexico's Constitution forbids foreigners from owning legal title to land within a "restricted zone" consisting of land located within 100 kilometers of Mexico's borders and within 50 kilometers of Mexico's coastline. Constitution, *supra* note

foreign investors full beneficial rights in restricted real estate. While these trusts were in existence prior to 1989, the new regulations were designed to guarantee their continuing validity.[69] Under the new regulations, real estate trusts could be extended automatically for an additional thirty years so long as the beneficiaries and trust terms remained unchanged.[70] The Regulations required real estate trusts (with foreign beneficiaries) to be used exclusively for the realization of either tourist activities[71] or industrial activities.[72] Additionally, the Regulations required all foreign trust beneficiaries to register with SECOFIN and forbade real estate trusts holding rural land from exceeding twenty hectares without prior approval.[73]

Fifth, the new regulations allowed foreign investors to incorporate or acquire stock in maquiladora[74] and export-oriented operations without seeking prior FIC approval.[75] Additionally, the Regulations granted permission for the expansion of existing maquiladora and export-oriented operations through the implementation of new projects, product lines, or economic activities, all without requiring specific FIC authorization.[76]

3. *Investor Response to the 1989 Regulations*

The initial response of foreign investors to the new regulations was much more staid than the Salinas Administration had anticipated. In fact, during the first year following promulgation of the Regulations, foreign investment increased at an arduously slow rate. Legal commentators contributed this slow economic growth primarily to three key factors, including: (1) President Salinas' decision not to repeal the 1973 Law; (2) the lingering memory that Mexico nationalized its banking industry in 1982;

3, tit. I, ch. I, art. 27.

69. Dumars, *supra* note 25, at 262.

70. Regulations, *supra* note 54, art. 20. Failure of the Secretariat of Foreign Relations to take action on the trust application within 45 days resulted in automatic approval.

71. *Id.* art. 19. Article 19 contains a complete list of tourist activities.

72. *Id.* arts. 16-22.

73. *Id.*

74. A "maquiladora" is "a generic term for those firms which 'process' (assemble and/or transform in some way) components imported into Mexico which are then reexported." Norris C. Clement, *An Overview of the Maquiladora Industry*, 18 CAL. W. INT'L L.J. 55, 56 (1987). The Maquiladora program allows parts of items to be imported into Mexico for assembly and then returned to the United States with the United States assessing a duty on the value added by assembly in Mexico. Dumars, *supra* note 25, at 263.

75. Regulations, *supra* note 54, art. 6.

76. Hodgins, *supra* note 55, at 367-68. New projects include industrial, commercial, and service facilities. Regulations, *supra* note 54, arts. 27-28.

and (3) the unstable political foundation underlying Salinas' presidency.[77]

In 1990, however, worldwide foreign investment in Mexico began increasing sharply. In order to appreciate this dramatic growth, it is beneficial to study the chart below that divides Total Foreign Investment (TFI) in Mexico into Direct Foreign Investment (DFI) and Portfolio Foreign Investment (PFI), which comprises stock market and money market investment. Mexico's foreign investment from 1989 to 1993, in millions of dollars, was as follows:[78]

YEAR	DIRECT F.I.	Portfolio F.I.
1989	3,036.90	493.30
1990	2,633.20	1,994.50
1991	4,761.50	9,870.30
1992	5,365.71	3,553.20
1993 (1st half)	2,736.70	7,835.10
1993 (2d (est.))	2,000.00	7,000.00
5 Year subtotal	$20,534.00	$40,746.40
Total Combined Foreign Investment	$61,280.40	

The United States was the largest foreign investor in Mexico; late 1980's-early 1990's direct foreign investment totaled over U.S.$11.6 billion in industrial projects alone.[79] With new regulations in place, lower rates of inflation,[80] and foreign investment on the rise, the Mexican Congress, with President Salinas's full support, enacted the 1993 Foreign Investment Law and solidified Mexico's position as a major player in international trade.

77. Koslow, *supra* note 20, at 453-54.

78. Kryzda, *supra* note 64, at 9-10. This chart is based on figures from the Mexican Central Bank.

79. Stuart Auerbach & Edward Cody, *Boom Over the Border: U.S. Firms Go to Mexico*, WASH. POST, May 17, 1992, at A1.

80. By the end of 1993, inflation in Mexico had fallen to 8.3%, down from 159% in 1987.

D. *1993 Foreign Investment Law*

On December 28, 1993, a new federal statute entitled the 1993 Foreign Investment Law (FIL) entered into force in Mexico, thereby repealing the restrictive 1973 Law.[81] According to an official statement sent by President Salinas to Congress in November of 1993, the purpose of the proposed FIL was "to establish a new legal framework which, in full compliance with the Constitution, promotes competitiveness in the country, provides legal certainty to foreign investment in Mexico and establishes clear rules to channel international capital to productive activities."[82] In effect, the 1993 FIL codifies many of the regulations promulgated by Salinas' administration in 1989, thus bringing Mexico's domestic law into symmetry with requirements established under the North American Free Trade Agreement (NAFTA). Until the President issues regulations explaining the 1993 FIL,[83] the 1989 Regulations shall continue in force, at least insofar as they do not contravene the FIL.[84]

The 1993 FIL may be subdivided into three broad categories, including: (1) provisions contrary to the 1973 Law; (2) provisions in accord with the 1973 Law; and (3) provisions in accord with the 1989 Regulations.[85]

1. *Provisions Contrary to the 1973 Law*

a. *Demise of the 49/51 Rule*

Perhaps the greatest departure from the 1973 Law is the demise of the 49/51 Rule, which limited foreign investors to a minority ownership position in the capital stock of Mexican companies.[86] Under the terms of the new Law, foreign investors may control up to 100% of the capital stock of a

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81. Foreign Investment Law, *Diario Official*, Dec. 27, 1993, *reprinted and translated in* TAX LAWS OF THE WORLD (Foreign Tax Law Publishers, Inc. 1994) [hereinafter FIL].

82. Jorge A. Vargas, *Mexico's New Foreign Investment Act*, 4 MEX. TRADE & LAW REP. 7 (Feb. 1994).

83. *See supra* text accompanying note 17.

84. FIL, *supra* note 81, Transitory Article Fourth.

85. *See* Vargas, *supra* note 82 (setting forth the following tripartite analytical framework). *See also* Michell Nader S. & Jorge Cervantes Trejo, *Mexico Liberalizes Foreign Investment Regime*, MEX. TRADE & L. REP., Mar. 1994, at 7-11.

86. Law, *supra* note 32, art. 5 (limiting foreign ownership to a maximum of 49%, unless otherwise set forth in the Law or agreed to by the FIC).

Mexican enterprise, subject to specific limitations set forth in the Law.[87] Several of these limitations are explored in the following discussion.

b. *Promoting Foreign Investment*

Another departure from the 1973 Law, is the 1993 FIL's promotion of foreign trade via the elimination of most performance requirements. Prior to the new Law, Mexico often imposed numerous conditions that needed to be met before the FIC would authorize foreign investment projects.[88] Under the FIL, the FIC may only consider the following criteria when evaluating petitions for foreign-owned projects in Mexico:

(1) The impact on employment and training of workers;
(2) The technological contribution of the project;
(3) Fulfillment of environmental provisions contained in the ecological ordinances governing the matter; and
(4) The project's general contribution to the increase in competency of the productive goals of the country.[89]

c. *Function of the National Commission of Foreign Investment (FIC)*

Under the 1993 FIL, membership on the FIC was altered to include the Secretaries of State, Foreign Relations, Finance and Public Credit of Social Development, Energy, Mines and State Industry, Commerce and Industrial Development,[90] Communications and Transportation, Labor and Social Welfare, and Tourism.[91] In addition, the FIC may invite other competent authorities to participate in its sessions.[92]

FIC duties changed dramatically, too, and now include: (1) setting foreign investment policies which promote investment in Mexico; (2) resolving terms and conditions of foreign investment participation in

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87. FIL, *supra* note 81, art. 4. This Article allows foreign investors to "participate in any proportion in the capital stock of Mexican companies, acquire fixed assets, enter new fields of economic activity or manufacture new lines of products, open and operate establishments, and increase or relocate those already existing, except as provided in this Law." *Id.*

88. *See supra* note 44 and accompanying text.

89. FIL, *supra* note 81, art. 29.

90. The Secretary of Commerce and Industrial Development shall preside over the FIC. *Id.* art. 24.

91. *Id.* art. 23.

92. *Id.*

activities regulated by Articles 8 and 9 of the FIL; (3) serving as a mandatory body for consultation in matters of foreign investment for departments and organizations in the Public Federal Administration; (4) establishing criteria for the application of legal and regulatory provisions on foreign investment through the issuance of general resolutions; and (5) all corresponding activities.[93]

2. *Provisions in Accord with the 1973 Law*

a. *Activities Reserved Exclusively to the Mexican Government*

While most provisions of the 1993 FIL reflect Mexico's desire to liberalize restrictions on foreign investment, there are notable exceptions. One of the most notable is the continued policy of reserving certain enterprises exclusively for the Mexican government. According to the 1993 FIL, the following "strategic areas" are reserved exclusively for the Mexican government: (1) petroleum; (2) basic petrochemicals; (3) electricity; (4) nuclear energy; (5) radioactive minerals; (6) satellite communications; (7) telegraph services; (8) radiotelegraphy; (9) mail service; (10) railways; (11) issuance of paper money; (12) mintage of currency; (13) control of ports, airports, and heliports; and (14) other areas expressly stipulated in applicable legal provisions.[94]

b. *Activities Reserved Exclusively for the Mexican People or to Mexican Companies with an "Exclusion of Foreigners Clause"*

In the same fashion as the activities reserved exclusively to the State listed above, the 1993 FIL also continues the 1973 Law's policy of reserving certain activities exclusively to the Mexican people, or to Mexican companies with an "exclusion of foreigners clause."[95] These reserved activities include:

(1) domestic land transportation of passengers, tourists and cargo,

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93. FIL, *supra* note 81, art. 26.

94. *Id.* art. 5. For a list of activities reserved exclusively to the Mexican government under the 1973 Law, *see supra* note 37.

95. An "exclusion of foreigners clause" is defined as "[t]he convention or express agreement which forms an integral part of the by-laws of a company, by which the companies in question shall neither directly nor indirectly admit foreign investors as partners or shareholders, nor admit companies which do admit foreigners as shareholders to participate." FIL, *supra* note 81, tit. I, ch. I, art. 2, para. VII.

not including messenger and express package services;
(2) retail sale of gasoline and the distribution of liquid petroleum gas;
(3) radio and television broadcasting services, excluding cable television;
(4) credit unions;
(5) developmental banking institutions; and
(6) rendering of professional and technical services.[96]

Foreign investors may not participate in these activities either directly or through the use of trusts, conventions, business or statutory agreements, pyramid schemes, or any other investment vehicle.[97] The only exception to this prohibition is through neutral investment.[98]

c. *Regulated Categories of Industrial Activity*

Continuing the practice of the 1973 Law, the FIL limits foreign participation in certain industrial areas to set percentages. Generally, these percentages are broken down into five brackets: 1) up to ten percent; 2) up to twenty-five percent; 3) up to thirty percent; 4) up to forty-nine percent; and 5) over forty-nine percent.

First, the up to ten percent bracket includes production cooperatives. Second, the up to twenty percent bracket includes domestic air transportation; air taxi transport; and specialized air transportation. Third, the up to thirty percent bracket includes controlling companies of financial groups; multiple banking credit institutions; securities exchange houses; and stock exchange specialists. Fourth, the up to forty-nine percent bracket includes insurance institutions; bonding institutions; foreign exchange houses; cable television; port services of pilotage to ships; manufacturing and marketing of explosives; etc.[99] Fifth, the over forty-nine percent bracket requires foreign investors to acquire approval of the FIC prior to investing in any of the following activities: private education; legal services; appraisal institutions; insurance; cellular telephones; drilling of petroleum and gas wells; etc.[100] However, limitations on foreign investment set forth in the fifth bracket require approval by the FIC only

96. *Id.* art. 6. For a list of similarly reserved activities under the 1993 Law, *see supra* note 38.
97. FIL, *supra* note 81, tit. I, ch. I, art. 6.
98. *Id.* tit. V, ch. I, art. 18.
99. *Id.* tit. I, ch. III, art. 7, paras. I-IV.
100. *Id.* art. 8.

when the total value of a company's assets exceeds a threshold amount determined annually by the FIC.[101]

3. *Provisions in Accord with the 1989 Regulations*

a. *Automatic Approval of Foreign Investment Projects*

According to the 1993 FIL, the FIC must respond to petitions submitted for consideration within forty-five working days.[102] Failure to decide within this period results in automatic approval of the petition.[103] As discussed above, the FIL limits the FIC's discretion to four criteria when evaluating petitions to engage in foreign investment.[104] These criteria are supplemented by additional criteria found in the 1989 Regulations,[105] including: (1) investment in fixed assets cannot exceed U.S.$100 million; (2) investment must be funded by foreign capital; (3) industrial projects cannot be located in Guadalajara, Mexico City, or Monterey; and (4) aggregate foreign investment must create permanent jobs and establish worker training and personnel development programs.[106]

b. *Real Estate Trusts within the Restricted Zone*

The FIL allows Mexican companies with exclusion of foreigner clauses, or clauses of similar import, to acquire ownership of real property within the restricted zone.[107] These companies are subject to the following limitations: (1) ownership of real property intended for non-residential activities must be registered with the Ministry of Foreign Relations; and (2) ownership of real property intended for residential purposes must comply

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101. *Id.* art. 9. *See also,* David A. Spencer, *Mexico's New Foreign Investment Law,* INT'L L. NEWSL. (Int'l Prac. Sec. of the Wash. St. B. Ass'n), Aug. 1994, at 3. According to transitory section 11 of the FIL, the initial threshold amount is approximately U.S.$26,730,000.

102. FIL, *supra* note 81, tit. VI, ch. III, art. 28.

103. *Id.*

104. *See supra* text accompanying note 89 for a list of the four criteria.

105. *See supra* note 84 and accompanying text.

106. *See supra* note 55 and accompanying text.

107. Constitutional and statutory authority supporting Mexico's "Restricted Zone" is found in Article 27, paragraph I of Mexico's Constitution; the Organic Act of Article 27 of Mexico's Constitution; Article 1, paragraph XIII of the 1989 Regulations; and Article 2 of the 1993 FIL.

with the provisions set forth in Title II, Chapter II of the FIL.[108]

While foreign natural persons and foreign legal entities are prohibited from acquiring legal ownership of real estate within the restricted zone, the FIL continues the practice of the 1989 Regulations by allowing such persons and entities to obtain beneficial use of immovable assets within the restricted zone. According to the FIL, the Ministry of Foreign Relations (Ministry) must issue a permit to a Mexican credit institution authorizing it to acquire rights, as trustee, on real property located within the restricted zone when its beneficiaries are either (1) Mexican companies without an exclusion of foreigners clause, or (2) foreign individuals or legal persons.[109] After the Ministry has issued a certificate authorizing the trust, the beneficiaries are permitted to obtain the fruits, products, or revenue which result from operation of the enterprise.[110] Finally, the FIL extends the duration of all real estate trusts from thirty years under the 1989 Regulations to fifty years.[111] The renewal of trusts is virtually automatic and may continue indefinitely as long as the FIC approves.

c. *Neutral Investments*

The FIL continues the practice of allowing neutral investments, as first established under the 1989 Regulations. Under the new law, neutral investment is defined as "that which is realized in Mexican companies or in trusts authorized in accordance with this Title and it shall not be computed for determining the percentage of foreign investment in the capital stock of Mexican companies."[112] Codification of the 1989 Regulations guarantees foreign investors continued access to the Mexican stock exchange.

d. *Imposition of Sanctions*

The FIL concludes with several articles addressing sanctions. Under these articles, sanctions are permitted "in the case of acts performed in contravention to the provisions of this Law" and may range from stiff fines[113] to actual revocation of authorization to conduct business in

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108. FIL, *supra* note 81, title II, ch. I, art. 10.

109. *Id.* ch. II, art. 11.

110. *Id.* art. 12.

111. *Id.* art. 13.

112. *Id.* tit. V, ch. I, art. 18.

113. Civil penalties may range from U.S.$4,500 to U.S.$22,500, depending upon the nature of the infraction. Vargas, *supra* note 82, at 9.

Mexico.[114] Such revocation of authority would result in nullification of all violative acts, conventions, or business and statutory agreements.[115] The Law may impose these sanctions on any person, whether a Mexican national, Mexican company, foreign national, or foreign legal entity.[116]

e. *North American Free Trade Agreement*

On January 1, 1994, Mexico entered into the North American Free Trade Agreement (NAFTA) with Canada and the United States. NAFTA does not create a common market like the European Union; rather it "creates a free trade area in which tariff and non-tariff barriers to trade are greatly reduced between the Parties."[117] By reducing barriers to trade, NAFTA should stimulate economic growth, thereby creating numerous jobs in member nations. Recent estimates predict that Mexico will spend U.S.$16 billion on public works projects in 1994 alone. Of this spending, U.S.$11.2 billion will be channeled into private investments, including U.S.$4.5 billion to construct terminals and to purchase buses and cargo trucks.[118] The remaining U.S.$4.85 billion will be spent on laying 1,488 miles of new highways.[119] Mexico, a nation whose workers have endured chronic unemployment, should benefit from increases in the availability or increases in the number of jobs, which should foster economic growth, discourage immigration into the United States, and create wealth, thereby enabling Mexican nationals to enjoy a higher standard of living.[120]

Chapter Eleven of NAFTA (the investment chapter) has three primary objectives: (1) to create a secure investment climate through the promulgation of clear rules for the fair treatment of foreign investors; (2) to remove tariff and non-tariff barriers to foreign investment by eliminating or liberalizing existing restrictions; and (3) to provide an effective means for dispute resolution between an investor and the host government.[121]

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114. FIL, *supra* note 81, arts. 37-38.

115. *Id.*

116. Vargas, *supra* note 82, at 9.

117. C. Johnston, Jr. et al., *Summary of the North American Free Trade Agreement* [Apr. 1993], Booklet 2, *in* Law and Practice under the GATT and other Trading Arrangements—North American Free Trade Agreements (looseleaf, Oceana Pub. Inc.), at 1.

118. Carlos E. Restrepo, *You Can Buy Some Land in Mexico, But the Better Bet is in Project Development*, FOREIGN TRADE, Aug. 1994, at 7.

119. *Id.*

120. Leslie Alan Glick, UNDERSTANDING THE NORTH AMERICAN FREE TRADE AGREEMENT: LEGAL AND BUSINESS CONSEQUENCES OF NAFTA 3 (1993).

121. Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT'L LAW. 727 (1993).

1. *Section A: Investment Rights, Duties, Obligations*

a. *Scope of Chapter Eleven*

Chapter Eleven's scope is extremely broad as it attempts to offer investors four basic protections: (1) non-discriminatory treatment; (2) freedom from performance requirements; (3) free profit repatriation; and (4) expropriation only in conformity with NAFTA's provisions.[122] These protections are afforded to "investments" (both existing and future), as well as to "investors of a Party."[123] Chapter Eleven's application is subject to two important constraints. First, financial services are excluded from Chapter Eleven,[124] and second, Chapter Eleven provisions are subordinate to all other NAFTA-Chapter provisions to the extent the two chapters conflict or are inconsistent with one another.[125]

b. *General Chapter Eleven Investor Rights and Protections*

Chapter Eleven guarantees non-discriminatory treatment to NAFTA investors and their investments. "Non-discriminatory treatment" means that investors and their investments are guaranteed the better of: (1) treatment no less favorable than a Party grants its own investors (National Treatment); or (2) treatment no less favorable than a Party grants to investors of any other Party or non-Party (most-favored-nation treatment).[126] Additionally, each Party, at a minimum, must treat investments in accord with international law, which includes fair and equitable treatment and full protection and security.[127]

Article 1106 states that no Party may impose or enforce performance requirements, which include, but are not limited to, requirements for:

(1) exporting a given level or percentage of goods or services;
(2) achieving a given level or percentage of domestic content;

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122. Michael C. McClintock, *Ch. 11 Investment by Nationals of other NAFTA-Countries*, NAFTA OVERVIEW LECTURE 2 (1994), at 2.

123. *North American Free Trade Agreement: Final Text*, Special Report, Free Trade Law Reports, CCH INT'L (Dec. 17, 1992). "Investors of a Party" means a Party, or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making, or has made an investment. *Id.*

124. *Id.* art. 1101. Financial Services are covered by NAFTA, Chapter 14.

125. *Id.* art. 1112.

126. *Id.*

127. *Id.* art. 1105.

(3) purchasing, using or according a preference to goods produced or services provided in a Party's territory;
(4) relating the volume or value of imports to the volume or value of exports; and
(5) mandatory technology transfer, except to remedy a violation of antimonopoly laws.[128]

In this way, investment is no longer tied to local source or export requirements, which were particularly prevalent in the Mexican automotive industry.[129]

Chapter Eleven guarantees the unhindered transfer of funds, monies and profits, by freely allowing investors to repatriate profits to their home countries, to transfer "sales proceeds" (from selling a business or "interest" therein), and to conduct other monetary remittances.[130] By the same token, Chapter Eleven does not require investors to repatriate profits.[131] The only permissible restrictions on transfers may be pursuant to a NAFTA-country's bankruptcy laws or necessary to maintain a "balance-of-payments" in the form of exchange rate ratios.[132]

Chapter Eleven forbids a Party from directly or indirectly nationalizing or expropriating a foreign investor's investment, unless it is:

(1) for a public purpose;
(2) on a non-discriminatory basis;
(3) in accordance with due process of law; and
(4) on payment of compensation at fair market value, including applicable interest.[133]

c. *Section A: Exclusions and Exceptions*

There are several major exceptions to Chapter Eleven. First, NAFTA-governments may, at their discretion, refuse to grant NAFTA benefits if either of the following exceptions apply: (1) Foreign Policy Exception,

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128. *See also* McClintock, *supra* note 122, at 3-4.

129. Glick, *supra* note 120, at 24.

130. NAFTA, *supra* note 123, art. 1109. *See also* McClintock, *supra* note 122, at 5.

131. Forced repatriation of profits is a long standing practice of some countries that requires the investor to incur confiscatory taxes on such remittances. McClintock, *supra* note 122, at 5.

132. The latter restriction is only permitted if an emergency exists such as "conditionality" requirements imposed by the IMF (Art. 2104). *Id.*

133. NAFTA, *supra* note 123, art. 1110. Payment of compensation must be made "without delay." *Id.*

involving a non-NAFTA country with whom the NAFTA-country (a) does not maintain diplomatic relations, or (b) currently imposes economic sanctions; or (2) the "Shell" Entity Exception, where investors of a non-NAFTA party own or control an enterprise within a NAFTA-country and the enterprise has no substantial business activities within the NAFTA-country's territory under which law it is organized.[134]

Second, NAFTA contains three annexes which list specific exceptions to the Chapter Eleven investment protections set forth above. Annex I lists all existing federal measures in all three NAFTA-countries which derogate from the national treatment, most-favored-nation, or performance requirement obligations of Chapter Eleven. All exceptions listed in this annex are subject to the "ratchet rule," whereby an existing rule may not be made more restrictive and, if liberalized, may not later be made more restrictive.[135] Among others, Mexico reserves the following exceptions: (1) ownership of land (requires use of real estate trusts); (2) cable television; (3) federal government review of incoming foreign acquisitions exceeding $25 million pesos (to reach $150 million pesos over a ten year period); (4) air/land transportation; (5) retail sales of petrochemical products; and (6) privatization.[136]

Annex II lists specific sectors which are not subject to the "ratchet rule." These sectors include: (1) basic telecommunications; (2) broadcasting; and (3) maritime trade.[137] Annex III lists special Mexican reservations which are based on its unique constitutional provisions requiring certain activities to be in the exclusive ownership or control of the Mexican State.[138] All provisions listed in Annex III are subject to the "ratchet rule."[139]

d. *Section B: Settlement of Investment Disputes*

Chapter Eleven also establishes a complex mechanism for the settlement of private investment disputes between a NAFTA-country and an investor of another NAFTA-country for alleged breaches of its NAFTA Chapter Eleven Section A obligations. This dispute settlement mechanism provides for resolution via international arbitration, rather than by a NAFTA

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134. *Id.* art. 1113.
135. Price, *supra* note 121, at 730-31.
136. McClintock, *supra* note 122, at 7-8.
137. *Id.* at 9.
138. *Id.* at 9-10.
139. Price, *supra* note 121, at 731.

dispute panel.[140] Possible fora for international arbitration include the following:

(1) ICSID: International Center for the Settlement of Investment Disputes, if both the investor and host country are signatory parties to the ICSID Convention (currently, Canada and Mexico are not signatories);
(2) ICSID "Additional Facility" alternative resolution if only one of the NAFTA-countries is not a party to the ICSID Convention; and
(3) Ad Hoc Tribunal established under the U.N. Commission on International Trade Law (UNCITRAL) rules.[141]

According to Articles 1116 and 1117, international arbitration is appropriate for both (1) alleged breaches of NAFTA Chapter Eleven obligations, and (2) anti-NAFTA behavior of government-run monopolies.[142] However, neither of these claims can be brought unless there is proof of an actual direct or indirect injury.[143] All claims brought under this are subject to a three-year statute of limitations.[144]

IV. CONCLUSION

During the past decade, Mexico's policy toward foreign investment underwent a true economic revolution that appears sure to continue well into the next century. However, the prudent Canadian or U.S. investor recognizes that Mexico's current open-door policy may not continue if its people or resources are exploited, as Mexico's frequently changing attitude toward foreign investment has shown. Maintaining good relations with Mexico demands that investors respect Mexican cultural values and laws and be willing to engage in arms-length negotiations. By treating Mexicans as equals, Canadian and U.S. investors can almost assure themselves continued access to an ever growing market of consumers who not only need, but actually prefer, Canadian and U.S.-made goods.

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140. For an excellent discussion of NAFTA Chapter Eleven Section B's dispute settlement mechanism, *see Id*, at 731-35.

141. McClintock, *supra* note 122, at 11.

142. *Id.*

143. *Id.*

144. *Id.*

WHY NAFTA'S IMMIGRATION PROVISIONS DISCRIMINATE AGAINST MEXICAN NATIONALS

Gerald A. Wunsch[*]

Although the oft-stated goal of the North American Free Trade Agreement (NAFTA)[1] is to create the world's largest free trade zone, stretching from the Yukon to the Yucatan, U.S. policymakers have seen to it that NAFTA's immigration provisions allow for discriminatory treatment of Mexican nationals as compared to Canadian nationals. Following an overview of the immigration provisions found in NAFTA, this article explores how those provisions discriminate against Mexicans and suggests why this discriminatory treatment exists. The discussion then turns inward to look at this country's attitudes toward our southern neighbor.

I. AN OVERVIEW OF NAFTA'S IMMIGRATION PROVISIONS

NAFTA's immigration provisions are found in Chapter Sixteen of the agreement, which is titled "Temporary Entry for Business Persons."[2] Chapter Sixteen provides that the obligation of each Party to NAFTA is to apply its immigration measures "so as to avoid unduly impairing or delaying trade in goods or services or conduct of investment activities under this Agreement."[3] Chapter Sixteen is augmented by Annex 1603,[4] which sets forth four separate categories of business persons whose entry to the United States is affected by NAFTA. Each of these will be addressed separately.

A. *Business Visitors (Annex 1603-Section A)*

The Business Visitor category under NAFTA corresponds to that found in the United States Immigration and Nationality Act of 1952[5] for the nonimmigrant B-1 classification.[6] Business Visitors will be granted temporary entry to engage in business activities, including research and design, marketing,

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1. North American Free Trade Agreement, 19 U.S.C. §§ 3301-3473 (1993), reprinted in 32 I.L.M. 296 (Mar. 1993) [hereinafter NAFTA].

2. Id. ch. 16.

3. Id.

4. Id. Annex 1603.

5. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1524 (1988 & Supp. V 1993) [hereinafter INA].

6. INA § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B).

sales, distribution, after-sales service, and other activities of a commercial nature. The Business Visitor must be prepared to demonstrate that "(a) the primary source of remuneration for the proposed business activity is outside the territory of the Party granting temporary entry; and (b) the business person's principal place of business and the actual place of accrual of profits, at least predominantly, remain outside such territory."[7] In plain language, the business activity must be international in scope and the business person must not intend to enter the local labor market.

B. *Traders and Investors (Annex 1603-Section B)*

Annex 1603-Section B provides that business persons shall be granted temporary entry to:

> (a) carry on substantial trade in goods or services principally between the territory of the Party of which the business person is a citizen and the territory of the Party into which entry is sought, or
> (b) establish, develop, administer or provide advice or key technical services to the operation of an investment to which the business person or the business person's enterprise has committed, or is in the process of committing, a substantial amount of capital. . . .[8]

This provision parallels the nonimmigrant E-1 (Treaty Trader) and E-2 (Treaty Investor) classifications found in the INA.[9] Like the E-1/E-2 classifications, Annex 1603 requires that the business person be employed in a capacity that is supervisory, executive, or involves essential skills.

C. *Intra-Company Transferees (Annex 1603-Section C)*

Intra-company transferees are business persons transferred from a business enterprise in the territory of one Party for employment by the same enterprise, or a subsidiary or affiliate thereof, in the territory of another Party. Section C specifies that the transfer must be temporary and in a capacity that is managerial, executive, or involves specialized knowledge of the enterprise. Section C also provides that a Party *may* require the business person to be employed continuously by the enterprise for at least one year within the last three before permitting the transfer to the subsidiary or affiliate in that Party's territory.

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7. NAFTA, Annex 1603, § A(2).
8. *Id.* Annex 1603 § B(1)(a)-(b).
9. INA § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E).

The nonimmigrant L-1 classification in the INA parallels NAFTA's Intra-Company Transferee category.[10] It imposes the same "one year out of the last three" employment requirement on the transferee before an executive, manager, or alien possessing specialized knowledge of the company can be transferred temporarily to the United States.

D. *Professionals (Annex 1603-Section D)*

Annex 1603-Section D provides that each Party to NAFTA shall grant temporary entry to business persons seeking to engage in a profession set out in Appendix 1603.D.1.[11] This Appendix names 63 professions, including accountants, hotel managers, urban planners, dieticians, registered nurses, astronomers, poultry scientists, and college teachers.

The Annex places limitations on cross-border travelers in the identified professions. For example, physicians may not engage in patient care and are limited to teaching or research positions only. NAFTA business persons engaging in one of the listed professions must present documentation that they possess the minimum education or licensing credentials set out in Appendix 1603.D.1, which generally is at least a baccalaureate or *licenciatura* degree, and also must be prepared to demonstrate that they will practice in the profession. United States officials have interpreted this language to mean an offer of employment from a U.S. employer intending to employ the individual in his professional capacity; self-employment is not allowed.[12] Section D has no direct counterpart in the INA, although the H-1B classification provides for temporary entry of workers with at least a baccalaureate degree or foreign equivalent[13] in so-called "specialty occupations."[14] The professions listed in Appendix 1603.D.1 are virtually identical to those listed in Schedule 2 to Annex 1502.1 of the United States-Canada Free Trade Agreement (CFTA),[15] which NAFTA superseded on January 1, 1994.

NAFTA's immigration provisions generally track the four categories found in the CFTA. These provisions controlled the temporary entry of persons between the United States and Canada from January 1, 1989, through the end of 1993. However, the superseding provisions in NAFTA allow the United

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10. INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L), 22 C.F.R. § 41.54, n. 2.1 (1994).

11. 8 C.F.R. § 214.6(c) (1994).

12. *Id.* §§ 214.6(d)(2)(iii), 214.6(d)(2)(ii).

13. INA § 214(i)(1)(B), 8 U.S.C. § 1184(i)(1)(B).

14. INA § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The companion provision for registered nurses is INA § 101(a)(15)(H)(i)(a), 8 U.S.C. § 1101(a)(15)(H)(i)(a).

15. United States-Canada Free Trade Agreement, H.R. DOC. NO. 216, 100th Cong., 2d Sess. (1988) [hereinafter CFTA], *reprinted in* 27 I.L.M. 281 (Mar. 1988). Schedule 2 was codified at 8 C.F.R. § 214.6(d)(2)(ii) (1994).

States to discriminate in a number of ways against business persons from Mexico seeking temporary entry.

II. HOW NAFTA'S IMMIGRATION PROVISIONS DISCRIMINATE AGAINST MEXICAN NATIONALS

A. *Business Visitors*

Annex 1603, Section A states that no Party to NAFTA may require "prior approval procedures, petitions, labor certification tests or other procedures" for NAFTA Business Visitors.[16] However, Section A preserves a Party's right to require a Business Visitor to obtain a visa prior to entry into its territory.[17] A Party imposing a visa requirement must consult with the Party whose nationals are affected by the requirement.[18]

Prior to NAFTA, citizens of Canada seeking to enter the United States temporarily in the nonimmigrant B-1 classification were not required to obtain a visa from a U.S. diplomatic post in Canada beforehand.[19] Also, Canadians were not required to present a Canadian passport as long as they could present other adequate evidence of Canadian citizenship, such as a birth certificate.[20] In this way, the procedure for Canadian business persons was straightforward: first, they simply went to a United States-Canada port of entry; second, they showed proof of Canadian citizenship to a U.S. immigration officer; and, third, they demonstrated to the immigration officer that their purpose for entry was for business and would be temporary. No official documentation was issued to the Canadian business person, and, for legitimate Business Visitors, the entire process tended to be informal. In sum, neither the U.S. legislation[21] nor the regulations of the Immigration and Naturalization Service[22] implementing NAFTA disturb existing practices for Canadian business persons seeking temporary entry to the United States.

Prior to NAFTA, Mexican business persons seeking temporary entry into the United States in the nonimmigrant B-1 classification were first required to obtain a B-1 visa from a U.S. diplomatic post in Mexico.[23] They also

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16. NAFTA, Annex 1603 § A(4)(a).

17. *Id.* Annex 1603 § A(5).

18. *Id.*

19. 22 C.F.R. § 41.2 (a) (1994).

20. *Id.*

21. North American Free Trade Implementation Act of 1993, 19 U.S.C. § 3301, Pub. L. No. 103-182, 107 Stat. 2057 (codified as amended at 19 U.S.C. § 3301).

22. 58 Fed. Reg. 69,205 (Dec. 30, 1993) (codified at 8 C.F.R. §§ 103, 212, 214, 235, and 274a (1994)).

23. INA § 212(a)(7)(B)(i)(II), 8 U.S.C. § 1182(a)(7)(B)(i)(II).

were required to present a valid Mexican passport for a visa stamp.[24] For Mexican nationals, B-1 visas could be issued for multiple entries to the United States up to ten years.[25] Thus, a trip to a U.S. consulate or the U.S. Embassy in Mexico City was not necessarily required for every trip a Mexican business person took to the United States. However, Mexican travelers were still subject to arbitrary barriers: U.S. consular officials have always had the discretion to grant a visa for a lesser period of time and for fewer entries than the maximum permitted by State Department regulations[26]—a discretion they often exercise.

To obtain a B-1 visa, the Mexican business person would be interviewed by a U.S. consular officer.[27] The applicant would bear the burden of establishing that he was not intending to immigrate to the United States,[28] and that the purpose of his proposed visit was to accomplish one of the legitimate business purposes enumerated in the Department of State Foreign Affairs Manual.[29] Further yet, business persons without a prior documented history of frequent business travel to the United States could be required to present (1) proof of continuing remuneration from a source in Mexico; (2) invitations from U.S. companies; and (3) proof of adequate ties to Mexico in order to overcome the presumption that the traveler possessed an intent to immigrate. Whether this presumption, which is imposed by the INA[30] on applicants for most categories of nonimmigrant visas, is overcome is a decision solely in the discretion of the consular officer, thereby empowering him broadly.

After obtaining the proper visa, the Mexican business person was required then to present that documentation at a United States-Mexico port of entry and again satisfy the inspecting INS official that he was not an excludable alien under the INA.[31] If admitted, the Mexican national would be issued an INS Form I-94 (Arrival and Departure Record)[32] documenting the date of his arrival, nonimmigrant classification (in this case B-1), and his required departure date.

The implementing regulations of the INS under NAFTA perpetuate the pre-existing requirements of a valid passport and visa (or Mexican Border Crossing Card) for Mexican Business Visitors seeking to enter the United

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24. INA § 212(a)(7)(B)(i)(1), 8 U.S.C. § 1182(a)(7)(B)(i)(1).
25. Department of State Foreign Affairs Manual, App. B/C/E, Reciprocity-Mexico.
26. 22 C.F.R. § 41.112(c) (1994).
27. *Id.* § 41.102(a).
28. INA § 214(b), 8 U.S.C. § 1184(b).
29. *See* Dept. of State Foreign Affairs Manual, *supra* note 25.
30. 10 Immigr. L. & Proc. (MB) § 41.31, n. 2 (May 1993).
31. 8 C.F.R. § 235.1(d)(1) (1994).
32. *Id.* § 235.1(f).

States.[33] Thus, Annex 1603, Section A of NAFTA allowed the United States to continue using pre-NAFTA standards with respect to Mexican Business Visitors. However, the possibility of future consultation between these two parties to NAFTA is permissible if Mexico seeks it.[34]

B. *Traders and Investors*

Annex 1603-Section B states that no Party may require labor certification tests or impose numerical restrictions on Traders or Investors seeking temporary entry under NAFTA into the territory of another Party. However, as was the case with Business Visitors, a Party may impose a visa requirement before allowing a NAFTA Trader or Investor to enter that Party's territory.

Canadian Treaty Traders and Investors were first recognized under the provisions of the CFTA[35] and were required by that treaty to obtain E-1/E-2 visas.[36] (This is the only nonimmigrant category that requires Canadians to obtain visas.) Treaty Trader and Investor status for Mexican nationals, on the other hand, is recognized for the first time by NAFTA.[37] Neither the United States' legislation nor the INS regulations implementing NAFTA disturb the pre-existing requirement that Canadian Treaty Traders and Investors obtain E-1 or E-2 visas at a U.S. diplomatic post before seeking entry into the United States.[38] Thus, for NAFTA Traders and Investors, the United States does not discriminate in its treatment of Mexican and Canadian nationals; citizens of both countries must obtain E-1 or E-2 visas before entering the United States.

C. *Intra-Company Transferees*

Annex 1603-Section C states that no Party may require labor certification tests or impose numerical restrictions on Intra-Company Transferees under NAFTA. However, in language identical to that applied to Business Visitors, Section C provides that a Party may require a Transferee to obtain a visa prior to entry. Section C also contains the same consultation requirement as Section A with respect to any Party implementing a visa requirement.

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33. *Id.* § 214.2(b)(4).

34. NAFTA, Annex 1603 § A, para. 5.

35. CFTA, *supra* note 15, Annex 1502.1, § B.

36. *Id. See also* 22 C.F.R. § 41.2(m) (1994).

37. NAFTA, Annex 1603 § B.

38. North American Free Trade Implementation Act, *supra* note 21, § 341, 8 C.F.R. § 212.1(l) (1994).

Prior to NAFTA, employers seeking to temporarily employ either Canadian or Mexican nationals in the United States in the nonimmigrant L-1 classification[39] had to first petition the INS on Form I-129.[40] They also were required to submit supporting documentation to establish the affiliation of the overseas and U.S. employers and that the temporary transfer was in a managerial, executive, or specialized knowledge capacity.[41] Moreover, a petitioning employer had to establish that the proposed transferee had been employed continuously by the petitioner in the requisite capacity for at least one year in the last three.[42] These petition requirements, because they existed previously for both nationals of Canada and Mexico, are permitted *sub silentio* by Section C[43] and have been left undisturbed by the U.S. implementing legislation and regulations. Under NAFTA, however, an important distinction exists between Mexican and Canadian nationals regarding the petition requirement: the INS implementing regulations continue the practice of permitting a Canadian national seeking L-1 status under NAFTA to present his employer's petition at a Class A port of entry located on the United States-Canada border for adjudication in conjunction with his own L-1 application.[44] This one-step processing greatly expedites the procedure for the petitioning employer. In contrast, processing an I-129 Petition for a Mexican National through one of the four INS regional service centers[45] typically takes three to four weeks.

The one-step process for Canadian nationals is allowed in the INS regulations because, unlike Mexican nationals, Canadians need not first obtain L-1 nonimmigrant visas from a U.S. diplomatic post before applying for entry in L-1 status.[46] The procedure for L-1 Intra-Company Transferees from Mexico is exactly the same under NAFTA as it was before NAFTA: they must present a valid Mexican passport at a U.S. diplomatic post in Mexico and apply for the requisite visa from a U.S. consular officer.[47] Like Business Visitors, they must satisfy the officer that they are entitled in all respects to the visa classification they are seeking. Section C allows the United States to continue requiring visas for Mexican nationals unless the requirement is removed at some future date pursuant to consultation between the United States and Mexico.

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39. INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

40. 8 C.F.R. § 214.2(l)(2)(i) (1994).

41. INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

42. *Id.*

43. NAFTA, Annex 1603 § C.

44. 8 C.F.R. § 214.2(l)(17)(i) (1994).

45. All I-129 petitions are currently processed at one of four INS regional service centers located in St. Albans, Vermont; Dallas, Texas; Lincoln, Nebraska; and Laguna Niguel, California.

46. 22 C.F.R. § 41.2(a) (1994).

47. *See supra* notes 23-24 and accompanying text.

D. *Professionals*

Annex 1603-Section D states that no Party to NAFTA may require "prior approval procedures, petitions, labor certification tests or other procedures"[48] or "impose or maintain any numerical restriction"[49] relating to the temporary entry of Section D Professionals under NAFTA. However, Section D preserves the right of a Party to impose a visa requirement on professionals of another Party prior to entry into the party's territory. In keeping with Annex 1603-Sections A and C, a Party imposing such a visa requirement must consult the other Party whose nationals are so affected.

Unlike the other sections of Annex 1603, and notwithstanding Section D's general prohibition against numerical restrictions, Section D allows a Party to establish an annual numerical limit with regard to professionals of another NAFTA Party, but only after consultation with that Party.[50] Most significantly, if a Party chooses to establish a numerical limit, that Party may also "require the business person to comply with its other procedures applicable to the temporary entry of professionals."[51] In other words, by imposing, in effect, a quota on the entry of professionals from another NAFTA Party, a Party may altogether ignore the Section D prohibitions against prior approval procedures, petitions, or labor certification tests when inconsistent with that Party's pre-existing requirements for the temporary entry of professionals. Finally, Section D requires that a Party imposing a numerical limit consult with the other Party whose professionals are affected "with a view to determining a date after which the limit shall cease to apply," but consultation is not required until three years after the numerical limitation is established.[52]

Appendix 1603.D.4 applies only to the United States and Mexico. It establishes an annual numerical limitation of 5,500 petitions for Mexican professionals seeking to enter the United States under NAFTA. Not counted against this quota are renewals of previously approved petitions; spouses or children accompanying the professional; or admissions of Mexican Specialty Workers in the nonimmigrant H-1B classification. Additionally, the INA sets an annual worldwide limitation of 65,000 for H-1B petitions.[53] Since first imposed in 1991, this quota has not been exceeded in any given U.S. government fiscal year.

Appendix 1603.D.4 concludes that the U.S. NAFTA quota for Mexican professionals shall apply for a maximum of ten years, unless consultation

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48. NAFTA, Annex 1603 § D(2)(a).
49. *Id.* Annex 1603 §D(2)(b).
50. *See id.* at Appendix 1603.D4.
51. *Id.* Annex 1603 § D(5)(a).
52. *Id.* Annex 1603 § D(7).
53. INA § 214(g)(1)(A), 8 U.S.C. § 1184(g)(1)(A).

between the United States and Mexico yields a relaxation of this limit. Of course, by the terms of Annex 1603-Section D, once the annual quota of 5,500 is removed, the right of the United States to require prior approval procedures, petitions, and labor certification tests is removed with it.

The U.S. implementing legislation amends Section 214 of the INA.[54] It gives force of law to those provisions of Annex 1603-Section D and Appendix 1603.D.4 that apply to nationals of Mexico, but not to nationals of Canada. First, the Attorney General is given the authority to establish the annual quota of 5,500 that applies to Mexican NAFTA professionals.[55] The quota may not be increased or eliminated before the ten-year cut-off unless the President submits reports to both houses of Congress after receiving advice from the private sector and non-Federal governmental sector advisory committees established under Section 135 of the Trade Act of 1974.[56] Second, Mexican NAFTA professionals will be subject to the controversial labor attestation requirements of INA Section 212(n).[57] Since 1991, these have been a prerequisite to an employer filing a petition to classify a Specialty Worker in nonimmigrant H-1B status. Third, prospective employers of Mexican NAFTA professionals must file a petition with the INS pursuant to INA Section 214(c).[58]

The implementing INS regulations[59] considerably expand on these requirements. The regulations make it clear that, in most respects, petitions seeking Trade NAFTA (TN) status[60] for Mexican professionals will be subject to the same procedural requirements as petitions seeking H-1B status for Specialty Workers. First, the professional's prospective U.S. employer must file an I-129 petition and supporting documentation with the INS Northern Service Center in Lincoln, Nebraska.[61] The supporting documentation must include a Labor Condition Attestation (Form ETA 9035),[62] which the employer has previously filed with a Regional Certifying Officer of the Employment

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54. North American Free Trade Implementation Act, *supra* note 21.

55. INA § 214(e)(3), 8 U.S.C. § 1184(e)(3).

56. INA § 214(e)(4), 8 U.S.C. § 1184(e)(4); Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1996 (codified at 19 U.S.C. § 2155 (1988 & Supp. V 1993)).

57. INA § 214(e)(5), 8 U.S.C. §§ 1182(n), 1184(e)(5). The companion attestation provision for registered nurses is INA § 212(m), 8 U.S.C. § 1182(m). *See* H. Rosemary Jeronimides, Note, *The H-1B Visa Category: A Tug of War*, 7 GEO. IMMIGR. L.J. 367 (1993), for an analysis of the controversy surrounding the labor attestation requirement.

58. INA § 214(e)(5), 8 U.S.C. § 1184(e)(5).

59. *See supra* note 22.

60. Both Canadian and Mexican NAFTA professionals are given TN status. Previously, under the CFTA, Canadian professionals were given Trade Canada (TC) status.

61. 8 C.F.R. §§ 214.6(d)(1)-(2) (1994).

62. 20 C.F.R. § 655.730(c)(1) (1994).

and Training Administration of the United States Department of Labor.[63] Form 9035 contains various attestations that the employer must make concerning the prospective employment of the Mexican NAFTA professional. This includes an attestation that the professional will be paid not less than the prevailing wage for the specific occupation in the intended area of employment.[64] The attestations of Form 9035 clearly constitute a labor certification test as contemplated by Annex 1603-Section D.

The INS may approve a petition for a TN professional from Mexico for up to one year only,[65] whereas petitions seeking H-1B Specialty Worker status may be approved for up to three years.[66] TN status may be extended indefinitely in one-year increments,[67] whereas H-1B may be extended for a total of only six years.[68] Extensions for H-1B's can also be granted for up to three years at a time.[69] To illustrate, the employer of a Mexican TN professional remaining in the United States for six years would need to have the INS approve a total of six petitions (but is not prevented from petitioning again), whereas the employer of an H-1B Specialty Worker, regardless of the worker's nationality, may only need to seek approval of two petitions over the same six-year period.[70]

Once the employer's petition is approved, the Mexican TN professional must present an approval notification at a U.S. diplomatic post in Mexico,[71] where the professional and his accompanying family members also must apply for TN and TD visas. There, the professional must establish to the satisfaction of the consular officer that he is not intending to immigrate because, unlike applicants for H-1B visas,[72] applicants for TN visas are presumed to intend to immigrate under the language of Section 214(b) of the INA.[73] Thus, while there is no regulatory cap on the period of time a Mexican national can remain in the United States in TN status, that time will likely be proscribed under Section 214(b).[74] After the requisite visas have been granted, the professional and accompanying family members will then be required to present their visas

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63. *Id.* § 655.730(b).
64. *Id.* § 655.730(d).
65. 8 C.F.R. § 214.6(d)(3)(iii) (1994).
66. *Id.* § 214.2(h)(9)(iii)(B)(1).
67. *Id.* § 214.6(h)(1).
68. *Id.* § 214.2(h)(13)(iii)(A).
69. *Id.* § 214.2(h)(15)(ii)(B)(1).
70. *See* Jeronimides, *supra* note 57, at 378-79, for a discussion of the advantages of the H-1B category.
71. 8 C.F.R. § 214.2(h)(18) (1994).
72. 22 C.F.R. § 41.53, n. 3.1 (1994).
73. INA § 214(e)(2), 8 U.S.C. § 1184(e)(2). *See also* 58 Fed. Reg., *supra* note 22.
74. *Id.*

and Mexican passports at a U.S. port of entry in order to secure admission.[75]

By contrast, the procedures for the admission of Canadian NAFTA professionals remain those that were in effect under the CFTA and Section 214(e) of the INA.[76] No prior petition, labor certification, or other prior approval is required. The Canadian national is not required to obtain a TN visa from a U.S. diplomatic post in Canada.[77] The Canadian national simply makes application at a U.S. port of entry by presenting evidence that his profession is one of those listed in NAFTA Appendix 1603.D.1 and that he has an offer of employment in that profession from a U.S. employer.[78] The fifty-dollar application fee under the CFTA also continues without change.[79] The Canadian national need only present adequate proof of Canadian citizenship; a passport is not required for entry.[80] The Canadian professional will be admitted in TN status for one year.[81] Through annual trips to the United States-Canadian border to renew her TN status, she can remain in the United States indefinitely so long as she continues to be employed in a qualifying capacity. Of course, Canadian nationals are also subject to INA Section 214(b). But since they do not need to obtain visas to enter the United States, their burden of overcoming the law's presumption of intent to immigrate will likely be less difficult than that of Mexican NAFTA professionals.

In summary, the conveniences that were established for Canadian nationals under the CFTA will continue unabated under NAFTA. On the other hand, NAFTA permits, and United States' legislation and regulations implement, requirements and restrictions on the entry of Mexican nationals that are no less inconvenient than those previously existing between the United States and Mexico. For Mexican TN professionals, NAFTA's requirements are more burdensome than what is available generally to degreed professionals seeking temporary entry to the United States in several ways. The decision of U.S. policymakers to discriminate in so many ways against Mexican business persons seeking entry under NAFTA clearly reflects the way many in the United States view our neighbor to the south.

III. WHY NAFTA'S IMMIGRATION PROVISIONS DISCRIMINATE AGAINST MEXICAN NATIONALS

On November 3, 1993, at the height of the national debate on the

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75. 8 C.F.R. § 214.6(f)(2) (1994).
76. 8 U.S.C. § 1184(e)(1), 8 C.F.R. § 214.6(e) (1994).
77. 8 C.F.R. § 214.6(e)(3) (1994).
78. *Id.* § 214.6(e)(3)(ii).
79. *Id.* §§ 103.7(b), 214.6(f)(1).
80. *Id.* § 214.6(e)(3)(i).
81. *Id.* § 214.6(f)(1).

ratification of NAFTA, the House Subcommittee on International Law, Immigration and Refugees conducted a hearing on NAFTA's immigration provisions.[82] During that hearing, a revealing exchange took place between Congressman Romano Mazzoli (D-KY), Chairman of the Subcommittee, and Doris M. Meissner, Commissioner of the Immigration and Naturalization Service. Chairman Mazzoli asked Ms. Meissner to justify the disparity in treatment between Mexican and Canadian professionals under NAFTA and the proposed U.S. legislation.

> MS. MEISSNER: I think the justification is that there is a clear difference between Canada and the United States as between the United States and Mexico where—where differences are concerned.
>
> MR. MAZZOLI: What is the difference? I mean they are human beings, and they have a baccalaureate degree. They are part of the free trade operation.
>
> MS. MEISSNER: I think where Canada is concerned, it was the clear assumption—and it has been proven out in practice—that there would not be any inordinate attraction. It is not a phase-in situation with Mexico.

(Ms. Meissner's last statement does not make sense. She may have meant to say, "It is a phase-in situation with Mexico."[83])

It is not surprising that the INS Commissioner was somewhat at a loss for words, or at least words that she was willing to express before a House Subcommittee, to explain the disparate treatment Mexicans receive under NAFTA's immigration provisions. Others who testified before the same Subcommittee were less reticent. John Howley, an AFL-CIO official, blasted the use of the TC category by U.S. employers of Canadian professionals under the CFTA.[84] Howley was concerned with CFTA precedent and pointed to Canada's small population compared to Mexico's, raising the specter of hoards of Mexican TN professionals entering the United States under the guise of NAFTA's obeisance to free trade.[85] Howley expressed organized labor's view that TN professionals would be, in fact, guest workers vulnerable to

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82. *Hearing on the North American Free Trade Implementation Act before the Subcommittee on International Law, Immigration, and Refugees of the House Judiciary Committee*, 103d Cong. 1st Sess., 134 (1993) [hereinafter *Hearing*].

83. *Id.* at 134.

84. *Id.* at 243.

85. *Id.*

abuse by employers.[86]

Howley's views before the Subcommittee were echoed, although in less strident tones, by Dr. Demetrios G. Papademetriou of the Carnegie Endowment for International Peace.[87] Dr. Papademetriou criticized the inclusion of the reciprocal entry of professionals under NAFTA, terming it a controversial provision with little direct bearing on the promotion of free trade among the parties to NAFTA.[88] In light of U.S. fears of an invasion of workers from Mexico, he praised the Mexican NAFTA negotiators who were persuaded to accept generally inferior treatment to Canadians for their business persons.[89]

Early in the U.S. NAFTA debate, that fear became intertwined with the companion fear of loss of U.S. manufacturing jobs *to* Mexico if NAFTA became a reality.[90] Largely drowned out in this debate was the current state of U.S. trade with Mexico. Between 1989 and 1992, trade with Mexico went from a $2 billion deficit to an estimated $7 billion surplus. During the same period, the United States gained 175,000 jobs, many of them in manufacturing, as a direct result of this increased trade.[91]

The debate over NAFTA became critical to the outcome of the 1992 U.S. presidential election, with one candidate favoring the treaty, a second vehemently opposed to the treaty, and the third, Bill Clinton, trying to perform a careful balancing act with many traditional Democratic supporters in organized labor opposed to the treaty.[92] Candidate Clinton's solution was to cautiously support NAFTA, putting emphasis on the need for strong implementing legislation to protect U.S. workers and the environment.[93]

Even after the Democratic victory in November 1992, the chances of passing the necessary legislation to implement NAFTA remained in serious doubt through most of 1993. In March, Ross Perot made a highly publicized appearance before Congress, and thereafter became the *ex officio* spokesperson for the powerful forces arrayed against NAFTA.[94] Perot co-authored *Save Your Job, Save Our Country* with Pat Choate.[95] Perot's central thesis was

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86. *Id.* at 246.

87. *Id.* at 154.

88. *Id.* at 156, n.1.

89. *Id.* at 158-59.

90. Sylvia Naser, *Economic Scene*, N.Y. TIMES, Aug. 6, 1992, at D2.

91. *Id.*

92. E.J. Dionne, Jr. & Dan Balz, *Clinton to Support NAFTA but Wants Aid for Displaced Workers*, WASH. POST, Oct. 3, 1992 at A10; E.J. Dionne, Jr. *Clinton Cautiously Backs Free-Trade Pact*, WASH. POST, Oct. 5, 1992, at A6.

93. *Id.*

94. Keith Bradsher, *Perot Wants A Trial Run of Trade Pact*, N.Y. TIMES, Mar. 25, 1993, at D4.

95. H. ROSS PEROT & PAT CHOATE, SAVE YOUR JOB, SAVE OUR COUNTRY (1993).

that as long as the average wage of a Mexican worker, including benefits, is one-seventh of the average U.S. worker's, the United States will be a magnet for both illegal *and* legal immigration by Mexican workers seeking higher paying U.S. jobs.[96]

In the weeks leading to the Congressional vote on NAFTA, opposition to the treaty, led by Perot and major labor unions, coalesced around the jobs issue. Many commentators predicted an uphill battle to pass NAFTA in Congress.[97] The Clinton administration, perhaps out of desperation, challenged Perot to a one-on-one debate (or to use the kitsch expression coined during the '92 election, a "*mano a mano*" debate) on NAFTA before a live CNN television audience.[98]

The watershed Al Gore-Ross Perot NAFTA debate aired on November 9, just one week before the NAFTA vote in Congress. Perot's remarks about Mexico during the debate were revealing. Perot depicted Mexico as a land of poverty, shanty towns, pollution, and labor violence where thirty-six families own over one-half of the national wealth and virtually everyone else dreams of having an outhouse and running water.[99] Perot asserted, "Livestock in [the United States] and animals have a better life than good, decent, hardworking Mexicans."[100] All in all, Perot characterized Mexico as an unfit partner for a free trade agreement, and he asserted that, in any event, Mexicans were too poor to buy U.S.-made consumer goods.[101]

Perot's patronizing attitude toward Mexico created quite a backlash south of the border.[102] Of course, the reality of Mexico today is much different than that projected by Perot. Although forty percent of the population lives below the poverty line (versus fourteen percent in the United States), Mexico is the third largest customer for U.S. exports and a country with which we enjoy a substantial trade surplus.[103]

Perot's debate performance, in its vehemence and confusion, typified

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96. *The Great NAFTA Debate*, WASH. POST, Oct. 3, 1993, at C3.

97. Frank Swoboda, *President Woos Labor On NAFTA*, WASH. POST, Oct. 5, 1993, at C1.

98. Al Kamen & Dan Balz, *Administration Challenges Perot to Debate Trade Pact*, WASH. POST, Nov. 5, 1993, at A1.

99. Dan Balz & Peter Behr, *Gore, Perot Trade Barbs on Trade Pact*, WASH. POST, Nov. 10, 1993, at A1; David E. Rosenbaum, *Beyond a Trade Pact*, N.Y. TIMES, Nov. 11, 1993, at A22.

100. David Rosenbaum, *Gore and Perot Duel on TV Over the Trade Pact*, N.Y. TIMES, Nov. 10, 1993, at B15.

101. *Excerpts From the Free Trade Debate Between Gore and Perot*, N.Y. TIMES, Nov. 10, 1993, at B16; WASH. POST, Nov. 10, 1993, at A1.

102. Tim Golden, *Mexicans Seethe With Anger at Perot's Depiction of Them*, N.Y. TIMES, Nov. 11, 1993, at A1.

103. *Id.*

the NAFTA opposition.[104] NAFTA became a focal point for the fears and frustrations of many U.S. workers caught in an economy where increased automation yields fewer well-paying, semi-skilled assembly line jobs.[105] A *Washington Post* editorial published two days after the Gore-Perot debate expressed a more thoughtful view of NAFTA.[106] Mexico is more developed today, both economically and politically, than the southern United States before World War II. In the middle decades of this century, rapidly expanding commerce between the North and the South ultimately enriched both regions, though in the short term there were worker displacements in the North as labor intensive manufacturing migrated to the South seeking cheaper labor. In the same way, NAFTA should be seen as a logical extension of the industrial development of the United States and Mexico. Perhaps there will be short-term pain, but in the long run gain, for both nations and their workers.

The premise underlying NAFTA's annual approval limit of 5,500 petitions for Mexican TN professionals is that this quota is needed to prevent a flood of cheap labor from entering the United States to compete with degreed professionals. This premise has certainly not been borne out during the first six months under NAFTA. Only about fifty petitions for Mexican nationals seeking this status were approved through the end of June 1994 by the INS Northern Service Center in Lincoln, Nebraska.[107] If this is a trend, it does not appear that there will be much need to raise the 5,500 annual quota in the near future. U.S. employers' slight use of the nonimmigrant TN category for Mexican nationals may be due in part to unfamiliarity with the availability of this category. However, it is more likely due to disadvantages attending this category compared to the H-1B Specialty Worker Category, discussed *supra*.[108]

NAFTA's contrary premise is that labor conditions in Canada are so favorable compared to the United States that we need not concern ourselves about the entry of a horde of degreed professionals from the north. This premise also appears to be false. Although no figures under NAFTA will be available until the end of 1994, final statistics are now available for the entire five-year history of the CFTA. What they reveal is dramatically increased use of the former TC category every year, beginning with 3,669 TC entries in 1989 and increasing to 17,732 entries in 1993,[109] the last year under the CFTA. With Canadian professionals able to use the same easy entry procedures under NAFTA

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104. *The NAFTA Debate*, WASH. POST, Nov. 11, 1993, at A22.

105. David Rosenbaum, *Beyond a Trade Pact*, N.Y. TIMES, Nov. 11, 1993, at A22.

106. *Id.*

107. Telephone interview with Jacquelyn A. Bednarz, Chief, Nonimmigrant Branch, INS Headquarters, Washington, D.C. (July 14, 1994).

108. *See supra* text accompanying notes 10-11.

109. *Hearing, supra* note 82, at 93, 103, 106, & 131. Entries for 1993 obtained during telephone interview with Jacquelyn A. Bednarz, *supra* note 107.

as under the CFTA, there is every reason to expect that they will continue an accelerating exodus to the United States under NAFTA.

On a superficial level, NAFTA discriminates against Mexican business persons in three of the four immigration categories created by the treaty, because discrimination was necessary to ensure approval by the United States Congress. On a deeper cultural level, however, the treaty discriminates because many in the United States stereotype all Mexican workers by those they see on the evening news running across the border under pursuit by U.S. Border Patrol agents. Perot's views are not isolated. Statistics and economic realities make poor weapons against long-held prejudices and ignorance.

Over the course of time, naturally, the United States and Mexico will consult, as NAFTA requires, about removing the treaty's restrictions against Mexican business persons. Yet, before those discriminatory provisions are completely removed, fundamental changes in the way we perceive Mexican society and our own society must occur. Continued economic development in Mexico may also need to occur. By itself, however, that development will not mollify U.S. xenophobia toward Mexico, such as surfaced during the national NAFTA debate in 1993.

THE MOVEMENT OF CONSUMER PROTECTION IN THE EUROPEAN COMMUNITY: A VITAL LINK IN THE ESTABLISHMENT OF FREE TRADE AND A PARADIGM FOR NORTH AMERICA

"The first duty of law is to keep sound the society it serves. Sanitary laws, pure food laws, and laws determining conditions of labor which individuals are powerless to determine for themselves are intimate parts of the very business of justice and legal efficiency."[1]

I. INTRODUCTION

Through the implementation of consumer protection laws, a nation seeks to protect its citizens from the dangers of consuming hazardous products that fail to comply with national health and safety standards. However, because consumer protection laws vary greatly between nations,[2] a product that complies with the health and safety standards of one nation may fail to meet the standards of another country and thereby be prohibited from sale to consumers within that nation. Therefore, free trade and the protection of consumers are often conflicting objectives.[3] While the goal of free trade is to eradicate barriers to the free flow of goods between nations, a nation often desires to obstruct the flow of goods that endanger the health and safety of consumers. Consequently, when countries with differing standards become trading partners in a free trade agreement, their varying consumer protection laws may hinder free trade. Balancing the goal of implementing free trade with the goal of protecting consumers has been an onerous task for countries who engage in free trade agreements. Thus, the critical question concerns how a nation reconciles its commitment to open borders with its desire to protect consumers through laws which tend to restrict trade and which vary in content and degree among trading partners.

The creation of free trading blocs such as the European Community (EC)[4] and, most recently, the North American Free Trade Agreement (NAFTA), make cross-border trade crucial to the world economy. However, varying consumer protection laws have been viewed as impediments to free

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1. President Woodrow Wilson, Inaugural Address (March 4, 1913), *in* 27 PAPERS OF WOODROW WILSON 148, 151 (Arthur S. Link ed., 1978).

2. Sverre Roed Larsen, Organisation for Economic Co-operation and Development, *Product Safety, Trade Barriers and Protection of Consumers*, *in* INTERNATIONAL TRADE AND THE CONSUMER, REPORT ON THE 1984 OECD SYMPOSIUM 177, 177 (OECD 1986).

3. *Id.*

4. The European Community, previously referred to as the European Economic Community (EEC), is now referred to as the "EC" pursuant to the Treaty on European Union art. G.

cross-border trade, making the synthesis of laws among trading partners imperative. For example, prior to the passage of NAFTA by the United States' House of Representatives on November 17, 1993, many consumer advocate groups in the United States staunchly opposed the agreement on the premise that a free trading relationship with Mexico would jeopardize consumer protection in the United States.[5] Specifically, critics contended that NAFTA would enable Mexico to challenge, and ultimately to eliminate, consumer protection laws in the United States as non-tariff barriers to trade[6] which violate the free trade agreement. Additionally, opponents maintained that NAFTA would enable Mexico to flood the market in the United States with products that imperil public health and safety. Thus, critics maintained that, to comply with NAFTA, the United States would be compelled to eradicate consumer protection laws that impede the free movement of goods in North America and would thereby diminish the protection afforded to consumers.

Similar to the controversy surrounding NAFTA, the nations of the EC have been compelled over the past two decades to confront and to resolve the conflicting goals of implementing cross-border trade and preserving consumer protection. Specifically, the varying national health and safety standards of the twelve EC Member States, which afford consumers a disparate level of protection, are often viewed as non-tariff barriers to trade which violate the EC Treaty,[7] hinder the establishment of free intracommunity trade, and threaten the Community's ability to realize a single European market.[8] Through the harmonization of national consumer protection laws and the creation of Community-wide health and safety standards, the EC has attempted to protect the public health while eradicating these non-tariff barriers to trade. Likewise, as Canada, Mexico, and the United States embark upon the creation of a single North American market through NAFTA, they, too, will be confronted with the challenge of

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5. Public Citizen, Citizens Trade Campaign, and the National Farmers Union were among the consumer groups opposed to NAFTA. *See News Conference with Labor, Environmental, Consumer Groups in Response to the NAFTA Accord*, Federal News Service, Aug. 13, 1993, *available in* LEXIS, INTLAW Library, NAFTA File.

6. A non-tariff or technical barrier to trade is an obstruction, other than a tariff, to the free movement of goods between nations. For example, a producer faces a non-tariff or technical barrier to trade when he wants to sell his product in the nation of a trading partner but has to modify it to comply with standards or legal regulations or has to submit it to a testing or certification process. *EC Commentaries: Standardisation § 1*, Coopers & Lybrand, Apr. 21, 1994, *available in* LEXIS, INTLAW Library, EURSCP File.

7. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY (as amended by Subsequent Treaties) Rome, March 25, 1957, art. 30 [hereinafter EC TREATY].

8. George Argiros, *Consumer Safety and the Single European Market: Some Observations and Proposals*, 1 LEGAL ISSUES OF EUROPEAN INTEGRATION 139, 144 (1990).

eliminating non-tariff barriers to trade while still maintaining appropriate mechanisms to protect the public health. Like the EC, North America may find the harmonization of national consumer protection laws necessary to facilitate free trade while affording consumers a satisfactory level of protection. Consequently, the movement of consumer protection in the EC which accompanied the Community's endeavor to establish a single European market is a paradigm for North America as it seeks to eradicate barriers to trade and to implement a single market without undermining the protection afforded to consumers.

The developing area of consumer protection as it relates to multilateral trade is of paramount importance to several groups. First, it is important to governments and policy-makers because the ability to harmonize consumer protection laws impacts whether a free trade agreement between nations can be successfully implemented.[9] Second, it is important to businesspeople because, as they place their products in international markets, a different consumer protection law in a new market may demand a modification of the product, ban the product from the marketplace altogether, or expose the company to greater liability than that to which it is accustomed in domestic markets.[10] Finally, the developing area of consumer protection is important to consumers whose expectations of product safety and whose rights to legal redress will be impacted directly by the consumer protection laws of trading partners.

This Comment addresses the growing importance of consumer protection law to multilateral free trade as exemplified in the European Community's efforts to implement a single European market and will suggest what North America can learn from the EC experience as it embarks upon the implementation of NAFTA. Part II explores the inherent conflict between free trade and consumer protection. Part III describes the movement in the EC toward the harmonization and standardization of consumer protection laws in order to facilitate trade between Member States. Part IV addresses the importance of consumer protection laws to the successful implementation of NAFTA. Finally, Part V illustrates what North America can learn from the movement of consumer protection in the EC.

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9. *See* Jacques Nusbaumer, Organisation for Economic Co-operation and Development, *The Use of Product Standards in International Trade, in* INTERNATIONAL TRADE AND THE CONSUMER, REPORT ON THE 1984 OECD SYMPOSIUM 212, 212 (OECD 1986).

10. *See, e.g.*, Louise G. Trubek, *Consumer Law and Policy in the European Community: An American Perspective*,3 JOURNAL OF PRODUCTS LAW 101, 110-11 (1984).

II. THE CONFLICTING GOALS OF FREE TRADE AND CONSUMER PROTECTION

Through the creation of national health and safety standards, a nation employs consumer protection laws to shield private consumers from the dangers of consuming hazardous products[11] which fail to comply with product standards.[12] For example, prior to the sale of a drug in the United States, a manufacturer must receive approval from the Federal Food and Drug Administration (FDA). However, when the United States enters into a free trading relationship with another nation which has conflicting, and perhaps more lenient, product safety standards, the regulation exercised by the FDA may be viewed by the trading partner as an obstruction to free trade, which requires that "all commodities can be freely imported and exported without special taxes or restrictions being levied."[13] Consequently, while "common standards indeed can and do facilitate trade . . . divergent standards in different countries rather hamper it."[14]

Free trade mandates the elimination of barriers to the free movement of goods between nations.[15] In forming the EC, the twelve Member States resolved to establish an "internal market . . . an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured."[16] Likewise, with the passage of NAFTA, the United States, Canada, and Mexico agreed to "eliminate barriers to trade in, and facilitate the cross border movement of, goods and services between the territories of the Parties."[17] Therefore, the common objective of free trade agreements is to facilitate the sale of foreign goods in domestic markets through the elimination of both tariff and non-tariff barriers to trade. The elimination of tariffs is the catalyst to the implementation of free trade; however, "[t]hese days, trade agreements don't just involve tariffs but revolve around so-called 'non-tariff trade barriers.'"[18] Domestic health and safety

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11. Guy Stanley, *The Third World Tackles Consumer Protection*, BUSINESS AND SOCIETY REVIEW, June 22, 1987, at 31.

12. *See, e.g.*, BRIAN W. HARVEY AND DEBORAH L. PARRY, THE LAW OF CONSUMER PROTECTION AND FAIR TRADING (4th ed. 1992).

13. BLACK'S LAW DICTIONARY 666 (6th ed. 1990).

14. Nusbaumer, *supra* note 9.

15. Barriers to trade include both tariff and non-tariff barriers. Specifically, barriers to trade include import and export tariffs and technical barriers to trade in the form of national regulations.

16. EC TREATY art. 8a. Article 8a was added by the Single European Act in 1986.

17. North American Free Trade Agreement U.S.-Mex.-Can., art. 102, *available in* LEXIS, INTLAW Library, NAFTA File [hereinafter NAFTA].

18. Joan Claybrook, *Fast Track Can Be Hazardous to Your Health*, THE WASHINGTON POST, May 17, 1991, at A25.

standards, depending on their purpose and construction, can constitute non-tariff barriers to trade which may be challenged by a trading partner and eradicated as violative of a free trade agreement.[19] Consequently, as domestic markets welcome foreign goods through a free trade agreement, the protection afforded to consumers may be lessened or eliminated altogether.

Although restrictive of free trade, consumer protection laws are beneficial to society and are often viewed as imperative for the public welfare. The sacrifice of consumer protection laws to the interests of free trade will heighten the vulnerability of consumers to the hazards of goods which are not required to meet certain levels of health and safety. Therefore,

> [u]ninhibited efforts to increase free trade will give the consumer a wider range of products and services at reasonable prices. But what in the short term may seem to be an economic gain for the consumer may also in certain cases result in both damage to health and economic loss over a longer period of time.[20]

Moreover, in both the EC and in North America, a disregard for the protection of the public health and safety in order to facilitate trade constitutes a violation of both free trade agreements which mandate a process of continuous improvement in living standards in the respective communities.[21] Consequently, there is an inherent conflict between the free movement of goods and consumer protection: while the health and safety of citizens is of paramount importance, national consumer protection laws which prohibit the sale of goods that fail to meet safety requirements can constitute non-tariff barriers to trade which violate free trade agreements. Therefore, "it would be an illusion to assume that the further development of the physical protection of the consumer and additional reductions in trade barriers can occur simultaneously without conflict."[22]

The movement of consumer protection in the EC that has accompanied

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19. *Id.*

20. Larsen, *supra* note 2, at 179.

21. NAFTA provides that the United States, Canada, and Mexico must strive to "improve working conditions and living standards in their respective territories . . . preserve the flexibility to safeguard the public welfare." NAFTA, *supra* note 17, pmbl. Similarly, the EC Treaty provides for the "'constant improvement' of living and working conditions and the promotion of 'a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability and an accelerated raising of the standard of living.'" *EC Commentaries: Consumer Policy § 2*, Coopers & Lybrand, Sept. 22, 1994, *available in* LEXIS, INTLAW Library, EURSCP File.

22. Larsen, *supra* note 2, at 179.

the creation of a single European market illustrates the critical balance between the conflicting goals of consumer protection and free trade. The EC experience demonstrates that, "'[t]he existence of different and divergent regulations risks creating new barriers to the free circulation of goods as soon as safety requirements vary from one country to another and, as a consequence, risks becoming an obstacle to completion of the Internal Market by 1992.'"[23] In fact, "there are great variations from country to country and region to region."[24] The European Community's struggle to establish a single internal market while balancing the national and Community interests in protecting consumers provides a useful model for North America as it attempts to balance the need for consumer protection with the commitment to open borders.

III. THE MOVEMENT OF CONSUMER PROTECTION IN THE EUROPEAN COMMUNITY

The European Community originated in 1957 with the Treaty of Rome and currently has twelve members: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom.[25] As provided in the Treaty of Rome,

> [t]he Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.[26]

Further, as delineated in the Single European Act,[27] the EC will fully implement a "completely free market."[28] The free movement of goods is one of the most fundamental aspects in the establishment of a common

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23. Argiros, *supra* note 8, at 144.

24. Larsen, *supra* note 2, at 177.

25. *See* P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW (5th ed. 1990).

26. EC TREATY art. 2.

27. The Single European Act was passed on February 28, 1986 and entered into force in July, 1987 as an amendment to the original EEC Treaty of Rome. 1987 O.J. (L169) 1. *See also* 1992: ONE EUROPEAN MARKET? (Roland Bieber et al. eds., 1992).

28. Mathijsen, *supra* note 25, at 13.

market.[29] To ensure the free movement of goods among Member States, the EC Treaty provides that, "[q]uantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States."[30] However, this "shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of . . . the *protection of health and life of humans* . . . [s]uch prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."[31] Therefore, the establishment of a single European market requires Member States to eradicate barriers to trade which are not intended to, nor effective in, protecting the public health.

In eliminating barriers to intracommunity free trade, the EC has determined that "[t]he health and safety of consumers must not be put in danger by the opening up of frontiers."[32] Currently, an estimated 15,000 to 30,000 deaths within the EC are caused by product-related accidents annually.[33] Further, approximately forty million people are injured each year, costing the Community in excess of thirty billion European Currency Units (ECU)[34] in hospitalization and insurance annually.[35] Many of these accidents are caused by dangerous products such as contaminated food products, hazardous parts, and drugs.[36] Thus, consumer protection within the Community has become a necessity due to the dangers consumers face within the common market.[37] Recognizing this need for consumer protection, the Single European Act "calls on the European Community to ensure, in its initiatives linked to the completion of the Internal Market, that consumers are granted a 'high' level of protection."[38] Additionally, the EC has found that "[s]ome of the main obstacles to genuine free trade among

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29. Harry L. Clark, *The Free Movement of Goods and Regulation for Public Health and Consumer Protection in the EEC: The West German "Beer Purity" Case*, 28 VA. J. INT'L L. 753, 757-58 (1988).

30. EC TREATY art. 30.

31. EC TREATY art. 36 (emphasis added).

32. Monique Goyens, *Consumer Protection in a Single European Market: What Challenge for the EC Agenda?*, 29 COMMON MKT. L. REV. 71, 82 (1992).

33. Argiros, *supra* note 8, at 139.

34. As of January 14, 1994, an ECU was equal in value to $1.11.

35. Argiros, *supra* note 8, at 139.

36. *Id.*

37. *Id.*

38. Coopers & Lybrand, *supra* note 21, § 1. Article 100A was added by the Single European Act in 1987 and provides that, "[t]he Commission, in its proposals envisaged in paragraph I concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection." Single European Act, Feb. 28, 1986 1987 O.J. (L169) 1.

the Member States are the differences in standards and legal requirements of manufactured goods."[39] Therefore, although

> [t]he EC was initially set up to foster economic integration . . . [i]ts primary concern has been to ban all intra-Community tariffs and gradually to reduce all other obstacles to the free flow of goods, services and factors of production within Europe . . . [t]he Community's concern with consumer protection stems in part from its desire to implement the open borders policy: if the several national consumer protection laws varied substantially, this lack of legal uniformity could hamper the economic integration process.[40]

The disharmony between the Member States' national consumer protection laws has impeded, and continues to hinder, the establishment of a European common market in which consumers are afforded a high level of protection.

A. *National Consumer Protection Law*

When the twelve EC Member States united to form the European Community, each nation afforded varying levels of protection to consumers.[41]

> [M]any reasons lead to the adoption by the Member States of different levels of standards . . . economic, social, cultural, or climatological conditions have a strong influence on the setting up of standards. The same is also true with regard to the regulatory philosophy which is followed by every country in relation to the protection of consumers' interests in safety.[42]

For example, in the control of drugs, national legislation among Member States varies greatly; where Ireland and Great Britain exercise only modest control of drugs by prohibiting the sale of any drug which is not of the quality and kind demanded by consumers, Denmark, France, and Germany exercise strict control by requiring actual proof of the drug's effectiveness

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39. Coopers & Lybrand, *supra* note 21, § 4.1.

40. Trubek, *supra* note 10, at 108.

41. NORBERT REICH AND HANS W. MICKLITZ, CONSUMER LEGISLATION IN THE EC COUNTRIES: A COMPARATIVE ANALYSIS 198 (1980). *See also id.* at 75-76.

42. Argiros, *supra* note 8, at 144.

before it may be placed on the market.[43] However, with the implementation of a common market and the subsequent free movement of goods, consumers throughout the Community can purchase products manufactured in other Member States which have different, and many times conflicting, product standards. If a nation refuses to distribute a Member State's products, albeit inferior in quality or safety, it obstructs the free movement of goods in violation of the EC Treaty and becomes subject to sanctions for the violation. Conversely, if a nation complies with the free movement of goods by allowing the sale to consumers of a good which fails to meet national health and safety specifications, consumers unknowingly may be faced with enhanced dangers in the marketplace. Without common standards and consumer protection laws throughout the Community, the common market would deprive the Member States of their ability to protect consumers.[44] Consequently, "[i]t is imperative that consumer law in the EC countries be harmoni[s]ed with regard both to substance and to enforcement."[45] And, consumer protection law centralized at the Community level may be the only effective form of regulation for the health and safety of consumers.[46] To remedy the conflict between free trade and consumer protection, the EC has attempted to create a Community consumer policy that shields consumers from the dangers inherent in conflicting national laws.

B. *Community Consumer Protection Law*

Recognizing the inadequacy of national laws to protect consumers within a common market, the Community determined that, "the creation of a European Community with a common market necessitates a comprehensive and coherent policy at Community level in order to protect consumers."[47] Because a principal objective delineated in the Treaty of Rome is "'the [c]onstant improvement of the living and working conditions of the [European] peoples,' the Heads of State indicated that consumer protection was a valid subject of community action . . . ."[48] Moreover, two additional justifications exist for Community action to protect consumers:

> [f]irstly, the single market is . . . part of the creation of a

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43. Reich & Micklitz, *supra* note 41, at 83.
44. Argiros, *supra* note 8, at 139.
45. Reich & Micklitz, *supra* note 41, at 198.
46. Argiros, *supra* note 8, at 139.
47. *Id.* at 140.
48. Trubek, *supra* note 10, at 106.

> 'Citizens' Europe' in which the protection of the consumer is a vital cross-border issue requiring a common policy. Secondly, the primacy and direct applicability of Community legislation makes the European Union Institutions the only effective bodies to implement such a policy.[49]

Thus, while safeguarding the health of the European citizen, the Community must eliminate "[q]uantitative restrictions on imports and *all measures having equivalent effect*"[50] which are not "justified on grounds of . . . the protection of health and life of humans"[51] and which "constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."[52] Consequently, the Community and its Member States may erect trade barriers only for the purpose of protecting the health and life of humans.

The principal objective of the Community's consumer policy has been to increase the overall level of protection afforded to consumers within the Community.[53] Rather than eliminating all the differences in national consumer protection laws between Member States, the Community has emphasized the protection of the public from injury[54] and the improvement of the general legal protection of consumers.[55] Therefore, over the past two decades, the Community has embarked upon the creation of a Community consumer policy through consumer protection legislation and through a developing body of case law in the Court of Justice of the European Communities.

1. *Community Consumer Protection Legislation*

In 1975, the EC adopted its first consumer protection program which enumerated the five basic rights of consumers: protection of economic interests; protection of health and safety; information and education; representation; and redress of grievances.[56] Moreover, in 1985, the EC Commission issued mandates on completing the internal market which "[laid] down a programme and timetable for the abolition of barriers of all

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49. Coopers & Lybrand, *supra* note 21, § 1.

50. EC TREATY art. 30 (emphasis added).

51. EC TREATY art. 36.

52. *Id.*

53. Argiros, *supra* note 8, at 140.

54. Thomas Trumpy, *Consumer Protection and Product Liability: Europe and the EEC*, 11 N.C.J. INT'L L. & COM. REG. 321, 334 (1986).

55. Argiros, *supra* note 8, at 155.

56. Trubek, *supra* note 10, at 106.

kinds in inter-state trade, the harmoni[s]ation of rules, the approximation of legislation . . . [t]o complete the internal market . . . [and] provide[d] for removal of physical, technical and fiscal barriers."[57] The EC further delineated the protection of consumer health and safety to be an urgent priority for the Community.[58] This section describes the EC's progress in enhancing consumer protection through Community legislation.

Focusing on the harmonization of the various laws of Member States, the EC has developed "Community-wide general consumer safety legislation, which would not attempt to restrict local initiatives, but to coordinate and complement them."[59] The EC also has emphasized the improvement of standardization procedures to reduce the technical barriers to trade erected from differences in national health and safety regulations.[60] Because "[c]onflicting national laws . . . constitute a clear barrier to intracommunity trade . . . the EC has issued numerous directives which require Member States to bring national law into conformity with common standards."[61] In particular, the EC Commission[62] has adopted mandatory framework directives that delineate essential minimum health and safety requirements for groups of products, including toys, certain medical devices, and machinery, before they can be sold in an EC Member State.[63] Products which conform to the essential requirements specified in the directives are

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57. Mathijsen, *supra* note 25, at 12-13.

58. Coopers & Lybrand, *supra* note 21, § 4.1.

59. Argiros, *supra* note 8, at 146.

60. *EC Commentaries: The Free Movement of Goods § 1*, Coopers & Lybrand, Sept. 22, 1994, *available in* LEXIS, INTLAW Library, EURSCP File.

61. Trubek, *supra* note 10, at 106. An EC directive "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." EC TREATY art. 189.

62. The EC Commission "is responsible for the functioning and development of the common market and is the 'guardian of the Treaty,' *i.e.* makes sure everybody acts in accordance with the rules included therein." Mathijsen, *supra* note 25, at 52-53. *See also* EC TREATY art. 155 ("In order to ensure the proper functioning and development of the common market, the Commission shall: ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied; formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary; have its own power of decision and participate in the shaping of measures taken by the Council and by the Assembly in the manner provided for in this Treaty; exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.").

63. Coopers & Lybrand, *supra* note 21, § 4.1. *See also* Coopers & Lybrand, *supra* note 6, § 5.1 (discussing adoption by Council in 1985 of the "New Approach to Technical Harmonisation and Standards" which specifies essential requirements for consumer products that must be satisfied before the products can be sold within the Community).

guaranteed free movement within the Community.[64] For example, in 1988, the Community adopted a directive for the safety of toys that established essential requirements relating to the physical properties, flammability, and hygiene of toys to be distributed within the Community.[65] Pursuant to the directive, "[a]n approved body in each Member State examines the toy . . . for the essential requirements . . . and, if satisfied, will issue an EC conformity stamp, which will ensure free circulation."[66] Moreover, the General Product Safety Directive,[67] which will become effective in 1994 and which requires all products distributed within the Community to be safe,[68] constitutes the EC's most far-reaching measure towards advancing product safety within the Community. Specifically, the directive requires Member States to take "'all necessary measures' to ensure that products . . . '[do] not present, in particular in respect of its design, composition, execution, functioning, wrapping, conditions of assembly, maintenance or disposal, instructions for handling and use, or any other of its properties, an unacceptable risk, for the safety and health of persons, either directly or indirectly.'"[69] The directive further "instructs each member nation to establish a government authority to monitor product safety and ensure compliance by manufacturers and distributors."[70] Finally, each Member State has the power to cease the importation of a product which it genuinely believes poses a threat to the health and safety of its citizens by informing the Commission and by following established procedures.[71] However, as required by the EC Treaty, "[t]he Commission must be satisfied that the import restriction is not an attempt to put up a disguised barrier to trade."[72] Accordingly, the EC facilitates the removal of hazardous products from the common market without entirely compromising the Member States' commitment to promote the free movement of goods.

Through the issuance of directives to Member States, the Community has sought to eliminate the barriers to trade emanating from the disparities between national health and safety requirements and to establish a uniform level of safety within the common market which affords consumers a high level of protection.[73] Additionally, to ensure that Community consumer

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64. Coopers & Lybrand, *supra* note 6, § 5.2.

65. Council Directive 88/378, 1988 O.J. (L187).

66. Coopers & Lybrand, *supra* note 21, § 9.

67. Council Directive 89/162, 1992 O.J. (L228).

68. Julie Gannon Shoop, *European Community Adopts Product Hazard Reporting Requirements*, TRIAL, June 1992, at 91.

69. *Id.* at 92.

70. *Id.*

71. Coopers & Lybrand, *supra* note 21, § 4.2.

72. *Id.* § 4.1.

73. *Id.*

protection legislation is transposed into national law, the Community adopted a three-year New Action Plan on July 28, 1993 which further emphasizes the continuous development of consumer protection legislation within the Community.[74]

2. *The Court of Justice of the European Communities*

While Community legislation is designed to balance the aims of establishing the free movement of goods with national interests in regulating the health and safety of consumers, the Court of Justice of the European Communities (Court of Justice) has become the "umpire governing this balance."[75] The Court of Justice must "ensure that in the interpretation and application of this Treaty the law is observed."[76] The Court of Justice interprets and formulates the law by referring to the objectives of the Community and by ensuring that the law furthers the accomplishment of these objectives.[77] Therefore, in the area of consumer policy, the Court of Justice must ensure that the free movement of goods is not hindered by national health and safety regulations, while enabling the Community to attain its goal of affording consumers a high level of protection.[78] Thus, the Court of Justice has attempted to harmonize existing differences in national consumer health and safety legislation based on Article 100 of the EC Treaty and has not permitted the aim of free intracommunity trade to prevail over the aim of consumer protection.[79] This section illustrates the court's attempts at balancing Community consumer protection with the free movement of goods.

A. *Towards the Free Movement of Goods*

In the landmark case of *Rewe-Zentral AG v. Bundesmonopol-*

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74. *Id.* § 2.

75. Clark, *supra* note 29, at 779.

76. EC TREATY art. 164.

77. Mathijsen, *supra* note 25, at 69.

78. As provided in the EC Treaty art. 2, the European Community shall establish a common market. And, as added by art. 100A of the Single European Act, consumers are to be granted a "high level of protection." EC TREATY art. 100A.

79. L. KRAMER, EEC CONSUMER LAW 8 (1986). *See also* EC TREATY art. 100 (declaring that, "[t]he Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.").

verwaltung, otherwise known as *Cassis de Dijon*,[80] the Court of Justice determined that a national regulation on alcoholic beverages that restricted the free movement of goods but did not serve to protect the public health was barred by the EC Treaty. After German authorities refused to allow the importation of Cassis de Dijon, a French liqueur which contained less than twenty percent alcohol and was freely marketed in France, the importer alleged that the German law requiring a minimum alcohol content of twenty-five percent constituted an obstruction to the free movement of goods in violation of the EC Treaty. The court determined that, "the unilateral requirements imposed by the rules of a Member State of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitute an obstacle to trade which is incompatible with the provisions of Article 30 of the Treaty."[81] Because Germany's law restricted free trade and did not further the health and safety of consumers, the law could not survive attack.

Similarly, in *Commission v. Republic of Greece*[82] and *Commission v. Germany*,[83] the Court of Justice invalidated Greek and German legislation restricting the importation of beer for purposes other than the protection of consumer health and safety. Specifically, in *Commission v. Republic of Greece*, the Court of Justice invalidated a Greek national law that mandated that importers of foreign beer first demonstrate that the imported beer was made from barley malt and met a minimum density requirement; products which failed to meet these requirements could not be sold as beer in Greece. Although the Greek government contended that the law was justified to protect the public health, the Court of Justice determined that, "a prima facie justification on grounds of health protection for such measures has not been made out . . . ."[84] Although

> it is for the member states, in the absence of community-wide harmonization, to decide what degree of protection of health and life of humans they intend to ensure, having regard however to the requirements of the free movement of goods within the

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80. Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung, 1979 E.C.R. 649, *available in* LEXIS, INTLAW Library, ECCASE File.

81. *Id.* (referring to Article 30 of the EC Treaty which provides, "[q]uantitative restrictions on imports and all measures having equivalent effect shall, without prejudice . . . be prohibited between Member States.").

82. Case 176/84, Commission v. Republic of Greece, 1987 E.C.R. 1193, *available in* LEXIS, INTLAW Library, ECCASE File.

83. Case 178/84, Commission v. Germany, 1987 E.C.R. 1227, *available in* LEXIS, INTLAW Library, ECCASE File.

84. Case 176/84, Commission v. Republic of Greece, 1987 E.C.R. 1193, *available in* LEXIS, INTLAW Library, ECCASE File.

> Community . . . such prohibitions or restrictions on imports from other member states on the ground of public health must not constitute a means of arbitrary discrimination or a disguised restriction on trade between member states.[85]

Because the Greek national law could not be justified as necessary to protect the public health, Greece's refusal to permit the importation of beer from other Member States violated the EC Treaty. Likewise, in *Commission v. Germany*, the Court of Justice determined that a German law which required imported beer to satisfy a beer purity standard constituted a barrier to the free movement of goods in violation of the EC Treaty.[86] These landmark cases illustrate that, in the absence of a genuine contribution to the health and safety of consumers, a national law which inhibits the free movement of goods will not withstand attack in the Court of Justice.

B. *Towards the Protection of Consumers*

Although it recognized the importance of the free movement of goods, the Court of Justice determined that, "obstacles to movement within the Community resulting from disparities between the national laws . . . must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to . . . *the protection of public health . . . and the defence [sic] of the consumer.*"[87] Therefore, the Court of Justice tolerates those national laws which, although restrictive of free trade, are designed to protect consumers from exaggerated dangers.[88] For example, in *Mirepoix*,[89] the Court of Justice indicated a greater willingness to permit Member States to restrict imports of products which reveal traces of pesticides.[90] Similarly, in *Sandoz*, the Court of Justice reaffirmed the ability of Member States to restrict the importation of foodstuffs containing vitamins with an uncertain

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85. *Id.*

86. EC Treaty art. 30 prohibits "[q]uantitative restrictions on imports and all measures having equivalent effect." EC TREATY art. 30.

87. Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung, 1979 E.C.R. 649, (emphasis added), *available in* LEXIS, INTLAW Library, ECCASE File.

88. Thomas van Rijn, *A Review of the Case Law of the Court of Justice on Articles 30 to 36 EEC in 1986 and 1987*, 25 COMMON MKT. L. REV. 593, 598 (1988).

89. Case 54/85, Ministere Public v. Xavier Mirepoix, 1986 E.C.R. 1067, *available in* LEXIS, INTLAW Library, ECCASE File.

90. Van Rijn, *supra* note 88.

degree of harmfulness.[91] However, the power of Member States to restrict imports through national measures is not without constraints;[92] although Member States have the authority to adopt national legislation to protect the public health in the absence of Community legislation, they must "restrict themselves to what is actually necessary to secure the protection of the public health."[93] By enabling Member States to protect public health, the Court of Justice attains the desired balance between free trade and consumer protection.

C. *Towards the Protection of Consumers in a Single European Market*

In attempting to balance the free movement of goods with the necessary protection of consumers in a common market, the Court of Justice has demonstrated that national regulations which are designed to protect consumers will be viewed in light of the Community's goal to establish a common market with the free movement of goods between nations.[94] Therefore, Member States can adopt necessary national health and safety legislation in the absence of Community regulation; however, the legislation must be non-discriminatory in nature and no more restrictive of the free movement of goods than necessary to protect the public health and safety.[95] By facilitating the protection of consumers within the common market, the Court of Justice balances the two fundamental goals of the Community: the free movement of goods and a uniformly high level of protection for consumers.

In its endeavor to complete an internal market with the free movement of goods, the European Community has encountered considerable difficulty in balancing the aims of free trade and the growing desire to protect consumers from enhanced dangers in a common market. As the need for a Community-wide consumer protection program to harmonize the varying laws of Member States intensified, the Community's development of consumer protection legislation and Court of Justice case law has been instrumental in synthesizing the often conflicting objectives of consumer protection and free trade. The movement of consumer protection within the

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91. Case 174/82, Criminal Proceedings against Sandoz BV, 1983 E.C.R. 2445, *available in* LEXIS, INTLAW Library, ECCASE File.

92. Case 176/84, Commission v. Republic of Greece, 1987 E.C.R. 1193, *available in* LEXIS, INTLAW Library, ECCASE File.

93. Case 178/84, Commission v. Germany, 1987 E.C.R. 1227, *available in* LEXIS, INTLAW Library, ECCASE File.

94. Goyens, *supra* note 32, at 71.

95. Case 178/84, Commission v. Germany, 1987 E.C.R. 1227, *available in* LEXIS, INTLAW Library, ECCASE File.

European Community illustrates the inherent conflict between free trade and consumer protection and suggests potential solutions to this conflict for other free trading blocs such as North America.

IV. THE NORTH AMERICAN FREE TRADE AGREEMENT AND CONSUMER PROTECTION

With the affirmative vote of the U.S. House of Representatives on November 17, 1993, the North American Free Trade Agreement (NAFTA) between Mexico, Canada, and the United States became the first free trade agreement to be reached between an emerging economy and developed countries.[96] NAFTA will create a free trade zone that stretches from the Yukon to the Yucatan;[97] it will encompass over 360 million consumers and account for over six trillion dollars in annual output.[98] In fact, the North American common market created under NAFTA will be larger than that of the European Community.[99]

Pursuant to NAFTA, the United States, Mexico, and Canada have "resolved to . . . create an expanded and secure market for the goods and services produced in their territories; reduce distortions to trade; establish clear and mutually advantageous rules governing their trade."[100] Specifically, over a fifteen year period, the nations will "eliminate barriers to trade in, and facilitate the cross border movement of, goods and services between the territories of the Parties."[101] To accomplish these goals, Mexico's tariffs on American and Canadian imports, which are approximately two and one-half times higher than in the United States, will

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96. Jill Dutt, *Trading Opinions Making Sense of all the Hype over NAFTA*, NEWSDAY, Nov. 7, 1993, at 5.

97. Judith H. Bello and Alan F. Holmer, *The NAFTA: Its Overarching Implications*, 27 THE INTERNATIONAL LAWYER 3, 590 (1993).

98. *White House Fact Sheet: The North American Free Trade Agreement*, 28 WEEKLY COMP. PRES. DOC. 1424 (Aug. 12, 1992).

99. Jesse Jackson, *Free Trade: A Fast One on the Fast Track*, LOS ANGELES TIMES, Apr. 15, 1991, at 5.

100. NAFTA, *supra* note 17, pmbl.

101. NAFTA, *supra* note 17, art. 102. *See also* Dutt, *supra* note 96 ("Tariffs and quotas would be eliminated immediately on many manufactured and agricultural products, within 10 years on most others and within 15 on all eligible products."). Additionally, eighteen percent of U.S. exports to Mexico are now duty-free; by the year 2009, 100% of U.S. exports to Mexico will be duty-free. Additionally, 45% of Mexican exports to the U.S. are now duty-free; by the year 2009, 100% of Mexican exports to the U.S. will be duty-free. *Id.*

be eliminated,[102] and other trade barriers will be reduced to facilitate the free movement of goods in North America. Additionally, through NAFTA, the United States, Mexico, and Canada will seek "to improve working conditions and living standards in their respective territories"[103] and to "preserve their flexibility to safeguard the public welfare."[104]

During the NAFTA debate in the United States, many consumer advocate groups vehemently opposed the agreement on grounds that the disparate level of protection afforded to consumers in Mexico would jeopardize the protection afforded to American consumers in a North American common market. Opponents contended that NAFTA will enable Mexican goods which are inferior in safety and quality to be sold within the market in the United States, thereby jeopardizing the health of American consumers. Furthermore, consumer advocates feared that consumer protection laws in the United States which regulate the sale of Mexican products in the United States' market would be vulnerable to attack as non-tariff barriers to trade in violation of NAFTA. This section explores the opposition to NAFTA launched by consumer groups, discusses the validity of the opposition in light of consumer protection in Mexico, and addresses NAFTA's adequacy in safeguarding consumer protection while facilitating free trade in North America.

A. *Opposition to NAFTA*

Various groups in the United States including farm, labor, environmental and consumer groups fought actively to obstruct the passage of NAFTA.[105] In particular, consumer groups such as *Public Citizen* and the *Citizens Trade Campaign* contended that NAFTA is "a bad agreement for consumers."[106] Specifically, they argued that NAFTA will harm consumers in two ways: first, it will allow inferior and unsafe Mexican products to be sold freely in the United States; and, second, it will enable Mexico to challenge consumer protection laws in the United States as non-tariff barriers to trade which must be eliminated in accordance with the free trade agreement. Therefore, opponents contended that free trade with Mexico will have dramatic effects on consumer protection laws in the

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102. Dutt, *supra* note 96.

103. NAFTA, *supra* note 17, pmbl.

104. *Id.*

105. David R. Sands, *Trade Negotiators have a Full Plate; "Kitchen Sinkers" Pile on Side Issues*, THE WASHINGTON TIMES, June 13, 1993, at A12.

106. Federal News Service, *supra* note 5.

United States.[107]

Among the effects postulated by consumer advocates was first that the opening of borders between Mexico and the United States will facilitate the sale in the United States of certain Mexican products which were produced in accordance with less stringent health and safety standards and which are hazardous to consumers. For example, because many agricultural practices and pesticides that are illegal in the United States are used openly in Mexico, many consumers fear that food exported to the United States could be adulterated and unsafe for consumption.[108] "That means [consumers] could unwittingly buy a tomato at the store that's full of toxins."[109] And, to refuse imports of Mexican food or other goods "is to restrain free trade, a violation of NAFTA."[110] Second, many opponents argued that NAFTA will enable domestic consumer health and safety standards to be challenged by trading partners as non-tariff barriers to trade which obstruct the free movement of goods.[111] Because health and safety standards in the United States are comparatively higher than in other nations, critics contend that standards in the United States necessarily will be diminished by the harmonization required to open borders.[112] Moreover, they argue that the agreement "says quite bluntly that any legislation that interferes with free trade violates the agreement. That means that all the . . . consumer protection laws enacted in our country are subject to being overruled by NAFTA in order to facilitate the free flow of trade between our countries."[113] Finally, opponents argued that the interests in establishing

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107. Sands, *supra* note 105.

108. Bill Evans, *NAFTA is a Disaster*, THE SAN FRANCISCO CHRONICLE, Apr. 1, 1993, at A20.

109. Dutt, *supra* note 96.

110. Evans, *supra* note 108. *See also* Marian Burros, *Eating Well*, THE NEW YORK TIMES, Apr. 28, 1993, at C4 (statement of Lori Wallach, a lawyer for Public Citizen) ("Country X wants to sell its applesauce to the United States. When the applesauce arrives, it is sampled for pesticide residues, and the levels of pesticide are well above what United States regulations allow, although the levels are in accordance with the standards adopted by the free-trade *[sic]* agreements. The United States rejects the applesauce, but Country X contends that the rejection is a barrier to free trade. Country X goes to a tribunal set up under GATT or NAFTA and asks the tribunal to determine whether the American action is a barrier to free trade. If the tribunal agrees with Country X, the United States has two options: it can change its law governing the amount of pesticides permitted in the applesauce, or it can pay Country X for its lost trade.").

111. Claybrook, *supra* note 18.

112. *Id. See also* Goldman, *The Legal Effect of Trade Agreements on Domestic Health and Environmental Regulation*, 7 J. ENVTL L. & LITIG. 11 (1992) ("Harmonization of U.S. and Mexican health and environmental laws is of particular concern because Mexico's laws are much weaker than U.S. standards.").

113. Evans, *supra* note 108.

free trade will prevail over concerns for the health and safety of consumers because "rules are so skewed in favor of free trade."[114] Thus, with the implementation of free trade in North America, critics contend that the protection of consumers will be subordinated to the goal of the free movement of goods in North America. To determine the legitimacy of the consumer groups' opposition to NAFTA and the feasibility of implementing free trade while maintaining protection for consumers in North America, Mexico's consumer protection laws and their effectiveness must be examined.

B. *Consumer Protection in Mexico*

Prior to the enactment of Mexico's Federal Consumer Protection Act (FCPA) in 1975,[115] protection for Mexican consumers was virtually nonexistent.[116] No consumer protection laws existed in Mexico, and traditional means of legal redress for consumers were too expensive, slow and complicated.[117] However, with an expanding base of consumers and with Mexico's endeavor toward industrialization, the need for consumer protection became increasingly apparent.[118] The FCPA was created to provide consumers with "an important avenue towards social justice."[119] However, nearly twenty years after its enactment, the protection actually received by Mexican consumers is questionable. Many observers contend that, despite the laws on Mexico's books, enforcement of these laws is inadequate.[120] This section examines the FCPA and its effectiveness in affording consumers adequate protection in the marketplace.

1. *Federal Consumer Protection Act of 1975*

Mexican consumer law originated with the enactment of the Federal

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114. Dutt, *supra* note 96.

115. Ley Federal de Protección al Consumidor D.O., December 22, 1975 [hereinafter FCPA]. The FCPA became effective on February 5, 1976.

116. Jorge A. Vargas, *An Overview of Consumer Transactions Law in Mexico: Substantive and Procedural Aspects*, 10 N.Y.L. SCH. J. INT'L & COMP. L. 345, 347 (1989).

117. *Id.* at 348.

118. *Id.* at 347-48.

119. *Mexico Faces a Year of Official Austerity*, LATIN AMERICAN NEWSLETTER, Jan. 2, 1976, at 2.

120. *Hearing of the Employment and Housing Subcommittee of the House Government Operations Committee: NAFTA's Effect on Labor Issues*, Federal News Service, Oct. 7, 1993, *available in* LEXIS, INTLAW Library, NAFTA File.

Consumer Protection Act in 1975. The FCPA was created to reflect eight guiding legal principles for the protection of consumers which continue to influence consumer legislation in Mexico today: 1) consumer protection norms are legally binding; 2) the relationship between consumers and merchants is based on truthfulness; 3) contracts must be drafted clearly and precisely; 4) warranties on goods and services are legally enforceable; 5) maximum interest rates in credit transactions should be established by public authorities; 6) consumers have the right to judicially alter unilateral clauses in adhesion contracts; 7) consumers can employ administrative procedures to alter unfair treatment or misleading practices of merchants; and 8) advertising and sales should be regulated by public authorities.[121] The FCPA regulates a wide variety of consumer transactions[122] including advertising, warranties, consumer credit transactions, services, door to door sales, liability for non-performance, warnings and instructions for dangerous goods.[123] All individuals and entities who provide services or make or distribute goods are subject to the FCPA;[124] violations of the minimum standards for products and services delineated in the FCPA are sanctioned by the Office of the Federal Attorney General for Consumer Affairs.[125] Additionally, all enterprises in Mexico must register with the Ministry of Health and Welfare which "supervise[s] conditions of sanitation; the production, packaging, advertising and sale of foods, drinks, medicines and related products; and public health."[126] However, despite the protection afforded by these regulations, "[a]reas in which more detailed and technical regulations will be required in Mexico include food products, electric domestic appliances . . . pharmaceutical products . . . ."[127] Furthermore, the actual effectiveness of the FCPA in regulating consumer health and safety and in providing protection to consumers has been challenged.

2. *Effectiveness of Consumer Protection in Mexico*

The protection actually afforded to consumers in Mexico is oft-debated. The inadequate enforcement of consumer laws in Mexico is viewed as a principal downfall of Mexico's consumer protection program. "Even where Mexico has strong standards in place, it has inadequate enforcement

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121. Vargas, *supra* note 116, at 351-53.
122. *Id.* at 362.
123. FCPA, *supra* note 115.
124. PRICE WATERHOUSE, DOING BUSINESS IN MEXICO 62 (1991).
125. Vargas, *supra* note 116, at 361-62.
126. PRICE WATERHOUSE, DOING BUSINESS IN MEXICO 33-34 (1984).
127. Vargas, *supra* note 116, at 382.

capabilities."[128] Similarly, "'the rules can change in a minute in Mexico . . . [b]ut people have to find things out for themselves.'"[129] For example, one firm "recently had a shipment held up at the border for weeks, when the Mexican government suddenly began enforcing a previously ignored labeling law."[130] The lack of enforcement and predictability of the laws in Mexico tends to lessen consumer protection and to facilitate the sale of many products which endanger the health and safety of consumers. For example, Picarindo brand candy, manufactured in Mexico and exported to the United States, was found to contain high levels of potentially dangerous lead, both within the candy and its packaging, and prompted an immediate warning to California consumers to avoid consuming the candy before it was recalled from the marketplace.[131] Other examples include breaded steak sandwiches sold in Mexico that are actually made of paper, brands of tequila which are largely composed of water, underweight tortillas that cause a loss of $370,000 to Mexican consumers for tortillas they never eat, and parrots that appeared to speak in the pet shop only because the shop owner was a ventriloquist.[132] Further, many dangerous products are sold to unknowing consumers without even a warning; to illustrate, an educational brochure which accompanied a child's toy chemistry set neglected to inform consumers that "the set packs enough power to blow a kid to bits."[133] The Director of the Mexican Association of Studies for the Defense of the Consumer explains that, "'Mexican consumers are so used to being cheated that they don't complain enough.'"[134] As a consumer activist for sixteen years, "[h]e has spoken out against unscrupulous sausage makers, underweight cookie packets, overweight policemen, contaminated ice cubes and bribe-taking bureaucrats."[135] And, "there are plenty of things he hasn't gotten to yet."[136] Additionally, for those consumers who do complain, the process of filing a complaint with Mexico's consumer protection agency is time-consuming and frustrating; "[i]t can involve up to

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128. Goldman, *supra* note 112.

129. Matt Moffett, *U.S. Firms Yell Olé to Future in Mexico*, THE WALL STREET JOURNAL, March 8, 1993, at B1.

130. *Id.*

131. *Californians Warned Against Mexican Candy*, JOURNAL OF COMMERCE, May 7, 1993, at 4A.

132. Matt Moffett, *Mexican Consumers Have a Stout Friend in Arturo Lomeli . . . They Need One - To Uncover Bad Tequila, Mute Parrots, and Meat Made of Paper*, THE WALL STREET JOURNAL, Jan. 18, 1988, at 1.

133. *Id.* at 7.

134. *Id.* at 1.

135. *Id.*

136. *Id.*

two days of standing in line [and] filling out forms in triplicate."[137] Thus, despite the FCPA, it appears that little progress has been made in protecting consumers in Mexico.[138] Consequently, to ensure the protection of consumers within the North American common market, it is essential that NAFTA provide a means of safeguarding consumers despite the disparate level of consumer protection among the North American trading partners.

C. *Consumer Protection under NAFTA*

The primary goal of NAFTA is the establishment of a North American common market.[139] A second fundamental goal of the agreement, however, is to "improve working conditions and living standards in [the] respective territories" and to "preserve their flexibility to safeguard the public welfare."[140] Thus, as barriers to trade are eradicated, the health and safety of the public remains a prominent concern. Accordingly, NAFTA empowers the United States, Mexico, and Canada to establish a level of protection deemed necessary to protect the public. Specifically, NAFTA provides that, "each Party may, in pursuing its legitimate objectives of safety or the protection of human, animal or plant life or health, the environment or consumers, establish the level of protection that it considers appropriate."[141] However, this power must not be exercised to inhibit the establishment of free trade. Rather, the nations must

> avoid arbitrary or unjustifiable distinctions between similar goods or services in the level of protection it considers appropriate, where the distinctions: a) result in arbitrary or unjustifiable discrimination against goods or service providers of another Party; b) constitute a disguised restriction on trade between the Parties; or c) discriminate between similar goods or services for the same use under the same conditions that pose the same level of risk and provide similar benefits.[142]

Consequently, each nation has the right to establish regulations which are non-discriminatory in nature and essential to the public health and to refuse

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137. Tod Robberson, *Mexico's Hang-Up*, THE WASHINGTON POST, May 17, 1993, at A16.

138. Moffett, *supra* note 132.

139. NAFTA, *supra* note 17.

140. *Id.* pmbl.

141. *Id.* art. 904(2).

142. *Id.* art. 907(2).

the importation of goods which fail to comply with health and safety standards.[143] To illustrate, NAFTA stipulates that food entering the United States must comply with pesticide standards set in the United States;[144] a failure to comply with these standards, which are applied both to domestic and to foreign products, enables the United States to refuse the importation of the food product. Moreover, to facilitate free trade and to enhance the safety and protection of consumers within the North American market, NAFTA mandates the joint development of harmonized standards for goods and services.[145] The Committee on Standards-Related Measures, composed of representatives of each nation, will initiate the harmonization of standards; however, the Committee is authorized to develop subcommittees dealing with the standardization of consumer information, labeling, packaging, product approval and product surveillance programs and the overall facilitation of consumer protection.[146] Consequently, by empowering the United States, Mexico, and Canada to take the necessary measures to protect the public health while requiring the development of harmonized regulations, NAFTA does not sacrifice consumer welfare to the establishment of free trade within North America. Rather, the nations must collaborate to harmonize health and safety standards and to afford consumers a commensurate level of protection throughout North America. Given the disparate level of protection currently afforded to consumers in North America, this is a formidable task for which the experience of the European Community provides a viable model.

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143. *Testimony of Charles E. Roh, Jr., Assistant U.S. Trade Representative for North American Affairs, Office of the United States Trade Representative before the Committee on Science, Space and Technology*, U.S. House of Representatives, Sept. 30, 1992, *available in* LEXIS, INTLAW Library, NAFTA File. *See also Report of the Industry Sector Advisory Committee for Trade in Consumer Goods on the North American Free Trade Agreement*, Sept., 1992, *available in* LEXIS, INTLAW Library, NAFTA File.

144. Dutt, *supra* note 96.

145. NAFTA, *supra* note 17, art. 906(1) ("Recognizing the crucial role of standards-related measures in achieving legitimate objectives, the Parties shall, in accordance with this Chapter, work jointly to enhance the level of safety and of protection of human . . . life and health . . . and consumers."). *See also id.* art. 906(2) ("Without reducing the level of safety or of protection of human . . . life or health . . . or consumers, without prejudice to the rights of any Party under this Chapter, and taking into account international standardization activities, the Parties shall, to the greatest extent practicable, make compatible their respective standards-related measures, so as to facilitate trade in a good or service between the Parties.").

146. *Id.* art. 913.

V. THE EUROPEAN COMMUNITY AS A PARADIGM FOR NORTH AMERICA

As the United States, Canada, and Mexico endeavor to create a single North American market, varying consumer protection laws will hinder the establishment of free trade. A reduction in the barriers to trade among trading partners is crucial to free trade; however, a reduction in the level of protection afforded to consumers in a common market is not desirable, particularly where an enhancement in the living standards of North Americans is a fundamental objective of the trading relationship. Like the European Community, North America must attain a balance between free trade and the protection of the health and safety of consumers. Consequently, the movement of consumer protection that accompanied the European Community's implementation of cross-border trade demonstrates a formidable challenge to the realization of a North American free trading zone: the harmonization of consumer protection laws.

The movement of consumer protection in the EC provides several useful lessons for the nations of North America as they embark upon the creation of a North American free trading zone. First, the EC experience demonstrates that national consumer protection laws may not be effective in the supranational or international environment[147] where trading partners with varying national laws engage in cross-border trade. In fact, even local, regional, or national measures may not suffice to afford consumers adequate protection where trade occurs on an international level.[148] Therefore, "although using trade policy to change another country's pollution standards or food safety controls greatly complicates trade negotiations, 'nevertheless the reality is that global companies competing in global markets ultimately require global rules.'"[149] Thus, as products cross national boundaries to be sold in foreign markets, consumer protection laws also must be able to transgress national boundaries so that multilateral trade does not diminish the protection afforded to consumers in expanding marketplaces. Second, the EC experience illustrates that the integration of the economies of trading partners through a free trade agreement also demands the integration of social policies among trading partners, including consumer protection laws.[150] Therefore, the implementation of free trade mandates a reconciliation between the consumer protection policies of the trading partners in order to protect consumers within the free trading bloc. Finally,

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147. Trubek, *supra* note 10, at 111.

148. GEOFFREY WOODROFFE, CONSUMER LAW IN THE EEC 37 (1984).

149. Sands, *supra* note 105 (quoting Geza Feketekuty, a senior policy adviser for the U.S. Trade Representatives Office).

150. Jorge G. Castaneda, *Perspectives on Free Trade - Canada, Mexico: a Kinship Evolves*, LOS ANGELES TIMES, Mar. 3, 1991, at 7.

the EC experience indicates that the concurrent implementation of free trade and the maintenance of consumer protection is a formidable task. The development of product standards within the EC has been a long and complex process which has been hindered by the varying needs, expectations, manufacturing sophistication levels and traditions in the twelve Member States.[151] Moreover, despite the lack of development in several EC Member States such as Spain, Portugal, and Greece, the EC has not allowed their underdeveloped consumer protection laws to compromise the desired level of protection for consumers within the Community. In fact, the more developed Member States in the EC "have no intention of letting the three new Southern members, Portugal, Greece, and Spain, export goods like toys, made without any appreciable safety standards, to other markets within the [EC]."[152] Rather, the Community has sought to elevate the standards of all nations to afford a uniform and desirable level of protection to consumers throughout the Community.

Similarly, as the first free trade agreement to be reached between an emerging economy and two developed economies, the implementation of NAFTA will pose substantial challenges to the United States, Mexico, and Canada as these nations attempt to synthesize their consumer protection laws and ensure the establishment of a North American common market in which consumers are protected from the hazards of consuming dangerous products. Thus, the standards to be developed under NAFTA will necessarily require a great deal of collaboration and effort by trading partners. The European experience provides a useful model for North America as it strives to create a North American free trade zone in which consumers receive a satisfactory level of protection.

VI. CONCLUSION

Reconciling the conflicting goals of free trade and consumer protection is a formidable task for countries who engage in free trade agreements. While seeking to eradicate barriers to the free flow of goods between nations, many free trading nations also wish to obstruct the flow of goods which endanger public health and safety through national product health and safety standards. In this light, consumer protection laws may often be challenged as trade barriers which contravene free trade agreements despite their value in safeguarding the public health. Thus, the harmonization and standardization of consumer protection laws is essential to the successful

151. Coopers & Lybrand, *supra* note 21, § 4.1.

152. Trumpy, *supra* note 54, at 338.

implementation of a free trade agreement.

In the implementation of a single European market, the European Community has found the harmonization of conflicting national consumer protection laws of its twelve Member States to be vital in facilitating free trade while simultaneously affording consumers adequate protection in a common market. Through the implementation of consumer protection legislation and a developing body of case law, the Community has made substantial progress in harmonizing national laws and in improving the protection of consumers in an expanding marketplace. Similarly, with the passage of NAFTA, the United States, Mexico, and Canada will embark upon a comparable process of creating a single North American market with the free movement of goods across national boundaries. And, although NAFTA empowers the United States, Mexico, and Canada to act for the public welfare and mandates the harmonization of product standards among the North American trading partners, maintaining a balance between the goals of free trade and the protection of consumers is an arduous task. Although consumer groups have a legitimate concern about the protection of North American consumers due to the inferior level of protection afforded to consumers in Mexico, the EC experience demonstrates that this obstacle can be overcome through collaboration and consideration for the rights of consumers in the implementation of free trade. Therefore, the EC experience in balancing the interests of free trade with the interests of consumer protection in a common market serves as a useful paradigm for North America as it embarks upon the implementation of NAFTA.

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THE HAGUE CONVENTION ON PARENTAL CHILD ABDUCTION: AN ANALYSIS OF EMERGING TRENDS IN ENFORCEMENT BY U.S. COURTS

I. INTRODUCTION

A Canadian court issued a divorce judgment terminating the marriage of Michelle, a Canadian citizen, and Fred, a U.S. citizen.[1] The court awarded custody of the couple's only child, five-year-old Kareem, to Michelle.[2] Noting that Kareem would soon be starting school, the court decided that the child should reside with Michelle in Canada during the school year, with summer visitation at his father's home in New Jersey.[3]

However, during the following visitation period, Fred commenced an action in a New Jersey court, which granted him sole custody of Kareem and ordered that the child not be removed from the state.[4] Thus, the separate litigation of this dispute on opposite sides of the border resulted in two conflicting custody orders. Prior to 1988, it would have been difficult to predict which parent would "win" in this situation.[5] In all likelihood,

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1. This is a true story, the facts of which are described in Duquette v. Tahan, 600 A.2d 472, 473 (N.J. Super. Ct. App. Div. 1991), *appeal after remand*, Tahan v. Duquette, 613 A.2d 486 (N.J. Super. Ct. App. Div. 1992).

2. *Duquette*, 600 A.2d at 474.

3. *Id.*

4. *Id.*

5. Obviously, only one parent can win in these types of situations. But the children will almost always lose when they become trapped in prolonged custody battles, which are often waged for reasons other than concern for the best interests of the children. *See* GEOFFREY L. GREIF & REBECCA L. HEGAR, WHEN PARENTS KIDNAP: THE FAMILIES BEHIND THE HEADLINES 11 (1993).

> Many abducting parents sustained losses as children that seem to shape their behavior as adults. Some of the left-behind parents appear to be repeating in adulthood patterns of victimization or abandonment begun early in life. With marriages characterized by unhappiness, pain, anger, violence, and substance abuse, a few of these parents may be products of families that also struggled with substance abuse and violence. . . . Thus, underlying the reported reasons for abduction--such as unhappiness with custody, visitation, or child support arrangements; anger and a desire for revenge; or the belief that the child is being harmed--are both the societal changes that provide a context for abduction and the personal histories of the parents involved.

Id. (footnote omitted). Children abducted by a parent face not only the failure of their parents' marriage, but also the strain of "life on the run." *Id.* at vi. These children exist in an environment of instability and insecurity. *See* UNIFORM CHILD CUSTODY JURISDICTION ACT, Prefatory Note, 9 U.L.A. 116 (1988 & Supp. 1993) [hereinafter UCCJA]. "A child who has never been given the chance to develop a sense of belonging and whose personal

Michelle's only recourse in her attempt to regain custody would have been to "snatch" Kareem and secretly return the child to Canada.[6] Parents like Michelle often resorted to this form of "self-help" due to the uncertainties

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attachments . . . are cruelly disrupted, may well be crippled for life . . . ." *Id.*

6. Parents in Michelle's situation could seek enforcement of foreign country custody decrees under the UCCJA. Section 23 of the UCCJA provides for extension of this domestic act to the international arena. UCCJA, *supra* note 5, § 23, at 326. However, problems still exist in recognition and enforcement of these foreign decrees. *See* Dana R. Rivers, Comment, *The Hague International Child Abduction Convention and The International Child Abduction Remedies Act: Closing Doors to the Parent Abductor*, 2 TRANSNAT'L LAW. 589, 606 (1989). Under the UCCJA, courts may find reasons to avoid enforcement of foreign decrees, such as changed circumstances or the best interests of the child. *Id.* at 607-08. Also, variations may exist in enactment of the UCCJA from state to state. *Id.* at 608. For example, South Dakota has not enacted Section 23, perhaps due to uncertainty about the effects of the international provision upon cases involving conflicts between state courts and tribal courts governing Indian tribes in that state. *See* Roger M. Baron, *Child Custody Jurisdiction*, 38 S.D. L. REV. 479, 492 (1993).

Furthermore, the UCCJA is not equipped to provide a remedy when non-custodial parents abduct their own children from the United States to another country. *See* Brenda J. Shirman, Note, *International Treatment of Child Abduction and the 1980 Hague Convention*, 15 SUFFOLK TRANSNAT'L L.J. 188, 195 (1991); Caroline LeGette, Note, *International Child Abduction and The Hague Convention: Emerging Practice and Interpretation of the Discretionary Exception*, 25 TEX. INT'L L.J. 287, 293-94 (1990).

Another weakness of the UCCJA is that it applies only to cases where custody decrees have been issued. *See* Legette, *supra* at 294. This presents a significant problem because approximately half of the child abduction situations occur where there are no outstanding custody orders. *Id.* (citing Adair Dyer, Remarks at the Briefing on the Hague International Child Abduction Convention and the International Child Abduction Remedies Act, at 4 (Pub. L. 100-300) (Washington, D.C., Jan. 6-7, 1989)).

In 1980, Congress enacted the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. § 1738A (1988), in order to complement the UCCJA. *See* Rivers, *supra*, at 608. However, the United States Supreme Court has determined that Congress' intent in enacting the PKPA was to require the states to grant full faith and credit to *domestic* decrees. *See* Rivers, *supra*, at 609 (citing Thompson v. Thompson, 484 U.S. 174, 182-87 (1988)). Thus, as one author stated:

> [T]he PKPA has not had an affirmative impact on international child custody disputes because it does not address enforcement of foreign country custody decrees. The absence of such a provision allows each state to determine its own recognition and enforcement guidelines regarding international abductions. Consequently, foreign parents faced with international abductions to the United States will not benefit from a uniform, national standard for affording full faith and credit to foreign country custody decrees.

Rivers, *supra*, at 611.

inherent in domestic legislation in the United States and the propensity of U.S. courts to assume jurisdiction in order to modify foreign country decrees.[7] Likewise, Fred hoped to benefit from this uncertain legal atmosphere when he violated the Canadian decree by retaining his child in the United States, believing the state court would prove to be a friendlier forum.[8]

Fortunately for Kareem and his mother, this custody dispute arose after the United States, Canada, and other countries had signed an international treaty designed to deal with situations where non-custodial parents violate custody rights by either abducting or retaining their children in foreign countries. Frustrated in their attempts to stem the growth of parental child abductions through their own domestic laws, countries began turning to each other for help.[9] In response, the Fourteenth Session of the Hague Conference on Private International Law drafted the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention").[10] The Hague Convention was signed by the United States on December 23, 1981,[11] and subsequently ratified by the U.S. Senate in 1986.[12]

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7. Rivers, *supra* note 6, at 611. "For a case in which the aggrieved parent is foreign, forum shopping often could mean protracted and burdensome litigation in the United States." *Id.* at 593-94.

In addition, the parent whose child is abducted from the United States to another country met numerous difficulties as well. *See* Shirman, *supra* note 6, at 197-98.

> Prior to . . . 1980 . . . no single agency monitored international child abduction. . . . [O]nce custodial parents found their abducted children in a foreign country, they typically found themselves relitigating custody suits in the foreign jurisdiction, a process which often resulted in inconsistent and disappointing outcomes. . . . Even those countries which recognized foreign custody decrees applied their laws inconsistently, or avoided them altogether by employing prohibitive procedural conditions. Thus . . . the very laws which were enacted to deal with the dilemma of child abduction actually increased the problem.

Id. (footnotes omitted).

8. Rivers, *supra* note 6, at 593. "Historically, 'forum shopping' has proven lucrative in the United States, thus encouraging abductions." *Id.* (footnote omitted). Initially, forum shopping did pay off for Fred, because he obtained what he wanted from the New Jersey court.

9. *Id.* at 611.

10. Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, S. TREATY DOC. NO. 11, 99th Cong., 1st Sess. (1985), 19 I.L.M. 1501 [hereinafter Hague Convention].

11. Letter of Submittal, Oct. 4, 1985, *reprinted in* 51 Fed. Reg. 10,494, 10,496 (1986) [hereinafter Letter of Submittal].

Legislation implementing the Hague Convention, the International Child Abduction Remedies Act ("ICARA"), was enacted on April 29, 1988.[13]

In drafting the Hague Convention, the intent of the signatory nations was to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access."[14] The U.S. Congress, in enacting the ICARA, found that "[t]he international abduction or wrongful retention of children is harmful to their well-being. . . . The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals

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12. Monica Marie Copertino, Comment, *Hague Convention on the Civil Aspects of International Child Abduction: An Analysis of Its Efficacy*, 6 CONN. J. INT'L L. 715, 721 (1991) (footnote omitted).

13. 42 U.S.C. §§ 11601-11610 (1988).

14. Hague Convention, *supra* note 10, 19 I.L.M. at 1501. Article 3 of the Hague Convention provides:

> The removal or the retention of a child is to be considered wrongful where--
>
> *a* it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> *b* at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph *a* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Id. Additionally, Article 5 of the Hague Convention provides:

> For the purposes of this Convention --
>
> *a* 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
>
> *b* 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Id. In other words, "rights of access" relate to visitation. *See* Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503 (1986) [hereinafter Legal Analysis]. It should be noted that neither the Hague Convention nor the ICARA define the phrase "habitual residence." *See* Hague Convention, *supra* note 10; ICARA, *supra* note 13. It is also undefined in Legal Analysis, *supra*. This potential problem is addressed in more detail below.

and retentions."[15]

Returning to the plight of Kareem and his feuding parents, the Hague Convention directly affected the outcome of this dispute. The treaty provided Michelle with a cause of action for establishing the jurisdiction of the Canadian court in deciding the custody dispute. Eventually, a New Jersey appellate court ordered that Kareem be returned to Michelle pursuant to the Canadian custody judgment.[16]

In his letter accompanying transmittal of the Hague Convention to the U.S. Senate for ratification, President Ronald Reagan stated that "by establishing a legal right and streamlined procedures for the prompt return of internationally abducted children, the Convention should remove many of the uncertainties and the legal difficulties that now confront parents in international child abduction cases."[17] At present, only a limited number of cases address the issues covered by the Hague Convention,[18] and only

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15. 42 U.S.C. § 11601(a)(1), (4).

16. *Tahan*, 613 A.2d at 489-90. Kareem's case is, itself, an example of some of the problems federal and state courts may encounter when enforcing the Hague Convention. Initially, the trial court balked at returning Kareem to Michelle for fear that Fred would not be able to see his child again. *Duquette*, 600 A.2d at 474. The appellate court upbraided the trial judge, however, for failure to apply the Hague Convention, although Michelle had specifically sought relief under the treaty. *Id.* at 475. The matter was remanded, but the trial judge was rebuked again during a second appeal for delaying the case for at least another seven months. *Tahan*, 613 A.2d at 488. The court stated, "In remanding, it was our expectation that this issue would be resolved promptly and that the situation of the parties would, juridically at least, be quickly stabilized." *Id.* The opinions indicate that Kareem was five years old when the case was first heard by the trial court. *Duquette*, 600 A.2d at 474. However, by the time the matter was resolved on appeal after remand, Kareem had reached the age of nine. *Tahan*, 613 A.2d at 490. The delay in Kareem's case was in contravention of the intent of the Hague Convention, which provides under Article 1(a) for the "prompt return" of children who have been wrongfully removed or retained. *See* Hague Convention, *supra* note 10, at 1501. Under Article 11, courts may be required to provide reasons for delays in cases where a decision is not made within six weeks. *Id.* at 1502. The New Jersey court system addressed other issues involving the Hague Convention in Kareem's case. Yet, this case is perhaps noteworthy due to the stern language of both appellate court opinions in dictating that the trial judge adhere to the provisions of the Hague Convention, and in scolding the judge for further delay following remand. Likewise, parents who attempt to delay proceedings may be subject to similar rebukes in court, but here the appellate courts took a trial judge to task for failing to implement the law properly. Hopefully, trial courts hearing future disputes will address the need for prompt action in a serious manner, and avoid unnecessary delays in attempting to re-establish stable environments for these children.

17. Letter of Transmittal, Oct. 30, 1985, *reprinted in* 51 Fed. Reg. 10,494, 10,495 (1986) [hereinafter Transmittal Letter].

18. Baron, *supra* note 6, at 494.

one federal case has reached the appellate level.[19] Therefore, the purpose of this Comment is to examine existing case law to determine whether courts in the United States—both on the state and the federal level—are strictly adhering to the objectives of the Hague Convention when interpreting and enforcing this international law. Furthermore, this Comment analyzes the manner in which courts are coping with the perceived weaknesses of the Hague Convention[20] and the development of precedent in this emerging area. In so doing, the focus is upon the case law and issues surrounding custody rights under the Hague Convention, as opposed to issues involving visitation.

II. ENFORCEMENT OF THE HAGUE CONVENTION

A. *Demonstrated Need for an International Solution*

Parental abduction is a troubling and emotionally devastating event, whether the wrongdoer remains within the country or escapes with the children to a foreign nation. However, the problems facing the parent left behind are exacerbated when wrongful removal or retention of children progresses from a domestic matter to one encompassing the international legal domain.[21] For example, these parents encounter increased costs in travel and in overcoming obstacles presented by different languages and legal systems.[22] Also, assistance from the authorities in foreign countries

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19. Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993). *See generally* Mark Dorosin, Note, *You Must Go Home Again:* Friedrich v. Friedrich, *The Hague Convention and The International Child Abduction Remedies Act*, 18 N.C. J. INT'L L. & COM. REG. 743 (1993).

20. For an overview of opinions regarding weaknesses of the Hague Convention, *see generally* Shirman, *supra* note 6, at 214-16; Copertino, *supra* note 12, at 729-42; Cathy S. Helzick, Note, *Returning United States Children Abducted to Foreign Countries: The Need to Implement the Hague Convention on the Civil Aspects of International Child Abduction*, 5 B.U. INT'L L.J. 119, 144-46 (1987); Esther Levy Blynn, Comment, *In re: International Child Abduction v. Best Interests of the Child: Comity Should Control*, 18 INTER-AM. L. REV. 353, 382 (1986).

21. Rivers, *supra* note 6, at 590-91.

22. *Id.* at 591. Recall that the distance involved in the case of the custody battle between Fred and Michelle was not particularly burdensome, as one parent resided in Canada and the other lived in New Jersey. *See supra* notes 1-4 and accompanying text. However, the left-behind parent often must face greater distances, and the parent abductor may take the child to any country in the world, if he or she so chooses.

often proves to be ineffective.[23]

Statistics highlight the gravity and magnitude of the international parental kidnapping dilemma. Between 1973 and 1991, the U.S. State Department received about 4,000 reports of international parental abduction, but estimated that the actual total could be as high as 10,000.[24] Two researchers in the United States found that more than one-fifth of the total number of parental abductions studied involved instances where children were known or believed to have been abducted to other countries. However, another study put this statistic as high as forty percent.[25]

Other statistics indicate that the success rate for recovery of children who are taken abroad by U.S.-born parents is about the same as the recovery of other children who are never taken outside the United States by their parental kidnappers.[26] This similar rate of recovery may be attributed, in part, to the fact that many of these parental abductors travel to other signatory nations recognizing the Hague Convention. In these situations, American parents are able to obtain assistance in regaining custody of their children through the reciprocal mechanisms of the Hague Convention.[27] Another possible reason is that the abductors themselves are handicapped in finding financial support, family or legal assistance, and

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23. Rivers, *supra* note 6, at 591. In describing the plight of these parents prior to the Hague Convention, one author wrote:

> Most Americans who experience the abduction of a child across international frontiers are at a complete loss about what to do and where to turn. There is no office in this country that is equipped to give them the necessary aid and direction. If they travel to the country where they presume the child to be, seeking help from the authorities, they find themselves shunted from one agency to another with no one office charged with responsibility to assist them. Attorneys in both countries run into the same difficulties, especially when the whereabouts of the abductor and child are unknown. They can attest to the enormous expenditures for travel, detective services, and other costs incurred by their clients in foreign abduction cases, not to speak of the emotional stress and strain involved.

Id. at 591 n.9 (quoting Brigitte M. Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 FAM. L.Q. 99, 110-11 (1980)). *See also supra* note 7.

24. GREIF & HEGAR, *supra* note 5, at 179 (footnote omitted).

25. *Id.* at 180 (citing Rosemary F. Janvier et al., *Parental Kidnapping: A Survey of Left-Behind Parents*, 41 JUV. & FAM. CT. J. 1-8 (1990)).

26. GREIF & HEGAR, *supra* note 5, at 183.

27. *Id.*

employment. As a result, many eventually return to the United States.[28]

On the other hand, researchers in the study found that 13.2% of the abducting parents investigated were foreign-born (*i.e.*, born outside of the United States), compared to 6.2% of the general population.[29] Compared to U.S.-born parents, foreign-born parents are no more successful at eluding authorities when they and their children remain within the United States' borders. However, they more often escape recovery when they take their children across the border.[30] Unlike the U.S.-born parental kidnappers, the foreign-born abductors enjoy a major advantage in foreign countries and often choose countries which do not recognize the Hague Convention.[31] Also, the foreign-born parents receive more ready assistance from family, friends, and the court systems while abroad than do their U.S.-born counterparts.[32]

Cultural differences may play a role as well, as is apparent when children are abducted from their mothers in the United States and taken to Middle Eastern countries.[33] These mothers encounter legal favoritism of the fathers in the Middle East, where it is assumed that fathers make the important decisions concerning the upbringing of their children.[34] Another reason for the high number of international parental kidnappings may be due to the fact that the number of international marriages themselves (*i.e.*, marriages between people of different nationalities) are escalating.[35] Greater social equality and acceptance have led to more racial and ethnic

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28. *Id.* "If they remained abroad, they frequently stood out as foreigners to neighbors and law enforcement officials, and as such they were unlikely to receive special protection or preferred treatment." *Id.*

29. *Id.*

30. *Id.* at 186 (footnote omitted). The recovery rate for foreign-born parents was 35.7 percent, compared to 59.2 percent for United States-born parents. *Id.* (footnote omitted).

31. *Id.*

32. *Id.*

33. *Id.* at 186-87.

34. *Id.* at 187. One example offered by the authors is that of Betty Mahmoody, a mother who fled Iran with her daughter. Her story was portrayed in a well-known book and movie. *Id.* (citing BETTY MAHMOODY & WILLIAM HOFFER, NOT WITHOUT MY DAUGHTER (1987)). *See also International Child Abduction: Hearing Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 101st Cong., 2nd Sess. 8 (1990) [hereinafter *Hearing*] (statement of Carmen DiPlacido, Director, Office of Citizens Consular Services, Bureau of Consular Affairs, U.S. Department of State) ("Without a doubt, the Middle East is troublesome primarily because of the culture and the religious issues, and that is an overriding impact on their courts, the Sharia law system.").

35. GREIF & HEGAR, *supra* note 5, at 191.

inter-marriages.[36] In addition, increased immigration and the ease of international travel in the modern-day world has led to a higher rate of international marriages.[37] Another factor is the more liberal granting and recognition of divorces.[38]

B. *Effectiveness Increases as Number of Signatories Grows*

One interesting conclusion from the recent United States study previously discussed was that foreign-born abductors tended to return to their home countries with their children.[39] In that study, only nine of the twenty-four different countries which were the birthplaces of foreign-born abductors recognized the Hague Convention, and the legal systems of many of those countries were dissimilar to that of the United States.[40] The authors of the research study concluded:

> [O]ur findings suggest that the Hague Convention is an important factor in the recovery of children who are abducted and taken abroad. Three destination countries in our study subscribed to the convention at the time of the abductions: Canada, the United Kingdom, and Australia. Eighty-four percent of the abductions to these countries after the Hague Convention rules were in effect resulted in recovery, compared to a recovery rate of 43% for international abductions to non-Hague destinations. . . . Although the Hague Convention now holds promise for recovery of children from countries that participate in it, the only hope for many parents is that more countries will subscribe and enforce it in the future. Unfortunately, such international cooperative efforts sometimes are made on the basis of national political expediency, rather than on consideration of the welfare of children and families.[41]

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36. *Id.*

37. *Id. See also* Sheikh v. Cahill, 546 N.Y.S.2d 517, 518 (N.Y. Sup. Ct. 1989).

38. Rivers, *supra* note 6, at 616 (citing Stotter, *The Light at the End of the Tunnel: The Hague Convention on International Child Abduction Has Reached Capitol Hill*, 9 HASTINGS INT'L & COMP. L. REV 285, 291-92 (1985-86)).

39. GREIF & HEGAR, *supra* note 5, at 194.

40. *Id.* In contrast, U.S.-born abductors tend to choose English-speaking countries where the Hague Convention is recognized and the legal systems share a common heritage with and respect for that of the United States. *Id.*

41. *Id.* at 194-95 (footnote omitted).

As noted previously, many of the legal uncertainties and difficulties of international parental kidnappings were due to the absence of a central monitoring agency in the United States and other countries.[42] The Hague Convention directly addresses this problem in Articles 6 and 7 by providing for the establishment of a "Central Authority" in each Contracting State. The purpose of the Central Authority is to receive applications under the Hague Convention and cooperate with other signatory nations in achieving the objectives of the treaty.[43]

Parents are frustrated to learn that courts in the United States cannot provide relief for them in foreign lands not recognizing the Hague Convention.[44] However, the Hague Convention must be recognized by both countries before either nation's court can act to return a child.[45] This threshold obstacle is perhaps best demonstrated by the 1989 federal court decision of *In re Mohsen*, one of the earlier cases decided pursuant to the Hague Convention and the ICARA.[46] In *Mohsen*, the court dismissed a petition by a citizen of Bahrain who was seeking the return of his child from the United States, where the mother had physical custody.[47] However, Bahrain was not a signatory to the Hague Convention.[48] Consequently, the court held that "the [ICARA] in itself provides no substantive rights. The [ICARA] plainly states that it 'empower[s] courts in the United States to determine *only rights under the Convention*. . . . '"[49] Finding that the Bahrainian father had no rights under the ICARA, the court never reached the issue of whether the child had been wrongfully removed or retained.[50]

Logically, the Hague Convention's success rate depends upon the number of nations which become signatories.[51] The number of countries adopting the Hague Convention has grown since the United States implemented the treaty. For example, only four countries—Canada, France, Greece, and Switzerland—signed the treaty after it was opened for signature

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42. *See supra* notes 7 & 23 and accompanying text.

43. Hague Convention, *supra* note 10, at 1501-02. The Office of Citizens Consular Services, Bureau of Consular Affairs, U.S. Department of State, has been designated as the Central Authority of the United States. *See* 42 U.S.C. § 11606(a); International Child Abduction, 22 C.F.R. § 94.2 (1993).

44. *Hearing*, *supra* note 34, at 1.

45. Helzick, *supra* note 20, at 146.

46. 715 F. Supp. 1063 (D. Wyo. 1989).

47. *Id.* at 1064.

48. *Id.*

49. *Id.* at 1065 (alteration and emphasis in original) ((citing 42 U.S.C. § 11601(b)(4)). *See supra* note 15 and accompanying text.

50. Mohsen, 715 F. Supp. at 1065.

51. Helzick, *supra* note 20, at 146.

on October 25, 1980.[52] The number of signatory nations grew to fourteen by 1990[53] and to twenty-four by the summer of 1992.[54] As of January 1, 1994, thirty-one nations had become signatories to the treaty.[55]

While the number of adopting countries has grown steadily, the rate of growth is very slow. A number of factors contribute to this slow growth, including differences in legal systems and social norms between signatory and non-signatory nations, nationalism, differing priorities, finances, and possibly even unawareness of the existence of the Hague Convention.[56] Perhaps these considerations will prevent some countries from ever signing the treaty. However, it is vital that many more countries adopt the Hague Convention in order to achieve a truly effective, international treaty. Continual growth is critical due to the large number of non-signatory nations which can serve as havens for parental abductors.[57]

C. *Where Are U.S. Courts Headed?*

> The [Hague] Convention operates on the assumption that courts in the 'home' country have primary responsibility for settling any outstanding issues concerning custodial rights and determining what arrangements are in the child's best interest. The Convention allows few exceptions to the requirement that the child be returned forthwith. If these exceptions are interpreted broadly, parents will have a greater incentive to resolve difficult custody problems by abducting the child and hoping that a court in the country of asylum will prove to be sympathetic. . . . It

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52. Letter of Submittal, *supra* note 11, at 10,496.

53. *Hearing*, *supra* note 34, at 3.

54. GREIF & HEGAR, *supra* note 5, at 193.

55. The following list of party countries was provided by the United States Central Authority, Office of Citizens Consular Services, Child Custody Divisions, U.S. Department of State. These countries are: Australia, Canada, France, Hungary, Luxembourg, Portugal, Spain, Switzerland, United Kingdom, United States, Austria, Norway, Sweden, Belize, The Netherlands, Germany, Argentina, Denmark, New Zealand, Mexico, Ireland, Israel, Croatia, Ecuador, Poland, Burkina Faso, Greece, Monaco, Romania, Mauritius, Bahamas.

56. Copertino, *supra* note 12, at 732 (footnotes omitted).

57. LeGette, *supra* note 6, at 288-89. For example, New Zealand, an English-speaking country, had become a haven for parental abductors prior to its adoption of the Hague Convention. *Id.* at 289. The fact that the country was not a party to the treaty likely influenced Elizabeth Morgan's decision to hide her daughter, Hilary, in New Zealand. *See* GREIF & HEGAR, *supra* note 5, at 193. *See generally* Suzanne McGrath Dale, Note, *Little Hilary: Happy at Last? New Zealand's Family Court and the Matter of Hilary Foretich*, 9 DICK. J. INT'L L. 411 (1991).

> remains to be seen if courts of the United States, where the Convention has recently come into force, will act with . . . sensitivity and dispassion when such cases enter American courts.[58]

The above commentary by a U.S. lawyer[59] accompanied his summary of an English case concerning an Australian father who successfully sought the return of his child under the Hague Convention.[60] It also expresses the author's concern that state and federal courts in the United States should attempt to give due consideration to the judgments of English courts when interpreting and enforcing the treaty. This is due to the fact that England implemented the Hague Convention prior to the United States[61] and had already begun building a body of case law construing the treaty. Federal court judges refer to English case law when interpreting the treaty in at least five opinions.[62] Although few court cases addressing the Hague Convention have been decided in the United States,[63] it appears that these courts are enforcing the Hague Convention consistently with its objectives and purposes.[64] A summary of the Hague Convention's objectives follows, along with an analysis of attempts by U.S. courts to execute the treaty in light of these objectives.

1. *Objectives of the Hague Convention*

Article 1 of the Hague Convention sets out two simple goals for signatory nations. They are: "[1] to secure the prompt return of children wrongfully removed to or retained in any Contracting State . . . and . . . [2] to ensure that rights of custody and access under the law of one Contracting

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58. Mark P. Kindall, *United Kingdom Case Note*, 83 AM. J. INT'L L. 586, 590 (1989).

59. *Id.*

60. *Id.* at 586 (construing C. v. C., [1989] 1 W.L.R. 654 (1988)).

61. Child Abduction and Custody Act, 1985, ch. 60 (Eng.).

62. *See Friedrich*, 983 F.2d at 1401; Levesque v. Levesque, 816 F. Supp. 662, 666 (D. Kan. 1993); Slagenweit v. Slagenweit, 841 F. Supp. 264, 268 (N.D. Iowa 1993); Ponath v. Ponath, 829 F. Supp. 363, 368 (D. Utah 1993); Prevot v. Prevot, 855 F. Supp. 915, 920 (W.D. Tenn. 1994). *See also supra* note 19 and accompanying text. The reliance by these courts upon British case law in its interpretation of the phrase "habitual residence" is discussed in detail below.

63. It should be noted that the ICARA provides for concurrent jurisdiction of the state and federal courts over matters brought under the Hague Convention. 42 U.S.C. § 11603(a).

64. Baron, *supra* note 6, at 494.

State are effectively respected in other Contracting States."[65]

In achieving these goals, Article 10 stresses a preference for voluntary return of the children, providing that "all appropriate measures in order to obtain the voluntary return of the child" should be taken.[66] Where the voluntary return cannot be obtained, however, the Hague Convention provides for judicial or administrative recourse, with Article 11 mandating that "[t]he judicial or administrative authorities . . . shall act expeditiously in proceedings for the return of the children."[67]

In addition, Article 17[68] has been interpreted as follows:

> [T]he person who wrongfully removes or retains the child in a Contracting State cannot insulate the child from the Convention's return provisions merely by obtaining a custody order in the country of new residence, or by seeking there to enforce another country's orders. Nor may the alleged wrongdoer rely upon a stale decree awarding him or her custody, the provisions of which have been derogated from subsequently by agreement or acquiescence of the parties, to prevent the child's return under the Convention.[69]

Article 16 appears to complement the above purpose in returning the child to the position he was in immediately prior to the abduction by stipulating that the court "shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention . . . ."[70] This supports the second objective discussed above regarding respect for the laws and decrees of other signatory nations.[71]

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65. Hague Convention, *supra* note 10, at 1501.

66. *Id.* at 1502.

67. *Id.* *See supra* notes 1-4, 16 and accompanying text for a discussion of a case where a trial court judge was rebuked at the appellate level for causing delay upon remand. *See also* Sortomme v. Sortomme, No. 92-4218-SAC, 1993 WL 105144, at *2-*5 (D. Kan. Mar. 10, 1993) (court refuses to recognize mother's rights under the Hague Convention where she did not act as though she had such rights and where her actions unnecessarily delayed the final resolution of the custody dispute).

68. *Id.* at 1503. Article 17 states: "The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention . . . ." *Id.*

69. Legal Analysis, *supra* note 14, at 10,504-05. Recall that the state appellate court deciding the custody case of Kareem would not permit Fred to rely upon a New Jersey custody decree in the father's attempt to evade the Canadian order granting custody to the boy's mother, Michelle. *See supra* notes 1-4, 16 and accompanying text.

70. Hague Convention, *supra* note 10, at 1503.

71. *See supra* note 65 and accompanying text.

Hence, Article 16 specifically requires courts *not* to delve into the merits of the custody case, while Article 17 puts the alleged wrongdoer on notice that he cannot benefit from his actions by seeking a favorable custody order in a more friendly forum. However, Article 17 also provides that courts may take into account the reasons underlying the order from the more friendly forum in applying the Hague Convention.[72]

Consequently, it appears that courts are allowed some flexibility under Article 17 in deciding whether to look at the merits of the underlying custody dispute. Yet, this may be desirable, especially under circumstances where the abductor has new, relevant evidence that was either not available at the time of the foreign custody decree, or the foreign court would not consider the evidence for some reason when making its decision. Still, courts should approach this built-in flexibility with caution to "prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties,"[73] thus resulting in an outcome which contravenes the purposes of the Hague Convention.[74]

For a parent seeking redress in a U.S. court for the abduction or wrongful retention of his or her children, the Hague Convention has several advantages over the Uniform Child Custody Jurisdiction Act ("UCCJA") and the Parental Kidnapping Prevention Act ("PKPA").[75] A significant advantage is the fact that the treaty applies in situations where a custody decree has not been issued (unlike the UCCJA and PKPA), permitting courts to deal with situations where parents abduct their children out of fear that they will not receive a favorable or fair custody order.[76]

Still, the UCCJA and the PKPA serve one useful purpose in conjunction with the Hague Convention. The ICARA states that notice shall be provided in accordance with the local applicable law governing such notice in international child custody proceedings,[77] indicating that notice must be made consistently with the dictates of the UCCJA and the PKPA.[78]

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72. Hague Convention, *supra* note 10, at 1503. *See also* Meredith v. Meredith, 759 F. Supp. 1432, 1435 (D. Ariz. 1991).

73. Legal Analysis, *supra* note 14, at 10,506 (citation omitted).

74. "Inherent in the philosophy of the Convention is the notion that strict application of the . . . provisions is necessary to deter future abductions." Rivers, *supra* note 6, at 617.

75. *See supra* notes 5-6; Helzick, *supra* note 20, at 144. For a summary of the UCCJA's and PKPA's weaknesses in dealing with international parental kidnappings, *see supra* note 6.

76. Legal Analysis, *supra* note 14, at 10,505; Helzick, *supra* note 20, at 144.

77. 42 U.S.C. § 11603(c).

78. David Jackson, *What Really Counts is Time and Place; Jurisdiction and notice requirements ensure an opportunity to be heard*, FAM. ADVOC., Fall 1989, at 20, 23.

2. *Threshold Requirements*

a. *Grappling with "Habitual Residence"*

Article 4 of the Hague Convention requires that "[t]he [Hague] Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights."[79] However, as noted earlier, the phrase "habitual residence" is not defined by the treaty.[80] Consequently, existing case law must be examined to determine and analyze the approaches courts of the United States are taking in determining the habitual residence of the child.

In *Friedrich*, the Sixth Circuit Court of Appeals was faced with determining the habitual residence of a child born in Germany to a German father and an American mother stationed in Germany as a member of the United States Army.[81] The mother brought the child to the United States following the couple's separation, and the father alleged that his son should be returned pursuant to the Hague Convention.[82] In reaching its finding that Germany was the child's habitual residence, the court found no helpful guidance in American case law, and thus applied an earlier English case, *In re Bates*, in its analysis.[83]

Bates offers an explanation for the absence of an explicit definition of "habitual residence" in the Hague Convention. That court stated:

> No definition of 'habitual residence' has ever been included in a Hague Convention. This has been a matter of deliberate policy, the aim being to leave the notion free from technical rules, which can produce rigidity and inconsistencies as between legal systems. . . . It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions. . . . and there must be a degree of settled purpose. . . . That is not to say that the propositus intends to stay where he is indefinitely. Indeed, his purpose, while settled may be for a limited period. Education, business or profession,

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79. Hague Convention, *supra* note 10, at 1501.

80. *See supra* note 14 and accompanying text.

81. 983 F.2d at 1398-99. *See also supra* notes 19 and 62 and accompanying text.

82. *Friedrich*, 983 F.2d at 1399.

83. *Id.* at 1401 (citing In re Bates, No. CA 122-89, High Court of Justice, Family Div'l Ct., Royal Court of Justice, United Kingdom (1989)).

> employment, health, family or merely love of the place spring to mind as common reasons for a choise of regular abode, and there may well be others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.[84]

The *Friedrich* court adopted this flexible, fact-sensitive approach to defining "habitual residence," agreeing that it must be distinguished from the common law concept of "domicile."[85] "To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions."[86]

The court pointed out that the child was born in Germany and had lived in Germany all his life except for short vacations to the United States.[87] It was not enough that the mother had always intended to return to the United States with her child at the end of her tour of duty in Germany, nor that she had even established citizenship and a permanent address for her son in the United States.[88] The court stated:

> Although these ties may be strong enough to establish legal residence in the United States, they do not establish habitual residence. A person can have only one habitual residence. On its face, habitual residence pertains to customary residence prior to the removal. The court must look back in time, not forward. All of the factors listed by Mrs. Friedrich pertain to the future. Moreover, they reflect the intentions of Mrs. Friedrich; it is the habitual residence of the child that must be determined. . . . Any

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84. *Quoted in* Brian L. Webb and Diana S. Friedman, Address at the North American Symposium on International Child Abduction, Sept. 30-Oct. 1, 1993.

85. 983 F.2d at 1401.

> During the nineteenth and early twentieth centuries, the domicile of the child provided the sole basis for jurisdiction in custody cases. Although the domicile theory was advantageous in that it established jurisdiction in only one state at a time, it was criticized for not taking the child's welfare into proper account. Critics believed that the state of the child's domicile was not necessarily the best forum to decide custody of the child. Another state might share an equal or greater interest in the dispute, as well as greater access to necessary evidence, in which case that state should be able to exercise jurisdiction.

Rivers, *supra* note 6, at 595-96 (footnotes omitted).

86. *Friedrich*, 983 F.2d at 1401.

87. *Id.*

88. *Id.*

> future plans that Mrs. Friedrich had for [her child] to reside in the United States are irrelevant to our inquiry.[89]

In *Levesque*, a federal district court again encountered the issue of determining the habitual residence of a child brought to the United States from Germany by the father.[90] In so doing, the *Levesque* court relied upon *Friedrich* and earlier English case law as well.[91] In harmony with *Friedrich* regarding the "fluid and fact based" approach to establishing the habitual residence of the child, the *Levesque* court found that both parents intended that the mother and child should leave the United States to live in Germany.[92] Although the length of the time period for the stay in Germany was left open, there was "a purpose with a sufficient degree of continuity to enable it properly to be described as settled" that Germany was to be the habitual residence of the child.[93]

The analysis of the *Levesque* court would appear to conflict with that of *Friedrich* in one aspect. While the *Friedrich* court cautioned against taking into account the future intentions of the mother to eventually return with her child to the United States,[94] the *Levesque* court considered the parents' future plan for the child to eventually return to Germany with his mother.[95] Perhaps the court emphasized its consideration of future intention in *Levesque* because *both* parents had agreed upon the child's indefinite stay in Germany. Consequently, the agreement rendered the father's surreptitious removal of the child to the United States a wrongful act.[96] In contrast, the mother in *Friedrich* appeared to allege her intent *alone* to return with her child from Germany to the United States, which apparently conflicted with the intentions of the father.[97] The *Friedrich* court stated:

> The district court . . . found that [the child]'s habitual residence was 'altered' from Germany to the United States when Mr. Friedrich forced Mrs. Friedrich and [their child] to leave the family apartment. Habitual residence cannot be so easily altered. . . . [The child]'s habitual residence in Germany is not

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89. *Id.*
90. 816 F. Supp. at 663. *See also supra* note 62 and accompanying text.
91. 816 F. Supp. at 666.
92. *Id.*
93. *Id.* (quoting *Bates*, *supra* note 83).
94. *See supra* note 89 and accompanying text.
95. *See supra* note 92 and accompanying text.
96. 816 F. Supp. at 666.
97. 983 F.2d at 1401.

> predicated on the care of protection provided by his German father nor does it shift to the United States when his American mother assumes the role of primary caretaker. [The child]'s habitual residence can be 'altered' only by a change in geography and the passage of time, not by changes in parental affection and responsibility. . . . If we were to determine that by removing [the child] from his habitual residence without Mr. Friedrich's knowledge or consent Mrs. Friedrich 'altered' [the child]'s habitual residence, we would render the Convention meaningless. It would be an open invitation for all parents who abduct their children to characterize their wrongful removals as alterations of habitual residence.[98]

After the *Friedrich* decision was handed down, another federal court case, *Ponath,* utilized the same analysis in addressing the habitual residence issue. In so doing, the *Ponath* court relied upon *Levesque* and prior English case law.[99] In *Ponath*, the father invoked the Hague Convention, alleging that the mother had wrongfully removed the child from Germany to the United States.[100] The court stated:

> [T]he more credible testimony . . . is that of [the mother] who testified that she, and the minor child, were detained in Germany against her desires by means of verbal, emotional and physical abuse. The court cannot conclude under such circumstances that [the mother] and the minor child were habitually resident in Germany within the meaning of the Hague Convention. Although it is the habitual residence of the child that must be determined, the desires and actions of the parents cannot be ignored by the court in making that determination when the child was at the time of removal or retention an infant. The concept of habitual residence must, in the court's opinion, entail some element of voluntariness and purposeful design. Indeed, this notion has been characterized in other cases in terms of 'settled purpose.'[101]

Thus, it is clear that the *Ponath* court considered all the facts and circumstances (including the actions of the father in using physical means to coerce the mother and child to remain in Germany) in determining whether there was a sufficient "settled purpose" as to the child's habitual

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98. *Id.* at 1401-02.
99. 829 F. Supp. at 365.
100. *Id.* at 364.
101. *Id.* at 367.

residence. The court concluded that there was no wrongful removal because the father consented to the return of mother and child to the United States, supported by the fact that the father had made no "meaningful effort" to seek the child's return to Germany.[102]

Unlike the courts deciding *Bates* and *Friedrich*,[103] a later decision in a lower New York state court, *Cohen v. Cohen*, reflected an effort to define "habitual residence" through a comparison with "domicile."[104] However, it is apparent that the New York court ultimately relied upon the facts and circumstances of the case in reaching its decision. The *Cohen* court ruled that Israel was not the children's habitual residence and refused to allow relocation of the children to Israel for resolution of the custody dispute.[105] The court stated: "The question of whether there has been a change of domicile is a mixed question of fact and law 'and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals.'"[106] The court relied upon *Meredith*, which held earlier that habitual residence "must be determined by the facts and circumstances presented in each particular case."[107]

In *Cohen*, the court determined that the mother consented only to her children visiting Israel with their father. The court based its conclusion upon the fact that the mother, who had always cared for the children, had no ties with Israel and probably would not have consented to the permanent move of her children there without accompanying them.[108] The court also took into account that there was no farewell party for the children and that the father took few of the children's belongings with him, indicative of a short trip rather than a permanent move thousands of miles away.[109]

Although courts in the United States appear to differ in some ways in their approach to the issue of habitual residence of the children—whether falling back on an analogy with "domicile" or determining the parents' "settled purpose"—it is apparent that the courts are considering the facts and circumstances of each case rather than attempting to apply any black letter rule of law. While this "totality of the circumstances" approach may appear vague and undefined, its result is an equitable method of determining habitual residence which permits courts to consider the realities of distressing situations and extenuating circumstances. In so doing, the courts

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102. *Id.* at 368.
103. *See supra* notes 84 and 85 and accompanying text.
104. 602 N.Y.S.2d 994, 998 (N.Y. Sup. Ct. 1993).
105. *Id.* at 999.
106. *Id.* at 998 (citations omitted).
107. *Id.* (quoting *Meredith*, 759 F. Supp. at 1434).
108. 602 N.Y.S.2d at 999.
109. *Id.*

are not determining the merits of the underlying custody disputes;[110] rather, the establishment of the habitual residence of these children is merely a step in addressing whether the children have been wrongfully removed, in keeping with the objectives of the Hague Convention.[111] After all, where there is no habitual residence, there can be no wrongful removal.

b. *The Exercise of Custody Rights*

Another threshold requirement of the Hague Convention which must be met before a court will order the return of a child is found in Article 3.[112] This condition, pertaining to custody rights, is a two-step inquiry. First, a breach of a parent's custody rights must have occurred under the law of the child's habitual residence.[113] Second, at the time of the wrongful removal or retention, the parent from whom the child is taken must have been actually exercising those custody rights.[114]

Under the ICARA, the parent petitioning for return of the child has the burden of proving by a preponderance of the evidence that (1) the removal or retention was wrongful under the law of the country of habitual residence, and (2) he or she actually possesses visitation rights.[115]

Furthermore, Article 5 of the Hague Convention provides that rights of custody shall include "the right to determine the child's place of residence."[116] Therefore, when a child is abducted from a caretaker entrusted with the child's care, the custodial parent is entitled to invoke the provisions of the Hague Convention.[117] Also, it is presumed that the parent with custody of the child was actually exercising it.[118] Article 13 of the Hague Convention places the burden of proof upon the abducting parent to show that the petitioning parent was not actually exercising custody rights at the time of the removal or retention.[119]

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110. "The [Hague] Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims." 42 U.S.C. § 11601(b)(4).

111. *See supra* note 65 and accompanying text.

112. *See* Hague Convention, *supra* note 10, at 1501. *See also supra* note 14.

113. *See supra* note 14.

114. *Id.*

115. 42 U.S.C. § 11603(e)(1).

116. Hague Convention, *supra* note 10, at 1501.

117. Legal Analysis, *supra* note 14, at 10,507.

118. *Id.*

119. Hague Convention, *supra* note 10, at 1502; Legal Analysis, *supra* note 14, at 10,507.

An examination of case law dealing with the issue of custody rights indicates that courts in the United States are careful to ensure that those rights are determined by the law of the child's habitual residence. Perhaps the best example of a court's rigid adherence to this aspect of the Hague Convention can be found in *Friedrich*.[120] In this case of a family living in Germany, the father had allegedly ordered his wife to take their son and leave, putting most of their belongings into the hallway of the apartment building.[121] The cost of residing on the military base with her son was too expensive for Mrs. Friedrich,[122] and she was unable to find other living accommodations within her budget in Germany.[123] So, without the permission, consent, or knowledge of the father, Mrs. Friedrich returned to the United States with her son.[124] Consequently, in response to the father's petition for the return of his son under the Hague Convention, Mrs. Friedrich argued that her husband was not exercising custody rights when she brought her child to the United States.[125]

First, the *Friedrich* court expressed doubt that the father had "*unilaterally* expelled Mrs. Friedrich and [their son] from the family apartment."[126] The court noted that Mr. Friedrich continued to maintain contact with his son and helped Mrs. Friedrich establish initial living quarters on the U.S. Army base.[127] Next, the court stated:

> Under the [Hague] Convention, whether a parent was exercising lawful custody rights over a child at the time of removal must be determined under the law of the child's habitual residence. . . . We have determined that [the child] was a habitual resident of Germany. . . . Neither the district court, nor either party on appeal, applied German custody law to the above facts. . . . We would be surprised if Mr. Friedrich's actions terminated his custody rights under German law, but we do not make that factual determination. Instead, we remand to the district court with instructions to make a specific inquiry as to whether, under German law, Mr. Friedrich was exercising his custody rights at the

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120. 983 F.2d 1396.

121. *Id.* at 1399.

122. Recall that Mrs. Friedrich was a member of the United States Army stationed in Germany. *See supra* text accompanying note 81.

123. *Friedrich*, 983 F.2d at 1399.

124. *Id.*

125. *Id.* at 1398.

126. *Id.* at 1402.

127. *Id.*

time of [his son]'s removal.[128]

The dissent disagreed with the ruling to remand the case for determination of custody rights under German law, believing instead that testimony by both the mother and father supported the district court's finding that the father was not exercising his custody rights.[129] Judge Lambros argued that only a clearly erroneous finding of fact by the district court could be set aside on appellate review, and that the appellate court should not reverse "simply because it is convinced that it would have decided the case differently."[130] However, as the majority emphasized, the lower court could not determine the father's exercise of custody rights without first applying the proper law regarding those rights. In this case, German law was appropriate.[131]

In this instance, the *Friedrich* court remained faithful to the mandates and objectives of the Hague Convention. If the lower court was to subsequently apply German law and conclude that Mr. Friedrich was exercising custody rights at the time his son was removed from Germany, then the Hague Convention would mandate the return of the child to Germany for disposition of the custody dispute.

Tyszka v. Tyszka presents another good example of a state court heeding the dictates of the Hague Convention.[132] A lower court held that a father wrongfully retained his children in the United States in violation of the Hague Convention, and it ordered that they be returned to their mother in France "until such time as the appropriate French court adjudicates the issue."[133]

Notwithstanding the ruling that the French judiciary should decide the outcome of the custody dispute, the trial court awarded joint legal custody to both parents in a later divorce and custody action.[134] On appeal, the higher court agreed with the mother that the custody decision should have been left to the French courts, and it vacated the custody portion of the trial court's order.[135] The appellate court emphasized that where a wrongful retention is found and the exceptions of Article 13 do not apply, the court

128. *Id.* (citation omitted).
129. *Id.* at 1403 (Lambros, J., dissenting).
130. *Id.*
131. *Id.*
132. 503 N.W.2d 726 (Mich. App. 1993).
133. *Id.* at 727.
134. *Id.*
135. *Id.* at 728.

"shall order the return of the child forthwith."[136]

A New York court encountered the custody rights issue when a mother violated a Canadian court order by taking her children to the United States shortly after the birth of her daughter.[137] Prior to their daughter's birth, the couple had separated. The separation agreement granted custody of their older son to the mother and visitation rights to the father.[138] The agreement also provided that the mother make the son available to the father for visitation purposes within the Toronto area.[139] However, the separation agreement was silent as to the then-unborn daughter.[140]

After the daughter's birth, the father obtained an interim order from a Canadian court prohibiting the mother from moving the children from Ontario.[141] Despite the order, the mother moved with her children to Brooklyn.[142] The Supreme Court of Canada ruled that the mother wrongfully removed the children from the jurisdiction.[143] As a result, the father brought an action in the New York court for return of his children.[144]

In ordering the mother to return with her children to Canada, the New York court took judicial notice of Ontario law regarding child custody.[145] The court stated:

> Respondent's [the mother's] contention that the petitioner [the father] is not entitled under the Hague Convention to have their son returned, because he only had visitation ('access') rights and not custody, might have some merit but for the respondent's contemptuous conduct, and the subsequent orders of the Supreme Court of Ontario. . . . Moreover, respondent's argument overlooks the fact that their daughter was not included in the provisions of the separation agreement. Therefore, the petitioner had an equal right to custody of their daughter when the respondent left Ontario. Under . . . ICARA, this Court can find there was a

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136. *Id.* (quoting Article 12 of the Hague Convention, *supra* note 10, at 1502). Exceptions under Article 13 whereby a court has the discretion to return a child to his or her habitual residence are discussed below.

137. David S. v. Zamira S., 574 N.Y.S.2d 429, 430-31 (N.Y. Fam. Ct. 1991).

138. *Id.* at 430.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 431.

143. *Id.*

144. *Id.*

145. *Id.* at 432.

'wrongful removal' in the absence of any formal declaration of custody.[146]

This small sampling of recent case law addressing the issue of custody rights under the Hague Convention demonstrates that courts in the United States are cognizant of the treaty's objective, whereby the country of the child's habitual residence should resolve custody disputes. This goal is justifiable and logical because it considers the probability that courts in the child's nation of habitual residence are better equipped to deal with the merits of custody issues. This is due to the availability of evidence and witnesses concerning the child's home life in the child's habitual residence. Family and other state courts, accustomed to hearing evidence on and deciding the merits of custody disputes, must remain especially prudent when finding a wrongful removal or retention under the Hague Convention.

c. *Age of the Child*

Besides the two requirements pertaining to establishment of the child's habitual residence and the parents' custody rights under the laws of that country, there is a third threshold requirement which must be met before a court may invoke the Hague Convention. Article 4 provides that the Hague Convention no longer applies once the child reaches the age of 16 years.[147] Even where a child is under 16 at any point during the proceedings—whether it be at the time of the wrongful removal or retention, or when a petition for the return of the child is filed—the treaty will cease to apply once that child reaches the age of 16.[148]

Accordingly, the Hague Convention would not be applicable in the case of an older child, even though that child may be mentally or physically dependent on a parent.[149] However, the fact that the treaty ceases to be effective once the child reaches the age of 16 does not prevent a country (or a state within the United States) from applying other local or state principles and laws.[150]

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146. *Id.* *See also supra* note 67 regarding another case where a mother's actions in contempt of a court's order also resulted in her loss of rights under the Hague Convention.

147. Hague Convention, *supra* note 10, at 1501.

148. Legal Analysis, *supra* note 14, at 10,504.

149. Shirman, *supra* note 6, at 214.

150. Copertino, *supra* note 12, at 731-32. *See also* Legal Analysis, *supra* note 14, at 10,504 ("Absent action by governments to expand coverage of the Convention to children aged sixteen and above . . . the [Hague] Convention itself is unavailable as the legal vehicle for securing return of a child sixteen or older. However, it does not bar return of such child

For example, Article 18 of the Hague Convention states that "[t]he provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time."[151] Therefore, a court could authorize the return of a child for any reason under other laws, procedures, or comity, whatever the child's age.[152] Also, Article 29 of the Hague Convention permits a person to circumvent the treaty altogether by invoking any other applicable law for the child's return.[153] Finally, Article 34 permits flexibility as well, providing that the country or state may obtain the child's return or arrange visitation rights by applying any local applicable law.[154]

3. *Exceptions to the Hague Convention*

The Hague Convention is not necessarily the exclusive means by which a parent may seek legal relief for the return of a child; the treaty provides some built-in versatility for the courts.[155] Besides allowing for application of other laws, the Hague Convention provides exceptions whereby a parental abductor may avoid application of the treaty altogether. Such an evasion is possible under a court's discretion, even where a wrongful retention or removal has been determined under the laws of the child's habitual residence.

These broad exceptions may be subject to misuse by the courts unless they are strictly construed to avoid frustration of the Hague Convention's

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by other means.")

151. Hague Convention, *supra* note 10, at 1503.

152. Legal Analysis, *supra* note 14, at 10,504.

153. *Id.* Article 29 states: "The Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights . . . from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention." Hague Convention, *supra* note 10, at 1504.

154. Legal Analysis, *supra* note 14, at 10,504. Article 34 states:

> This Convention shall take priority in matters within the scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Hague Convention, *supra* note 10, at 1504.

155. *See supra* notes 72, 149-153 and accompanying text.

objectives.[156] When confronted with affirmative defenses under these exceptions, however, it appears that courts in the United States are aware that they must sparingly exercise their discretion in order to safeguard those objectives.[157] A discussion of these discretionary exceptions follows.

a. *Grave Risk of Physical or Psychological Harm*

Article 13(b) of the Hague Convention provides:

> [T]he judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -- . . .
>
> *b* there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. . . . [158]

This discretionary exception, like others in the treaty, is the result of a compromise concerning differences in legal systems and family law principles of the countries involved in negotiating the treaty.[159] "[I]t was generally believed that courts would understand and fulfill the objectives of the Convention by narrowly interpreting the exceptions and allowing their use only in clearly meritorious cases, and only when the parent opposing return had met the burden of proof."[160]

Under the ICARA, a parent opposing the return of the child to the habitual residence has the burden of proving his defense under Article 13(b) by the standard of clear and convincing evidence.[161] This establishes a higher burden of proof for the parental kidnapper than that which is required for the parent seeking return, who must prove by a preponderance of the evidence that a child has been wrongfully removed or retained[162] or that the parent has visitation rights.[163] However, this difference in the burdens of proof between that required of the parental abductor and the parent

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156. *See supra* note 58 and accompanying text. *See also* Rivers, *supra* note 6, at 624; Shirman, *supra* note 6, at 215-16; Helzick, *supra* note 20, at 145.

157. *See supra* text accompanying note 64.

158. Hague Convention, *supra* note 10, at 1502.

159. Legal Analysis, *supra* note 14, at 10,509-10.

160. *Id.* at 10,509.

161. 42 U.S.C. § 11603(e)(2)(A).

162. 42 U.S.C. § 11603(e)(1)(A).

163. 42 U.S.C. § 11603(e)(1)(B).

seeking return appears consistent with the objectives of the Hague Convention.

A lower burden of proof for the parent seeking return simplifies the means by which the child can be returned to his habitual residence, where the laws of that country can be applied to resolve the custody dispute. At the same time, a higher standard of proof for the parental abductor assures that a court will return a child to the habitual residence unless the parental kidnapper is able to present more than general or negligible evidence that the child will likely be harmed if returned.

Also, determining the habitual residence of the child and a breach of parental custody rights is a simple and straightforward factual inquiry, for which proof by preponderance of the evidence is sufficient. In contrast, establishing that an intolerable situation or a grave risk of psychological or physical harm awaits the child upon return to the habitual residence involves an inquiry into a more emotional kind of evidence. To conclude that such a grave risk exists, the court must inquire into the merits of the underlying custody dispute, which is contrary to the overriding objective of the Hague Convention.[164] Thus, to justify such an inquiry, the parental abductor should be required to meet a higher burden of proof before the court exercises its discretion to block the return of the child.

Yet, American sensibilities favor the Article 13(b) exception. Moreover, the premise of the Hague Convention is to reduce or deter the emotional trauma of parental abduction.[165] If the child is to be the beneficiary of this treaty's effects, the Hague Convention should protect the child where invocation of the international law would result in greater emotional trauma. The discretionary exception appears especially appropriate where new evidence comes to light, or where the court in the child's habitual residence cannot or will not consider such evidence when deciding a custody dispute.[166]

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164. *See supra* text accompanying notes 65-71.

165. *See supra* note 5.

166. *But see* Shirman, *supra* note 6, at 218-19.

> Although an abducting parent has established by clear and convincing evidence that the return of the child would expose him or her to an intolerable situation or grave risk of psychological or physical harm, return should not be denied automatically. Instead, the child should be returned to the custody of a third party in the state of the child's habitual residence. The courts in that state would then be responsible for resolving the issue, and either ordering the return of the child to the original custodial parent or modifying the custody decree.

Id. However, attention must be focussed upon the child in this situation. Ordering the child back to another country to be placed in a third party's hands (which could be either a foster

A study of relevant case law addressing the Article 13(b) exception shows that American courts are cautious in applying discretion to return the child. For example, one court went so far as to interview the child *in camera* before ruling on the defense. The court found nothing in either the interview or other evidence presented by the opposing parent to indicate that the child would be exposed to psychological or physical harm if returned to his habitual residence.[167]

An earlier California opinion addressed the same issue. Only eight days after the father filed a petition, the court ordered the return of the children from the United States to his custody in Spain. This order came despite testimony of a court-appointed doctor that the daughter might face the risk of permanent psychological damage if returned.[168] The court was swayed by the doctor's testimony that the negative effects of a return to Spain would be lessened if the mother returned with them, which she had already agreed to do.[169]

In rendering its judgment, the court stated:

> The [Hague] Convention exception in this area speaks of 'exposing' the children to psychological harm by return to the country of habitual residence. In this sense, this court firmly believes that neither child will be 'exposed' to harm by returning the children to Spain. Certainly one must be a realist and understand that any abducted child will suffer trauma to some extent when moved about the world by an ill-advised parent. But returning the children to Spain will serve, in this court's opinion, to allow the Spanish courts to determine what is in the best interest of the children. . . . To retain the children in the United States guarantees that the mother will continue to frustrate the

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home or some type of foster-care institution) would only result in even more disruption in the short life of a young child, especially where the court has good reason to believe that the child has already experienced an emotionally traumatic family life. Furthermore, it may be unnecessary to order the child back. The court ordering the child back will doubtless make available to the courts of the child's habitual residence the reasons for finding clear and convincing evidence of the risk of grave harm. Thus, the court in a child's country of habitual residence may simply order the return of the child. Where a court is convinced that a grave risk of harm awaits the child upon return, but that the child is comparatively safe and happy with the parental kidnapper, the only fair decision would be *not* to return the child, and to permit both the mother and child to get on with the rest of their lives.

167. *Sheikh*, 546 N.Y.S.2d at 521.

168. Navarro v. Bullock, No. 86481 (Cal. Sup. Ct. Sept. 1, 1989), *reported in* 15 FLR 1576, 1577 [hereinafter Navarro].

169. *Id.*

> custodial and visitation rights of the father, and to undermine his relationship with his children. . . . To allow this to happen would be to allow [the] mother to profit by her own wrong, and to continue to damage the children psychologically by her unwillingness to allow the father access to his children.[170]

The court in *Tahan* also undertook an analysis of the Article 13(b) exception when Fred, the father, invoked this defense to the return of Kareem from the United States to his mother in Canada.[171] Evidence such as psychological profiles, evaluations of parental fitness, and lifestyle and relationships was offered in support of invoking the exception.[172] The *Tahan* court pointed out that Article 13 permits inquiry into the surroundings and the basic personal qualities of the people to whom the child will be exposed in determining whether apprehensions for the child's safety and welfare upon return are realistic and reasonable.[173] The court commented, "Here, however, the [father] indicated no intention to address the surroundings. . . . Every element of his proffer went to issues which . . . may only be addressed in a plenary custody proceeding in Quebec."[174]

Thus, the *Tahan* court acknowledged that "Article 13b requires more than a cursory evaluation of the home jurisdiction's civil stability and the availability there of a tribunal to hear the custody complaint."[175] Nevertheless, it limited the *type* of evidence which may be heard to that pertaining to the surroundings to which the child would be exposed upon return.[176]

Thus far, it appears that courts in the United States have recognized the danger of giving too broad an interpretation to the Article 13(b) exception. Hopefully, U.S. courts will continue to follow England's example and "act with . . . sensitivity and dispassion" when deciding whether to exercise this discretionary power.[177]

b. *Protection of Human Rights and Fundamental Freedoms*

Another discretionary exception to application of the Hague Convention is found in Article 20, which provides that "[t]he return of the child . . .

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170. *Id.*
171. 613 A.2d at 489.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *See supra* text accompanying notes 58-62.

may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."[178] As with the Article 13(b) exception discussed above, the ICARA requires that a parent opposing the return of a child under Article 20 meet the burden of clear and convincing evidence.[179]

Although the Article 20 exception has not been addressed in reported U.S. case law and there is no precedent in other international agreements to guide the courts, it is intended, like Article 13(b), to be narrowly interpreted.[180] It appears that the treaty may not have survived the negotiating process without the addition of this public policy exception.[181] "To prevent imminent collapse of the negotiating process . . . there was a swift and determined move to devise a different provision that could be invoked on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process."[182]

This provision is not intended to be an automatic default device whenever it is raised as a defense. The parental abductor first must show that the fundamental principles of the country where the child has been taken will not permit the return. It is not enough to show that the return would be "incompatible, even manifestly incompatible, with these principles."[183]

In addition, the country hearing the petition may not exercise the Article 20 exception "any more frequently, nor must their invocation be more readily admissible than they would be in their application to purely internal matters."[184] In other words, the courts should avoid discriminatively invoking this provision more often than a similar exception would be invoked under other laws of that country.[185]

c. *Child's Preference, Age, and Maturity Considered*

As noted, the Hague Convention ceases to apply once a child reaches the age of 16. Courts are then free to apply any other applicable law to effect the return of the older child.[186] Article 13 of the treaty also

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178. Hague Convention, *supra* note 10, at 1503.

179. 42 U.S.C. § 11603(e)(2)(A). *See also supra* notes 161-66 for a discussion of the differences in burdens of proof required of the parental abductor and the left-behind parent and why this is consistent with the objectives of the Hague Convention.

180. Legal Analysis, *supra* note 14, at 10,510.

181. *Id.*

182. *Id.*

183. *Id.* at 10,511.

184. *Id.*

185. *Id.*

186. *See supra* text accompanying notes 146-53.

contains a provision whereby the wishes of the mature child who is under the age of 16 may be taken into account in the court's discretion.[187]

The parent raising this exception in opposition to the return of a child to the habitual residence must present a preponderance of the evidence to prevail.[188] The burden is lower than that required for other exceptions to the Hague Convention.[189] Still, courts are cautioned to watch for undue influence or "brainwashing" by the parental abductor when considering the wishes of the mature child.[190] "A child's objection to being returned may be accorded little if any weight if the court believes that the child's preference is the product of the abductor parent's undue influence over the child."[191]

Very little case law has been written which addresses this defense. In *Sheikh*, the court carefully rejected the father's assertion that his nine-year-old son preferred to remain in his custody.[192] The court concluded that the son's preference was the result of "being wooed by his father during the visitation. Given Nadeem's age and maturity, this reaction to the summer vacation is to be expected."[193]

Family courts and other lower state courts accustomed to resolving custody disputes will readily recognize situations where children have been subject to undue influence by their parental kidnappers. The Hague Convention provides flexibility where a court feels justified under the facts and circumstances in giving weight to a mature child's wishes.

d. *One-Year Statute of Limitations*

Finally, parental kidnappers may be able to escape the application of the Hague Treaty pursuant to Article 12. Exception is provided where more

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187. Legal Analysis, *supra* note 14, at 10,504. Article 13 states: "The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." *See* Hague Convention, *supra* note 10, at 1502.

188. 42 U.S.C. § 11603(e)(2)(B).

189. *See supra* text accompanying notes 161-64, 178; 42 U.S.C. § 11603(e)(2)(A). *See also* Dorosin, *supra* note 19, at 752. "This reduced burden of proof makes it easier for a respondent to prevent the child's return from the United States and indicates a retreat from the U.S. commitment to the essential anti-abducting purpose of the Convention." *Id.* (footnote omitted).

190. Legal Analysis, *supra* note 14, at 10,510.

191. *Id.*

192. 546 N.Y.S.2d at 521-22.

193. *Id.* at 522.

than a year has passed since the wrongful removal or retention and the parent can show by a preponderance of the evidence that the child is settled in the new environment.[194] This provision may sometimes put the parent who is seeking return of a child at a disadvantage, particularly where there is difficulty locating the abducting parent and child.[195] While certain provisions permit a court to return a child at any time,[196] a judge may be reluctant to do so once the child has become acclimated to his or her new surroundings for fear that a return may cause further psychological harm.[197]

Once again, courts are warned to apply this one-year limitation narrowly, in that "nothing less than substantial evidence of the child's significant connections to the new country is intended to suffice to meet the respondent's burden of proof."[198] Furthermore, courts are urged to consider the reasons for any delay in filing a petition, particularly where the parental abductor has caused a long search by concealing the child's presence.[199]

The limited case law in this area pinpoints the accrual of the action as the time of the wrongful removal or retention. In other words, where a parent takes physical custody of a child pursuant to a lawful visitation period, the one-year period will commence at the end of the visitation period, as there can be no wrongful removal or retention during the visitation.[200] U.S. courts should continue to carefully apply this one-year limitation for filing a petition, considering extenuating circumstances when applicable.

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194. Hague Convention, *supra* note 10, at 1502. Article 12 provides:

> Where a child has been wrongfully removed or retained . . . and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. . . .

Id. *See also* 42 U.S.C. § 11603(e)(2)(B).

195. Shirman, *supra* note 6, at 214.

196. *See supra* text accompanying notes 150-53.

197. *See generally* Copertino, *supra* note 12, at 729-30; Helzick, *supra* note 20, at 143-45.

198. Legal Analysis, *supra* note 14, at 10,509.

199. *Id.*

200. *See Duquette*, 600 A.2d at 475; Navarro, supra note 168, at 1576.

Ultimately, concern must focus on the child. However unfair the actions of a parental abductor may appear, it may be unjust to order a child's return to the habitual residence if it would cause greater emotional harm or trauma.

III. CONCLUSION

The emotional distress of a marital separation or breakup is often devastating to a child. The potential for trauma is intensified when one parent resorts to the self-help remedy of abduction and takes the child to a foreign country. The Hague Convention was drafted to protect children from the harmful effects of parental kidnappings. The treaty provides an effective legal device for return of the abducted child to the habitual residence. It is vital that more nations adopt the treaty to decrease the number of "haven" states where parents go to escape the mandates of the Hague Convention.

It appears that the judiciary of the United States has embraced the spirit and goals of the Hague Convention by strictly interpreting its provisions to achieve the prompt return of abducted children whenever appropriate. Lower courts, therefore, should be cautious when applying certain exceptions to the Hague Convention. Moreover, appellate courts should continue to uphold the objectives of the treaty by promptly policing the actions of the lower courts whenever they deviate from these stated goals.

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WHY U.S.-ENFORCED INTERNATIONAL FLIGHT SUSPENSION DUE TO DEFICIENT FOREIGN AIRPORT SECURITY SHOULD BE A NO-GO

I. INTRODUCTION

According to current projections, scheduled international passenger air traffic will double by the year 2000, growing at an average annual rate of six to seven percent in this decade.[1] There are several reasons for this increase, the most prominent being advancement in technology. Technological advancement has allowed for the development of faster, larger aircraft that are able to haul greater numbers of persons for longer periods of time.[2]

Accompanying these impressive accomplishments, and the ever-increasing number of international travelers, is a real concern about the international traveling public's safety. Because modern technology makes international travel more and more commonplace, it is also reasonable to assume that travelers expect safety standards between countries to be fairly common. That is, travelers have come to expect that the safety standards adhered to in the country of departure will mirror the standards in the destined country. Among these safety expectations are standards regarding equipment, personnel training, flight, and airport security.

This Comment analyzes certain laws, regulations and international agreements that delineate responsibilities, duties and procedures with respect to international flight suspension due to substandard foreign airport security. It exposes certain aspects of United States law [hereinafter, federal law] that effectuate undesirable economic consequences while not necessarily accomplishing their intended purpose--to safeguard the United States' international flying public. In conclusion, general recommendations are offered indicating how federal and international law may better serve international aviation and the safety of the international flying public.

The Federal Aviation Act of 1958 [hereinafter, the Aviation Act] is analyzed with respect to the factors the Secretary of the Department of Transportation [hereinafter, DOT Secretary] considers when acting on behalf of the public interest with respect to foreign airport security standards. Also, the Foreign Airport Security Act [hereinafter, The Security Act],

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1. Chuck Y. Gee, Dean, *Aviation and Tourism: The Traveling Public,* 20 TRANSP. L. J. 1, 2 (1991).

2. For example, consider the Boeing 747–400 and the McDonnell–Douglas MD–11. Although both aircraft are recent versions of their predecessors, the Boeing 747 and the McDonnell Douglas DC-10, their advanced modifications make it possible to maintain cruising altitudes and speeds for over 8,000 miles at once. This allows people to travel nearly halfway around the world non-stop and remain airborne for fifteen hours at a time or more. Also, the size of such aircraft make it possible for more people to travel at once, which increases profit potential.

signed into law as part of the International Security and Development Cooperation Act of 1985 and later incorporated into the Aviation Act, is analyzed at length. The Security Act equips the United States Government with legal engines for assessing foreign airport security and taking subsequent action with respect thereto.

References are also made to other legal instruments affecting the enforcement of foreign airport security standards and subsequent governmental action. The Convention on International Civil Aviation [hereinafter, The Chicago Convention] and its Annex 17, dealing with international airport security standards and procedures, provide international authority allowing the United States to act outside its territorial jurisdiction. Also, several Bilateral Air Transport Agreements, made separately between the U.S. and other countries for the purpose of conducting air transportation with each of those countries, will be discussed. These contracts give the U.S. Government latitude in enforcing decisions in the global arena, such as flight suspension.

To illustrate the practical impact of the aforementioned laws and procedures, a real situation is discussed in which the U.S. Government determined a foreign international airport to be security-deficient. As a result of the alleged deficiency, the DOT Secretary suspended domestic air carrier flights and foreign air carrier flights that operated directly between that airport and the United States. By analyzing this fact pattern with regard to the above-referenced legal processes, this Comment illuminates deficiencies in the law, recommends how and why the law should be modified, and contemplates other laws that the legal and political community may enact to produce better results.

II. AMERICAN TRANS AIR AND THE MURTALA MUHAMMED INTERNATIONAL AIRPORT

On August 11, 1993, the DOT Secretary effectively denied all air carriers the ability to operate between the United States and Lagos, Nigeria.[3] To accomplish this, the DOT Secretary suspended all flights operating directly between any airport within the territorial jurisdiction of the United States and the Murtala Muhammed International Airport located in Lagos, Nigeria.[4] This suspension, which became effective immediately and

3. *DOT Suspends Travel to Lagos, Nigeria Airport, Says it Lacks Effective Security Measures*, United States Department of Transportation, 1993 WL 311897, August 11, 1993 [hereinafter, United States Department of Transportation News Release].

4. *Id.*

continues indefinitely,[5] applied to both U.S. air carriers[6] and foreign air carriers operating flights between the United States and Lagos.[7] The Lagos airport's failure to maintain and administer effective security measures, coupled with the DOT Secretary's finding that the airport created a "condition" that threatened the safety and security of passengers, aircraft and crews traveling to or from the Lagos airport, formed the basis authorizing the suspension.[8]

The DOT Secretary's flight suspension directly affected the operations of American Trans Air (ATA), a U.S. passenger air carrier based in Indianapolis, Indiana.[9] ATA offers scheduled service between various points in the United States and cities in foreign countries, including Lagos, Nigeria.[10] The Secretary's suspension applied to ATA because it was a carrier offering service directly between the United States and Lagos. The flight suspension forced ATA to refund tickets it had issued for passage to and from Lagos.[11]

The suspension action by the DOT Secretary, however, did not necessarily keep passengers from traveling to the Lagos airport. Upon finding that direct flights to Lagos, Nigeria originating from the United States were suspended, passengers originally routed on such flights simply changed their routes. Passengers traveled to a U.S. gateway city, boarded a flight that was

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5. At the time of this Comment's publication, the DOT Secretary's suspension order remained effective.

6. An aircraft's nationality is technically determined by the country in which it is registered, not necessarily by the country in which the airline operates or is incorporated. *See* The Convention on International Civil Aviation, Dec. 7, 1944, art. 17, 61 Stat. 1180, 1185 T.I.A.S. 1591, 15 U.N.T.S. 295 (entered into force April 14, 1947); The Federal Aviation Act of 1958, Pub. L. No. 85–726, 72 Stat. 737, tit. V, §501; Aircraft Registration, 14 C.F.R. § 47 et. seq. (1993).

7. *Id.*

8. *See* U.S. Department of Transportation News Release, *supra* note 3, at 1.

9. The analysis, conclusion, or any other views expressed in this Comment are those of the author only, and are not necessarily the views of American Trans Air, or any of its executives, agents, assignees, employees, or any other person or entity in any way associated with American Trans Air.

10. *See e.g.* Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier permits filed Under Subpart Q During the Week Ended June 19, 1992, (DOT Notice) 57 Fed. Reg. 28,897–03 (1992). This document states that the DOT received the "Application of American Trans Air, Inc. pursuant to section 401 of the [Aviation] Act and subpart Q of [title 14 of] the [code of Federal] Regulations [section 302.1701 et seq.], [which] applies for a certificate of public convenience and necessity authorizing it to provide scheduled foreign air transportation of persons, property and mail between any points or points in the United States and Lagos, Nigeria."

11. Memorandum from ATA to its employees discussing refund procedures (Aug. 12, 1993) (on file with author).

not destined for Lagos, flew to a foreign city, and then negotiated passage from that city to Lagos.[12]

For example, a passenger prohibited by the DOT Secretary's suspension order from traveling directly to Lagos from the United States (via ATA, any other U.S. carrier, or foreign carriers) could, instead, board a plane in the United States destined for London, England. After arriving in London, this passenger could take a another flight to Lagos. Though hampered by additional inconvenience and a lengthier journey, a passenger could, in effect, nullify the DOT Secretary's efforts to keep the flying public away from the Lagos airport. Also, the same foreign air carrier that delivered such a passenger to Lagos indirectly, via an intermediate foreign airport, could be the same foreign carrier suspended from offering flights directly to and from the United States and Lagos. Therefore, such a foreign air carrier ultimately could receive the business of passengers prohibited from traveling on U.S. air carriers.

This situation presents at least two general problems. First, passengers traveling from the United States may effectively, and relatively easily, circumvent the DOT Secretary's flight suspension order, making moot the U.S. Government's interest in safeguarding the public. Such circumvention is an indicator of the public's actual interest in reaching Lagos by air, even after given the warning of the potential dangers that exist at Lagos' airport. Therefore, such flight suspension could actually be seen to run contrary to the public's interest. Second, if a foreign air carrier can provide indirect service to the security-deficient airport and such air carrier is also one that could have provided the same service directly (i.e., a U.S. air carrier's competition), then the DOT Secretary's flight suspension decision effectively allows the foreign air carrier a competitive advantage over its American counterpart. The U.S. carrier would be prohibited from offering service directly, yet a foreign air carrier would be able to take passengers to the alleged security-deficient airport as long as it stopped first at a foreign destination other than the security-deficient airport. Even if a foreign air carrier did not directly compete with a U.S. air carrier for fares on the suspended route, the flight suspension still denies revenue to U.S. air carriers by forcing would-be passengers to foreign air carriers who can fly to the prohibited destination, albeit not from the U.S. The following discussion

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12. ATA, for example, helped its passengers find alternate routes to Lagos, Nigeria in an effort to satisfy the passengers' expectation of passage. "Protection" is a term of art used in the air carrier industry to describe the practice where an air carrier that can no longer offer service to a certain destination (for whatever reason) will "protect" passengers with reservations to that destination by finding passage for those passengers on other air carriers. ATA employed this practice in an effort to help serve its customers who were affected by the flight suspensions to Lagos, Nigeria.

explains how these general problems, or loopholes, manifest themselves as a result of current international and federal law.

III. INTERNATIONAL AVIATION LAW WITH RESPECT TO THE LAGOS AIRPORT FLIGHT SUSPENSIONS

Before the U.S. legal processes allowing the DOT Secretary to suspend flights to Lagos, Nigeria are discussed, a brief analysis of international aviation law is necessary for understanding the facts surrounding the ATA situation outlined above. Also, a review of particular aspects of international aviation law provides a solid backdrop for understanding how international flights are regulated and allows an analysis of federal law regarding international flight suspension to be better understood.

A. *Bilateral Air Transport Agreements*

Civil air carrier authority to land in other countries is derived from contracts entered into by countries of such air carriers wishing to engage reciprocally in international air travel. These contracts are known as bilateral air transport agreements. The evolution and use of bilateral air transport agreements between countries as the primary way to govern and regulate civil international air services derives from a fundamental principle of air law described immediately below.

Countries engaged in international aviation claim an absolute sovereignty over the air space above their territories and territorial waters, including the right to impose regulations regarding the use of such space.[13] When a foreign air carrier flies over U.S. territory, for example, it is subject to FAA regulations and all other federal laws.[14] The reciprocal is also true: U.S. air carriers operating aircraft in and around foreign territories must abide by that country's aeronautical regulations.[15]

This right of sovereignty, always existent and enforceable,[16] is self-limited when countries engaging in international commercial aviation form bilateral air transport agreements.[17] Generally, these agreements contain

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13. Convention on International Civil Aviation, *supra* note 6, art. 1.

14. *Id.* art. 11; *See generally*, Alaska Airlines, Inc. v. Sweat, 568 P.2d 916 (Alaska 1977) (holding that federal law preempts issues and subject matter involving aviation law).

15. Convention on International Civil Aviation, *supra* note 6, art. 1.

16. *Id.* art. 5, 6, and 9(b).

17. *See Id.* art. 6 (where no scheduled international air service into the jurisdiction of a contracting state may be operated without authorization by that country and in accordance with the terms of such permission. Historically, this authorization has taken the

clauses granting specific rights for the two contracting parties to operate air services, on designated routes, at specified frequency, between the two countries.[18] A bond of reciprocity becomes apparent to the extent that what is acceptable practice in one state constitutes acceptable practice in the other state, and vice versa.

B. *The Effect of Bilateral Air Transport Agreements*

As the name suggests, bilateral air transport agreements historically have not involved more than two sovereigns. These contracts, in their respective annexes, identify certain air routes linking the two contracting states.[19] The agreements allow the contracting states to designate which air carrier(s), registered with their respective states,[20] may pick up and let down passengers in their territories. These air routes may, but do not necessarily, involve intermediate points in a country not a party to that specific bilateral air transport agreement.[21] Although an air route between two contracting states may involve a landing at an intermediary port not within the territory of either contracting state, bilateral air transport agreements do not, generally, allow passenger traffic originating from that non-party country to board the flight.[22] Such practice would remain the standard, even if the country of that intermediary point was a party to a separate bilateral air transport agreement with one or both of the contracting states.[23]

To illuminate this practice, consider the following example: Country A and Country B are parties to a bilateral air transport agreement with each other (the "A-B Bilateral"). Country C is a party to a separate bilateral air transport agreement with Country A (the "A-C Bilateral"), and a party to another such agreement with Country B (the "B-C Bilateral"). The A-C bilateral does not include Country B as an intermediary point in any routes

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form of bilateral air transport agreements.

18. *See generally* Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Air Services, July, 23, 1977, U.S.-Gr. Brit., 28 U.S.T. 5368, 5373–5374 [hereinafter, Bermuda II].

19. *See* e.g. *Id.* art. 2, and Annex 1.

20. *See* The Convention on International Civil Aviation, *supra* note 6, at arts. 17, 18, (indicating that aircraft have the nationality of the state in which they are registered and no aircraft can be validly registered in more than one state); Bermuda II, *supra* note 18, art. 3; *See supra* note 6.

21. Bermuda II, *supra* note 18, art. 2, and Annex 1.

22. *Id.* Annex 1, §5(1) and §5(2).

23. *Id.*

between Countries A and C. So, even though Countries A and B have a bilateral agreement, and Countries A and C have a bilateral agreement, an air carrier from Country A cannot travel to Country C via Country B. The B-C Bilateral only applies to air carriers of those two countries, not of Country A, which is not a party to the B-C bilateral.

In light of the above scenario, consider this real example. The United States is a party to bilateral air transport agreements with both Great Britain and Nigeria.[24] Each bilateral air transport agreement contains annexes that prescribe routes to be utilized by the party states. The U.S.-Nigeria Bilateral does not authorize a U.S. air carrier or Nigerian air carrier to travel to and from each other's territory by way of Great Britain. For this reason, it would be impossible for a U.S. air carrier, such as ATA, to circumvent the DOT Secretary's flight suspension by flying indirectly to Lagos via Great Britain (or any other non-party country). However, because Great Britain and Nigeria have their own bilateral agreement, flights between those two countries would still be permitted, assuming the British aeronautical authorities would not have found it necessary to suspend flights between Nigeria and Great Britain.[25] Similarly, flights between Great Britain and the U.S. would still be available under that respective bilateral agreement, unless the United Kingdom's airports also were found security-deficient by the DOT Secretary, or the DOT Secretary otherwise found it necessary to suspend such flights.

However, no flight suspension order by the DOT Secretary has been issued with respect to flights between London, England's Heathrow International Airport, Gatwick International Airport, or any other international airport in the United Kingdom. But note that even if the DOT Secretary would suspend flights between the U.S. and the United Kingdom, passengers could still simply find air passage to Nigeria via any number of international air carriers serving other foreign cities. For example, ATA utilized the services of both a German air carrier and a Swiss air carrier, to help its affected passengers re-negotiate their itinerary to and from Lagos.[26]

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24. *See generally* Bermuda II, *supra* note 18; Air Transport Agreement Between the Federal Military Government of the Federal Republic of Nigeria and the Government of the United States of America, April 27, 1978, U.S–Nig., 29 U.S.T. 3102 [hereinafter, The Nigerian Bilateral].

25. To date, only the United States has suspended flights between it and Lagos, Nigeria.

26. *See supra* note 12. According to ATA, it aided its affected passengers by assisting them with finding passage on the German-flagged air carrier Lufthansa and the Swiss-flagged air carrier, Swissair.

IV. THE AUTHORITY VESTED IN THE SECRETARY OF TRANSPORTATION

Although the specific authority to suspend flights from the United States to a security-deficient airport is expressly granted in the Security Act, the DOT Secretary generally is guided by factors outlined in the Aviation Act. The Aviation Act provides the DOT Secretary with the authority to act in the public interest when regulating air commerce and provides specific factors that the DOT Secretary must consider when determining the public interest. First, the Aviation Act is discussed with respect to the public interest and the DOT Secretary's duties thereunder. Then, the Security Act is analyzed to highlight the specific authority vested in the DOT Secretary with respect to the Lagos flight suspension situation.

A. *The Federal Aviation Act of 1958*[27]

1. *The Department Of Transportation and the Federal Aviation Administration*

a. *Duties and Public Interest Factors*

As a provision of the Aviation Act, Congress called for the creation of the Federal Aviation Administration (FAA).[28] One of Congress' principle purposes for creating the FAA included the implementation of an agency that would be responsible for promoting safe air travel and protecting lives and property both in the air and on the ground.[29] In creating the FAA, Congress placed the agency within the Department of Transportation.[30] Furthermore, Congress mandated the FAA to "carry out . . . [the] duties and powers of the [DOT] Secretary related to aviation safety."[31] As an agency of the DOT, the FAA carried out the actual airport assessments that led to suspending flights to and from the Lagos airport, but these assessments were carried out only under the authority and auspices of the DOT Secretary. Because the FAA is an agency of the DOT, the DOT Secretary acts as the "mouthpiece" for all public notifications and otherwise takes the responsibility for the Lagos flight suspension.

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27. Federal Aviation Act of 1958, Pub. L. No. 85-726; 72 Stat. 737.

28. *Id.* §301(a)(b), repealed by Public Law 97-449, §7; 96 Stat. 2444, currently codified at 49 U.S.C. §106.

29. H.R. Rep. 85-2360, at 1; *See*, National Organization for Reform of Marijuana Laws (NORML) v. Mullen, 608 F. Supp. 945 (D.C. Cal. 1985), remanded on other grounds 796 F. 2d 276 (9th Cir. 1986) (discussing the purposes for the creation of the FAA).

30. 49 U.S.C. § 106(a) (1994).

31. *Id.* §106(g)(1).

The Aviation Act, in general, directs the FAA (and thus the DOT Secretary), when carrying out its duties mandated by the Security Act (discussed infra), to consider "as being in the public interest [the regulation of] air commerce in a way that best promotes its development and safety."[32] In this context, "air commerce" is not limited to economic concerns, but has been broadly construed so as to incorporate Congress' intent to promote air safety.[33] Because the DOT Secretary must assume, by statute, that the public interest entails acting in a way that best promotes safety, it is arguable that the DOT Secretary had both the power and a duty to suspend flights to the Lagos airport. However, this theory assumes that the suspension best promoted safety. Furthermore, it assumes that, in terms of the public interest, this factor stands alone or should be considered before any other public interest factors, including economic public interest factors.

This conclusion seems to gain support from an examination of 49 U.S.C. § 40101, where the public interest factors created by the Aviation Act, and which the DOT Secretary is mandated to consider when performing his or her duties under the Aviation Act, are outlined.[34] Under this section, all the public interest factors the DOT Secretary is mandated to consider are juxtaposed with one another.[35] Although Congress has recently re-codified this part of the Aviation Act, it did not substantively change these public interest factors, nor the Aviation Act in general.[36] The re-codification makes it clear, however, which set of factors the DOT Secretary should consider in carrying out his or her duties given the situation or issue involved.[37] If the situation included economic issues, the DOT Secretary is required to maintain a policy reflecting one set of public interest factors.[38] If the situation involves safety issues, another, different, set of

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32. 49 U.S.C. 40101(d)(1) (1994); *See* United States v. S.A Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 821 (1984)(holding that the FAA "has a statutory duty to promote safety in air transportation, not to insure it.")

33. *See* Hill v. National Transp. Safety Bd., 886 F.2d 1275 (10th Cir. 1989).

34. 49 U.S.C. § 40101(1994); the Aviation Act was re-codified by Congress on July 5, 1994 by Public Law 103-272, 108 Stat. 745.

35. *Id.*

36. Revision of Title 49, Transportation, United States Code, P.L. 103-272, 108 Stat. 745 at §1(a), where certain laws are "revised, codified, and enacted . . . without substantive change"; *See*, S. Rep. 103-265, 103rd Cong., 2nd Sess. 1994, 1994 WL 261999 (Leg. Hist.) at 1.

37. *See* H.R. Rep. 103-180 at 257; 1994 U.S.C.C.A.N. 1074 (indicating that the factors listed under 49 U.S.C. §40101(a) were only to be considered when the DOT Secretary acted on economic issues. Also, this legislative history indicates that the factors outlined under 49 U.S.C. § 40101(c) and (d) were only to be considered by the DOT Secretary when determining issues of safety).

38. *Id.*

factors is then used by the DOT Secretary to determine the interests of the public.

b. *The DOT Secretary Should Consider the Economic as Well as The Safety Interests of the Public*

The public interest factors the DOT Secretary is required to consider when carrying out his or her duties with respect to the economic aspects of air commerce include:

> assigning and maintaining safety as the highest priority in air commerce,[39] preventing any deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of the Congress to further the highest degree of safety in air transportation and air commerce,[40] the availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination, or unfair or deceptive practices,[41] placing maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system; and (B) to encourage efficient and well-managed carriers to earn adequate profits and attract capital, considering any material differences between interstate air transportation and foreign air transportation,[42] encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry[43] [and] strengthening the competitive position of air carriers to at least ensure equality with foreign air carriers, including the attainment of the opportunity for air carriers to maintain and increase their profitability in foreign air transportation.[44]

An overview of some of these economic-based factors indicates that although safety in air commerce must be considered, other factors demand attention. The aforementioned factors, therefore, recognize the public's interest in considering safety as well as economic matters when regulating

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39. 49 U.S.C. § 40101(a)(1) (1994).
40. *Id.* § 40101 (a)(3).
41. *Id.* § 40101(a)(4).
42. *Id.* § 40101(a)(6).
43. *Id.* § 40101(a)(13).
44. *Id.* § 40101(a)(15).

air commerce. Yet, Congress outlines an entirely separate set of factors the DOT Secretary must consider as being in the public interest when safety issues present themselves.[45] These safety factors give no consideration to the public's interest in competitiveness, profitability, or affect on air transportation markets, all of which determine the quality and price of air service, among other things. By outlining the public interest factors in such a way that separates what the DOT Secretary should consider as being in the public interest, depending on whether the situation involves economic or safety issues, Congress failed to realize and account for the fact that safety *and* economy are issues present in nearly all air transportation decisions. The flight suspension to the Lagos airport, is no exception. It too involves issues of safety that call for action in the public interest which is inconsistent with the public's interest in low-cost, convenient international air travel. Because of this, the DOT Secretary cannot conclude that he or she truly acts in the public interest when only considering those factors outlined by Congress that solely apply to safety in air travel. Instead, any determination of the public interest must include equal consideration of the public's interest in economic issues related to air transportation.

Before the Airline Deregulation Act of 1978 [hereinafter called the Deregulation Act] amended the Aviation Act by terminating the Civil Aeronautics Board (CAB) (the FAA's predecessor),[46] the delegation of duties and regulation-making authority were much broader and allowed the CAB wide discretion. Specifically, the Aviation Act's original public interest factors allowed the CAB a broad range of policies, many of them protectionist and anti-competitive in nature.[47] Furthermore, the public interest factors used in determining economic situations were broad and over-reaching.[48] The Deregulation Act modified these factors to accurately reflect the public's interest by allowing competition and other market forces to determine the regulation of aviation domestically and internationally.[49] These modified factors outlined at 49 U.S.C. §40101(a) specifically direct the DOT Secretary to stress competition, variety, and otherwise encourage the development of international transportation.

Therefore, the Deregulation Act first allowed market forces to determine the direction and amount of governmental intervention in the aviation industry and internalized the factors that the DOT Secretary supposedly considers when acting in the public interest, at least with respect to

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45. *See Id.* § 40101(d).

46. S. REP. NO. 329, 96th Cong., 1st Sess. 1979, 1980. The CAB has been replaced by the FAA.

47. H.R. REP. NO. 95–1211, 95th Cong., 2nd Sess., (1978).

48. *Id.*

49. *Id.*

economic situations. Because market forces predicate the need for unhindered competition in any industrialized nation, when the DOT Secretary is confronted with a situation that involves not only safety issues, but issues of economy, the DOT Secretary should have a duty to weigh economic public interest factors as well. Only by doing so can the DOT Secretary gauge clearly and accurately the true public interest with regard to situations like the security at the Lagos airport.

Even if the DOT Secretary could analyze the public interest factors in such a way, one could still argue that since the economic public interest factors also mandate the DOT Secretary to consider passenger safety when making decisions,[50] those factors should subordinate the other factors listed in that subsection.[51] A plain-language analysis of these factors, however, suggests otherwise. Consider the factor mandating the DOT Secretary to include safety as the highest priority in air commerce.[52] Although Congress determined that safety should be the public's highest priority and interest, this does not mean that after the DOT Secretary considers all public interest factors, including the economic reality of the situation, the public interest in airport safety would mandate flight suspension to the Lagos airport. That is, the aggregate of the other factors which stress competition in a deregulated marketplace, could mandate that flights not be suspended, even in light of the fact that safety is the public's highest priority. This would be true especially if the demand to travel to a certain destination was great and there existed a reasonable public expectation of relatively inexpensive passage to such a destination.

This argument would be consistent with the flight suspension to the Lagos airport, since ATA alone had to deny passage via its airline to over 3,000 people.[53] Many of these passengers incurred greater expense as they traveled to the Lagos airport indirectly and circumvented the DOT Secretary's flight suspension.

2. *Conclusion With Respect to the Federal Aviation Act's Purposes, Policy Statements and Public Interest Factors*

The Lagos airport flight suspension situation indicates that safety does

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50. *See supra* text accompanying notes 37-38.

51. *See supra* text accompanying notes 39-44.

52. *See id.*

53. The author learned this through personal interviews with several ATA ticketing agents at ATA headquarters in Indianapolis, Ind. (Oct.-Nov. 1993), and through a telephone interview with general counsel for ATA at ATA Headquarters in Indianapolis, Ind.(Oct. 1994).

not encompass the totality of what is deemed to be in the public interest. Passengers originally denied direct passage to Lagos by the DOT Secretary's order simply changed their itinerary and flew there indirectly along a route that the DOT Secretary had no authority to regulate. Such public action is clear evidence that the DOT Secretary should not be limited to a certain set of factors when determining the public interest in a situation involving safety and another set of factors to determine that interest if the situation is economic. This is true especially when the situation involves both kind of issues, such as the flight suspension to the Lagos airport. By suspending flights to the Lagos airport, the DOT Secretary caused U.S. carriers to incur substantial losses, while those air carriers' foreign competition benefited. Also, the affected travelers incurred additional expenses in completing their indirect travel to that airport. Most importantly, the legal processes in place which allowed the DOT Secretary to effectuate these flight suspensions did not keep air passengers from the risks present at that airport because they were able to get around the flight suspension. Hence, the DOT Secretary must be guided by factors that consider the public interest more realistically, interests that are personified by the Lagos airport flight suspension situation.

These points indicate that the method used by the DOT Secretary in determining the public interest, for the purpose of carrying out his or her duties with respect to international airport security, need modification. This conclusion is bolstered by the fact that the DOT Secretary's suspension of flights did not achieve its public goal with respect to the Lagos, Nigeria flight suspensions, which was to keep the flying public away from the Lagos airport. An examination of The Foreign Airport Security Act sheds additional light on the suspect prudence of the Secretary's suspension decision. It lends further insight as to the modification of procedures for determining the public interest when the DOT Secretary exercises flight suspension authority with respect to security-deficient foreign airports.

B. *The Foreign Airport Security Act*[54]

The Security Act, signed into law on August 8, 1985, outlines the DOT Secretary's direct, technical authority for suspending U.S. and foreign air carrier flights operating directly between the United States and a foreign country's security–deficient airport. This Act gave the DOT Secretary the specific authority and procedures for suspending flights between the United

54. Foreign Airport Security Act, Pub. L. No. 99–83, §§ 551–559, 99 Stat. 190, 222 (1985). (signed into law as a section of the International Security and Development Cooperation act of 1985, Pub. L. No. 99–83) amending §1115 of the Federal Aviation Act of 1958, 49 U.S.C. App. §1515, repealed; re-codified at 49 U.S.C. §44907 (1994)).

States and Lagos, Nigeria. The Security Act expanded the DOT and FAA's role in foreign airport security as it attempted to respond to the growing number of terrorist attacks levied against the United States and its citizens. Impetus for formulation of such legislation occurred mainly as a result of the Trans World Airlines (TWA) flight 847 hijacking in Athens, Greece.[55] Before implementation of the Security Act, no legal mechanisms existed within the U. S. Government for identifying foreign international airports posing a substantial security risk to air passengers. Also, no effective procedures existed for conveying a message to users of such dangerous facilities. Finally, no procedures were available for correcting the security problems and preventing future ones.[56]

1. *Requirements of the Security Act's Foreign Airport Assessment Program with Respect to the Lagos Flight Suspensions*[57]

a. *Assessments*

The Security Act directs the DOT Secretary to assess, "At intervals the . . . [DOT Secretary] . . . considers necessary, . . . the effectiveness of the security measures maintained at; (A) a foreign airport; (i) served by an air carrier; (ii) from which a foreign air carrier serves the United States; or (iii) that poses a high risk of introducing danger to international air travel; . . ."[58] The Secretary delegates responsibility for security

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55. Douglas B. Feaver, *TWA Sees No Collusion By Athens Security Staff Guns, Grenades Brought Aboard Jet,* WASH. POST, June 18, 1985, at A10; *See also* International Security and Development Cooperation Act, § 558 (citing Congress' express celebration of the hostage release, individual praise for the bravery of the Captain and flight crew, and condolences to the family of the Navy Petty officer who was killed during the altercation).

56. *International Terrorism: 1985 Hearings and Markup on H.R. 2822 Before the Committee on Foreign Affairs and its Subcommittees on Arms Control, International Security and Science and on International Operations,* House of Representatives, 99th Cong., 2d Sess. (1985).

57. Although the Aviation Act does not initiate any formal program by that name, it does prescribe several specific tasks for the FAA to carry out, and therefore, the General Accounting Office refers to these tasks and procedures as the "Foreign Airport Assessment Program." *See* General Accounting Office, RCED-89-45, *Aviation Security: FAA's Assessments of Foreign Airports* (1988); (hereinafter, GAO Report).

58. 49 U.S.C. § 44907(a)(1) (1994). The author attempted to obtain the results of the assessment conducted at the Murtala Muhammed Airport (Lagos Airport), but has been denied access for security reasons. Furthermore, all mention of the flight suspension, whether through news release or otherwise, indicates that the Lagos airport was closed to U.S. traffic because it failed to maintain proper security standards. No reports indicate how

assessment to the FAA Office of Civil Aviation Security.[59]

Besides making these assessments, the Civil Aviation Security Office also must report to the Secretary of State any terrorist threat that exists at assessed airports in foreign countries and explain in detail whether that airport is operated under the "de facto" control of that country's government.[60] The Office must also report its findings to the Secretary of Transportation especially when, based on the FAA's assessment, a foreign airport does not maintain or administer effective security measures.[61] Finally, the Office must make an annual report to Congress giving a summary of the assessments conducted.[62]

b. *Notice*

The Security Act directs the DOT Secretary to notify the foreign government operating an airport assessed to be below international security standards that it is failing to maintain or administer effective security measures.[63] Included in this notification must be recommendations to cure the security breaches.[64] If the breaches are not remedied within ninety days of notification to that foreign government, the American public must be notified through all of the following: the Federal Register, mass media, a prominent public display of such notice in all U.S. airports offering regularly scheduled airline service to such an airport, and by the attachment of notices of the DOT Secretary's finding to the passenger tickets of all U.S. and foreign air carriers providing direct service between the U.S. and such airport.[65]

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the airport failed those standards. In an interview with the author, general counsel for ATA indicated that ATA had not been given the results of the FAA assessment, either.

59. GAO Report, *supra* note 57, at 2.

60. *Id.*; 49 U.S.C. § 44907(b).

61. GAO Report, *supra* note 57, at 2.

62. 49 U.S.C. §44907(a)(3). The FAA is required to submit such reports no later than December 31, 1991 of each year, pursuant to 49 U.S.C. §44938(b). At the time of this writing the FAA's latest report to Congress has not been made available. Even if such a report was available to the public, the DOT and FAA are permitted, pursuant to 49 U.S.C. 44938(b), to submit the report as classified. Therefore, it would be highly unlikely that any member of the public, could view the FAA's assessment or exact assessment procedures used at the Lagos airport. Further, if such information was made public, the FAA would, in effect, be publicizing to the world, including terrorists, the security-deficient aspects of a given airport.

63. *Id.* § 44907(c).

64. GAO Report, *supra* note 57, at 2.

65. 49 U.S.C. § 44907(d).

If, after consultation with the Secretary of State, the DOT Secretary determines that "a condition exists that threatens the safety or security of passengers, aircraft, or crew traveling to or from the airport," the Secretary need not wait ninety days before executing the notice procedures described above or the sanctions described below.[66] However, the government of the country operating the security-deficient airport still must be consulted with regard to the assessment results.

c. *Sanctions*

The Security Act provides for sanctions in the event a foreign government does not remedy a security-deficient airport in its territory or the airport is not under the legitimate government's control. Such sanctions take the form of flight suspensions in two ways. First, the DOT Secretary is given the power to "withhold, revoke, or prescribe conditions on the operating authority of an air carrier or foreign air carrier that uses that airport to provide foreign air transportation."[67] Conditions limiting this power are: (1) the DOT Secretary must consult with the appropriate aeronautical authorities of the foreign country; (2) the DOT Secretary must consult with each air carrier serving such airport; and 3) the decision must have been approved by the Secretary of State.[68]

The Security Act, does not specify exactly what is meant by the consultation or what issues are to be covered in such a consultation.[69] Consultations are urged elsewhere by the Security Act, making it plausible that any such consultation with foreign governments should be of the same or similar nature.[70] Similarly, DOT Secretary consultation with air carriers

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66. *Id.* § 44907(d)(2)(A).

67. *Id.* § 44907(d)(1)(C).

68. *Id.*

69. For example, the consultation simply could entail the Secretary informing the foreign government of the determination that its airport is substandard, and therefore, the U.S. is no longer allowing aircraft originating in the U.S. to fly to the airport. Or it may be a discussion including the procedures that need to be taken to bring the facility up to par, and how the government might best go about doing it. Similarly the consultation with each air carrier is unclear as to the contents and purpose of any such discussion.

70. Specifically, 49 U.S.C. §44907(c) requires that after an assessment of a foreign airport is made by the FAA and the DOT Secretary determines that such a facility is substandard with respect to effective security measures, the Secretary "shall notify the appropriate authorities of the government of the foreign country of the decision, and recommend the steps necessary to bring the security measures in use at the airport up to the standard used by the Secretary of Transportation in making the assessment. "Considering that the spirit of the Security Act is one of safe and prosperous air travel, as opposed to being an

is urged in other parts of the Federal Aviation Act.[71] Therefore, the Security Act appears to suggest that the required consultation encompasses more than a formal or simple notification, but rather some sort of briefing with respect to the situations, including any reasons for subsequent action.

Second, the DOT Secretary has the authority to suspend air service of any U.S. carrier or foreign air carrier between the U.S. and the substandard security foreign airport *immediately*, "with the approval of the Secretary of State and without notice or a hearing," provided that certain conditions are met.[72] These conditions include (1) an existing situation "that threatens the safety or security of passengers, aircraft, or crew traveling to or from . . . [a foreign] . . . airport," and (2)" the *public interest* requires an immediate suspension of transportation between the United States and that airport." (*emphasis added*).[73]

2. *Analysis of the DOT Secretary's Authority to Suspend Fights to the Lagos Airport*

a. *After Assessment and Consultation*

There seems to be little difference between the two ways in which the DOT Secretary may suspend international flights to security-deficient airports. However, important differences exist. Under the Security Act, the DOT Secretary may suspend air carrier authority to operate into security-deficient foreign airports after an FAA assessment has concluded that such an airport fails to adhere to airport security standards set out in Annex 17

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being an Act for the purpose of reprimanding or economically hindering actors in international air travel, an assumption can be made that the consultation with the foreign government required by § 44907(d)(1)(C) should be one of the same nature as required by §44907(c). Note however, that if the Secretary acts within §44907(d)(1)(C), the Secretary should already have notified or otherwise consulted with the foreign government with regards to the FAA assessment, under § 44907 (c). This is evidence that the "consultation required by §44907 (d)(1)(C), may indeed only encompass formal notification of U.S. intentions with regard to flights from the U.S. to that airport, and not necessarily a problem–solving consultation.

71. *See e.g.* 49 U.S.C. §40105(c) (1994) (where consultation with air carriers is required, ". . . to the maximum extent practicable . . ." in developing and implementing international aviation policy).

72. 49 U.S.C. §44907(e).

73. *Id.*

of the Chicago Convention.[74] Generally, these flight suspensions are allowed only after consultation with the government controlling the substandard airport, and only after DOT Secretary recommendations are made (through the FAA) regarding ways the deficiencies can be remedied.[75] Also, the DOT Secretary must wait ninety days to allow the foreign government time to bring the deficient airport up to international standards before " withhold[ing], revok[ing], or prescrib[ing] conditions on the operating authority of an air carrier or foreign air carrier that uses that airport to provide foreign air transportation."[76] The only exception to the ninety day rule presents itself if a condition exists where the safety or security of passengers, aircraft, or crew traveling to or from such an airport is certainly compromised.[77] If such an imminently dangerous condition exists, the DOT Secretary may immediately withhold, revoke, or otherwise impose conditions on the U.S. and foreign air carriers that operate flights directly between the United States and the foreign airport.[78] However, even if a condition exists that relieves the DOT Secretary's duty to wait ninety days, consultation with the foreign government, nonetheless, is still mandatory and an assessment must be completed.[79]

b. *Without Assessment and Consultation*

The DOT Secretary, in certain circumstances, has much broader flight suspension authority. Under the Security Act, the Secretary may suspend the right of a U.S. or foreign air carrier to engage in foreign air transportation between the U.S. and that foreign airport, regardless of whether the FAA assessed the foreign facility, when certain conditions exist.[80] Also, no consultation with the foreign government is required, nor does the DOT Secretary need to provide any recommendations to the foreign government, when these conditions exist.[81] The DOT Secretary's authority to execute

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74. 49 U.S.C. § 44907(a)(2)(C) requires that the FAA use "a standard that will result in an analysis of the security measures at the airport based at least on the standards and appropriate recommended practices contained in Annex 17 to the Convention on International Civil Aviation . . . ." Annex 17 outlines minimum international airport security standards. These standards must be adhered to by all countries who are a party to the Agreement. Nigeria is a party to this agreement.

75. *Id.* § 44907 (a)(2)(A),(c).

76. *Id.* § 44907 (d)(2)(A)(i), (d)(1)(C).

77. *Id.* § 44907 (d)(2)(A)(ii).

78. *Id.*

79. *Id.* § 44907 (c).

80. *Id.* § 44907 (e); *See supra* text accompanying notes 72-73.

81. *Id.*

such suspensions, however, is still subject to the consultation with and approval of the Secretary of State.[82] No waiting period is required, either ninety days or otherwise, as the Secretary's suspension authority is immediate when there is an existing life threatening condition, or the public interest requires such action.[83]

c. *Authority Beyond That of the DOT Secretary Under The Security Act*

The Security Act allows the U.S. President even broader flight suspension authority than the DOT Secretary regarding air travel between the United States and security-deficient foreign airports. Specifically, the Security Act allows the President to prohibit air carriers and foreign air carriers from providing service between the United States and any other foreign airport that is directly *or indirectly* served by aircraft flying to or from the foreign security-deficient airport.[84] Note that this Presidential authority acknowledges and closes the 'loophole' that passengers use to circumvent the DOT Secretary's suspension order with regard to flights between the United States and Lagos, Nigeria. Under this authority, for example, flights to other foreign airports that serve air carriers which in turn serve the Lagos airport would be off limits to any international air carriers leaving the United States. Thus, ATA's passengers who were affected by the DOT Secretary's flight suspension could not have traveled to the Lagos airport via another international airport, e.g. London's Heathrow, if the President ordered the flight suspension. Because of the strong political effect such action would cause, however,[85] the President's flight suspension authority has not been exercised under the Security Act.

3. *The Security Act and the Lagos Flight Suspensions*

Considering the facts surrounding the DOT Secretary's flight suspensions to Lagos, it is clear that the DOT Secretary acted under the lesser authority of the Security Act.[86] That is, the FAA conducted a formal assessment in September 1992.[87] At that time the FAA found that the

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82. *Id.*

83. *Id.*

84. 49 U.S.C. §44907(d)(1)(D).

85. For example, such a flight suspension might violate clauses of the various Bilateral Air Transport Agreements; *See supra* text accompanying notes 13-26.

86. Aviation Proceedings Notice 92-20, 57 Fed. Reg. 47367–01 (1992); 49 U.S.C. §44907(a)-(d).

87. U.S. Department of Transportation News Release, *supra* note 3, at 1.

security measures used at the Lagos airport did not meet the standards established by Annex 17 of the Chicago Convention.[88] After this assessment, the DOT Secretary accordingly confirmed that the Lagos airport did "not maintain and administer effective security measures."[89] The DOT Secretary also found that conditions existed which presented a danger to passengers, aircraft, and crews at the Lagos airport.[90] This meant that the DOT Secretary did not have to wait ninety days before exercising his flight suspension authority.[91] However, in this situation, the DOT Secretary chose not to exercise the suspension authority immediately, but required U.S. and foreign air carriers to subscribe to the publication requirements notifying all passengers of the deficient security at the Lagos airport.[92]

In accordance with prescribed procedures, the DOT Secretary published a notice regarding the FAA's security assessment of the Lagos airport in the Federal Register, presumably displayed these findings prominently in all U.S. airports regularly being served by scheduled air carrier operations,[93] and alerted the news media.[94] In addition, the Secretary ordered that all U.S. and foreign air carriers serving the Lagos airport directly via the United States serve written notice to any passengers buying tickets to the Lagos airport of the Secretary's findings and determinations regarding the sub-standard safety environment of the Lagos airport.[95]

Finally, the DOT Secretary presumably notified the Nigerian government regarding the FAA's assessment results, and, since October 8, 1992, "the Federal Aviation Administration has provided substantial technical assistance to the Nigerian government to help it improve the airport's security."[96]

V. EFFECT OF DOT AUTHORITY ON THE ATA–LAGOS SITUATION

By analyzing the authority given to the DOT Secretary with respect to international aviation and discussing how it applied to the ATA–Lagos

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88. *Id.*

89. Aviation Proceedings Notice 92–20, *supra* note 86, at 1.

90. *Id.*

91. *See supra* text accompanying notes 74-79.

92. Aviation Proceedings Notice 92-20, *supra* note 86, at 1.

93. A warning is prominently displayed in several places at the Indianapolis International Airport, Indianapolis, Ind.

94. *U.S. Suspends Flights to Nigeria*, S.F. CHRON., Aug. 12, 1993, at A11; 49 U.S.C. §44907(d). In executing these procedures the DOT Secretary acted pursuant to §1115 (e)(2)(A) of the Security Act, now repealed and recodified.

95. Aviation Proceedings Notice 92-20, *supra* note 86, at 1; 49 U.S.C. §44907(d)(1)(B).

96. 49 U.S.C. §44907(c); U.S. Department of Transportation News Release, *supra* note 3, at 1.

situation, several issues present themselves in light of the two general problems caused by the current federal law (outlined earlier). These include (1) the appropriateness of the DOT Secretary's authority under the Security Act, especially considering the DOT Secretary's duty to act in the public interest; (2) the misuse of the Security Act as a political tool instead of a public safety tool; and (3) the Security Act's simple inability to successfully prohibit travel to allegedly unsafe airports.

A. *The Security Act and the Public Interest*

The DOT did not detail to the public how the Lagos airport failed to adhere to Annex 17 of the Chicago Convention.[97] However, this refusal to give detail was most likely motivated by the very real possibility that exposing such information could cause a major crisis in the form of a terrorist attack or similar tragedy.[98] At any rate, without such information, it remains difficult to analyze whether the DOT Secretary had grounds for exercising the authority to discontinue the operations of U.S. and foreign air carriers between the United States and Lagos.

What should be clear from the ATA-Lagos airport situation, however, is the fact that the Security Act vests in the DOT and State Secretaries the power to suspend U.S. air carrier and foreign air carrier flights between the United States and a given airport even though the act of suspension may not necessarily, or likely, keep travelers safe. At the same time, the flight suspension effectively gives American air carrier business away to foreign competitors. Under certain circumstances, actions may be taken without regard to whether the FAA assessed the foreign airport for security deficiencies.[99] Also, these actions with respect to a foreign airport that have not been assessed by the FAA may be taken immediately, especially if the DOT Secretary determines, in his discretion, that public interest mandates immediate action.[100]

The DOT Secretary is required to consider the factors that the Federal Aviation Act mandates to be taken into account when determining the public interest.[101] Where no security assessment has taken place,[102] however,

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97. *U.S. Suspends Flights to Nigeria, supra* note 94.

98. *See e.g.* GAO Report, *supra* note 57 at 1; The GAO did not even relinquish the names of the airports where the FAA had done assessments, nor the specific results of such reports, to the Honorable Cardiss Collins, Chairwoman of the Subcommittee on Government Activities and Transportation, Committee on Government Operations, House of Representatives.

99. *See* 49 U.S.C. §44907(e).

100. *Id.*

101. *See supra* text accompanying notes 27-53.

the DOT Secretary cannot (1) determine if a condition exists which truly threatens the safety of passengers, aircraft and crew *with respect to airport security*, and (2) should not act where safety is declared to be the most important factor.

Without an FAA assessment of a foreign airport, there is no other accurate way to gauge the safety of a foreign airport, or the amount and likelihood of risk to passengers, aircraft, and crew. The need for an assessment is especially acute when a foreign airport faces a situation (such as a terrorist factor) that could test its security processes. Without this assessment the DOT Secretary may be left to make suspension decisions using information not specifically dealing with the airport's security measures.

B. *Abuse of the Foreign Airport Security Act*

Cases in which a foreign country may be experiencing political strife present particular problems. For example, assume that regularly scheduled air carriers from the United States and the foreign country both offer air service between the United States and an airport in that country. Assume further that the FAA has not conducted a recent assessment to determine whether the airport meets international safety standards. Political strife might be a factor to consider in determining the safety of the international travelers at that airport. In fact, the Security Act mandates that when assessing foreign airports, in addition to on-site observations of the facility, the DOT Secretary must consult with the Secretary of State to determine whether such an airport is under the "de facto control" of the country in which it is located.[103]

When the DOT Secretary acts pursuant to that part of the Security Act codified at 49 U.S.C. § 44907(e), the DOT Secretary must still acquire the approval of the Secretary of State, even though no airport security assessment need be executed. The Security Act, however, does not specify what the consultation must contain or in what detail it must be composed. In contrast, when the DOT Secretary suspends flights to a given country's security-deficient airport under the part of the Security Act codified at 49

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102. Although the FAA in fact conducted a security assessment of the Murtala Muhammed International Airport in Lagos, Nigeria, discussion of the DOT Secretary's wide discretion and broad authority under the part of the Security Act codified at 49 U.S.C. §44907(e) further illuminates the Aviation Act's shortcomings with respect to its purpose of safeguarding international travel. Because this Comment details the Security Act, a discussion of this section of the Security Act is warranted.

103. 49 U.S.C. §44907(b).

U.S.C. § 44907(d)(1)(c), and after an FAA assessment, the DOT Secretary consults the U.S. Secretary of State to determine whether that country's recognized government had control over the airport. There is little question under this part of the Security Act that the required consultation should be undertaken in the spirit of foreign airport security, and should center around the FAA security assessment.

The part of the Security Act codified at 49 U.S.C. §44907(e), however, does not specify what the consultation with the Secretary of State should concern, even though it allows the DOT Secretary to immediately suspend flights to a foreign airport as soon as the Secretary of State grants approval. In effect, this means that the "consultation" could consist of non-airport security matters. Even if the consultation involves the welfare of U.S. citizens, the DOT Secretary is acting ultra vires of the Security Act, if a consultation on a given airport does not focus on its security.

If the DOT Secretary consults with the Secretary of State and then chooses to suspend flights, the decisive act is still beyond the scope of the Security Act if the airport in question had consistently maintained its security at or above international security standards and political strife motivated the decision. Therefore, this part of the Security Act gives the DOT Secretary something akin to an emergency power, along with wide discretion to apply it. This discretion includes the power to suspend direct flights even without an assessment of the airport in question. The DOT Secretary, upon consultation with, and affirmation from, the Secretary of State, can suspend flights indefinitely. As long as the DOT Secretary believes that a condition exists which threatens the safety of passengers, as well as aircraft and crew, and that the condition creates a situation in which the public interest demands flight suspension, this severe administrative action would be deemed appropriate under the Security Act.

Notice that such discretion can be used politically, instead of truly safeguarding the well-being of passengers and airport personnel alike. For instance, if political strife ignited in a country, and the conflict ran counter to the interests of the U.S. government, the DOT Secretary could capriciously suspend flights into any or all the airports of that country in surreptitious response to the political nature of the strife, regardless of whether there was any evidence concerning a potential security breach resulting from the strife.

C. *Politics Involved With the ATA–Lagos Situation?*

In a country such as Nigeria, which has very few airports that can accommodate international air traffic, cutting off flights to and from the United States could deal that country a devastating economic blow. It is conceivable that the resultant economic hardship could, if only indirectly,

cost the proponents of a popular political movement success. Obviously, in this light the Security Act can be a powerful political tool, limiting international access to such a country. Note also that by having the DOT Secretary suspend flights under a safety ruse, the U.S. Government, and particularly the U.S. President, does not have to engage in an international debate about economic sanctions or otherwise incur criticism for sanctioning a country because of disapproval of its government or dissident activities.

D. *Politics in Nigeria*

Though she is Africa's leading actor on the global stage, Nigeria presently finds herself teetering on the edge of a national political breakdown. In June of 1993, the Nigerian military annulled the result of the presidential elections, the first elections held in ten years.[104] Nigeria's new controlling military regime has been condemned both outside and within Africa for detaining human rights activists and banning newspapers that criticize the government.[105] As Africa's most populous and industrial nation, Nigeria looked forward to being chosen as the African continent's leading choice to fill a permanent seat on the United Nations Security Council.[106] However, "for Nigeria to have more claim to the seat than South Africa, there is the need to show more positiveness about the new world order, which is predicated on democracy."[107] The recent hindering of elections and banishment of the country's free press flies directly in the face of the democracy-based new world order. Consequently, this has caused major players in the new world order and Nigeria's traditional allies, the United States and Great Britain, to invoke sanctions against the un-elected Nigerian military government.[108]

Some observers and reporters believe that the flight suspension by the DOT Secretary was entirely political and had nothing to do with the actual security standards at the Lagos airport. The Detroit Free Press reported that the U.S. "invoked sanctions against [the Nigerian military] government . . . [which] included discontinuance of military training and supplies to Nigeria . . . [and the suspension of] commercial flights to and from Nigeria and reduced the number of visas being issued to Nigerians."[109] The day the

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104. Remer Tyson, *Nigerians see Nation in Retreat: Once Powerful Country Suffers Great Anxiety*, DET. FREE PRESS, Aug. 21, 1993 at 4A.

105. *Id.*

106. *Id.*

107. *Id.* (quoting Dr. Bola Akinterinwa, a senior research fellow at the Nigerian Institute of International Affairs, Lagos, Nigeria).

108. *Id.*

109. *Id.*

DOT released news of the suspensions, the San Francisco Chronicle reported that "the action has been under consideration since September because of unspecified security problems . . . [and that] . . . Nigeria is on the eve of a nationwide protest against the military dictatorship's refusal to relinquish power."[110]

It can be argued that the political uprising Nigeria experienced in 1993 caused an unsafe condition at the airport because the airport could not demonstrate (to the satisfaction of the DOT Secretary) adequate safeguards protecting the flying public from terrorist attack. However, it is possible that the executive branch of the U.S. Government, in response to the political changes in Nigeria, employed the Security Act to impose a political sanction by cutting its traffic to and from the United States under the guise of deficient airport security. If so, the DOT Secretary and the U.S. Government abused its authority under the Security Act.

VI. PRESIDENTIAL AUTHORITY UNDER THE SECURITY ACT

The DOT Secretary is not the only federal office given the power to affect foreign air commerce under the Security Act. As mentioned earlier the President has considerable authority to suspend flights to security-deficient foreign airports, including such operations as ATA's flights to Lagos. In fact, this Presidential authority is much broader and less discriminatory than the suspension powers of the DOT Secretary.

A. *Presidential Flight Suspension Authority*

Under the Security Act, the U.S. President has the power to close the loophole that allows indirect travel to security-deficient airports even though direct flights between foreign security-deficient facilities and the United States have been suspended. Under the Security Act, "the President may prohibit an air carrier or foreign air carrier from providing transportation between the United States and any other foreign airport which is directly or indirectly served by aircraft flying to or from the airport with respect to which the determination is made under this section."[111] According to the Security Act, however, this subsection only applies to airports that have already been assessed by the FAA.[112] Like the DOT Secretary's authority, Presidential prohibition can be enforced immediately if a condition exists

110. *U.S. Suspends Flights to Nigeria, supra* note 94.

111. 49 U.S.C. §44907(d)(1)(D).

112. *Id.* § 44907(c).

that threatens the safety of passengers, aircraft, or crew, but only if the FAA conducted an assessment first.[113]

B. *Flight Suspensions for Political Purposes and The Security Act*

Note that the Security Act grants the President the authority not only to suspend those flights that operate directly between the United States and a foreign security-deficient airport, but also flights serving other foreign airports known to accommodate air carriers that carry passengers to the security-deficient airport. However, this authority is only granted upon the condition that an FAA assessment is first carried out and a determination made that a security deficiency actually exists at that foreign airport.

The President has no authority to suspend flights that directly or indirectly serve a foreign airport when no assessment was done—even if the President finds that (1) a condition exists which affects the safety of passengers, aircraft, and crew and (2) the public interest might well be served by such a sweeping suspension. Therefore, the Foreign Airport Security Act was not meant to be used as a political tool, but instead, to be used with discretion, and only as it regards deficient foreign airport security practices indicated by FAA investigation and assessment. Furthermore, the fact that the President possesses such broad power provides a reasonable basis for concluding that the loophole allowing travelers to by-pass the flight suspension was known to Congress because Congress gave the President a specific way to close it.

C. *The Effect of Exercising Presidential Authority Under The Security Act*

The most obvious reason why the President retains sole authority to prohibit flights that indirectly service a security-deficient airport, while the DOT Secretary does not, concerns the effect of such power. This power is reserved for the President because of the enormous economic and political effect such a decision would have. By prohibiting even indirect flights from the United States to a security-deficient foreign airport, the President would be taking action akin to an international boycott.[114]

Recall the facts involved with the suspension of flights into the airport

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113. *Id.* § 44907(d)(1)(D).

114. *See* H.R. CONF. REP. NO. 237, 99th Cong., 1st Sess.(1985), 1985 U.S.C.C.A.N. 210, 1985 WL 47111, (describing the House Amendments to the Security Act before its passage. Here, such action by the President was described as a "general air carrier boycott with respect to such airports").

at Lagos. In that situation, passengers could still travel to Lagos via any number of foreign airlines and other foreign airports. In fact, ATA helped the passengers who were originally scheduled to fly to Lagos by booking alternate transportation routes via other foreign air carriers.[115] ATA flew many of these passengers to a gateway city, like New York City's John F. Kennedy International Airport, where the passengers then boarded foreign air carriers such as Swissair, Lufthansa, and British Airways bound for London's Heathrow Airport.[116] From London, passengers found passage to the Lagos airport on either the same or a different foreign carrier. However, if the U.S. President executed his authority under the Security Act, as described above,[117] he could have suspended all U.S. and foreign flights offering service between any point in the United States and London's Heathrow airport.

Such Presidential action, however, would probably have had catastrophic economic and political consequences.[118] First, the costs far outweigh the benefits that would be derived. In this era of interglobalism and international economics, cutting the lifelines between points in the United States and countries like Great Britain would paralyze international business and trade. Second, because authority for foreign air carrier operation in a given country is based on bilateral air transport agreements between the two countries and their airlines, and because these bilateral agreements generally operate on a basis of reciprocity, backlash from the affected countries would be imminent.

VII. CONCLUSIONS AND RECOMMENDATIONS

Highlighting the suspension of flights into Lagos' Murtala Muhammed Airport and analyzing the legal apparati providing the authority to effectuate that flight suspension exposes inadequacies regarding the United States Government's practice of international flight suspension. Specifically, through analysis of certain aspects of the Security Act, international flight suspension by the DOT Secretary (1) fails to keep the flying public away from security-deficient international airports; (2) hinders U.S. carrier competitiveness in international markets, especially small U.S. carriers such

115. The author learned this through personal interviews with several ATA ticketing agents at ATA headquarters in Indianapolis, Ind. (Oct.-Nov. 1993), and through a telephone interview with counsel for ATA at ATA Headquarters in Indianapolis, Ind.(Oct. 1994); *See supra* note 26.

116. *Id.*

117. *See also supra* text accompanying notes 84-85.

118. This Presidential power has never been invoked.

as ATA; and (3) grants a vague authority to the DOT Secretary that enables he or she to act without accurately gauging the public interest.

A. *Two Approaches*

Because the Security Act cannot safeguard a member of the flying public that intends to travel to a security-deficient airport unless the Presidential authority under the Security Act is invoked, and because the President's authority may never be invoked because of the political and economic backlash that would likely result, approaches should be taken either to (1) amend the Security Act and/or (2) continue the pursuit of total harmonization of international aviation standards, while focusing on international airport security standards as an integral component of such harmonization. Furthermore, the need for implementation of one or both of these approaches appears not only from the fact that the U.S. Government cannot effectively keep the flying public from traveling to security-deficient airports, but also due to the fact that acts of direct suspension are economically crippling to U.S. air carriers engaged in international air commerce.

1. *Amending The Security Act or Otherwise Curbing U.S. Government Authority to Suspend International Flights*

a. *Let the Market Rule*

It is possible to argue that as long as the Security Act effectively keeps one passenger from flying to a security-deficient foreign airport, thereby safeguarding that passenger's exposure to the associated dangers, the Security Act fulfills its purpose. This argument, however, fails to consider the costs resulting from taking such action. Costs include loss of revenues, hindrance of competitiveness, and the loss of personal benefits enjoyed by travelers when they may travel freely.

The Security Act should be fundamentally amended to alleviate this problem. The Security Act should not grant the DOT Secretary or the President authority to suspend flights due to foreign security-deficient airports. The DOT Secretary should, however, continue notifying the traveling public of the status of security-deficient airports and the concomitant risks. Ultimate decisions regarding flying to a security-deficient airport should be made by passengers, air carriers, and the air carrier's insurer. Government should assume only an advisory and persuasive role regarding flight suspension decisions due to a security-deficient foreign airport, unless there is a bona fide threat to national security. Although Congress may have had good intentions when it enacted the Security Act to combat

terrorist attacks against U.S. air carriers and citizens, the flight suspension to Lagos has demonstrated how these good intentions have actually caused adverse results. Because of the state of international aviation law, government intervention in the form of flight suspensions burdens U.S. domestic carriers more than it does their international competitors. The Security Act cannot prohibit U.S. passengers from utilizing foreign air carriers to reach a prohibited destination absent a Presidential decree,[119] so such loss in revenues is directly incurred by U.S. carriers.

Instead, the capitalist consumer market can better determine whether flights to security-deficient airports should be suspended. After receiving appropriately detailed information by the DOT Secretary in the manner outlined by the Security Act, a traveler can make an informed decision. Similarly, air carriers would be free to make a private suspension decision, weighing factors such as cost of insurance coverage, whether such insurance would cover such flights, and the opportunity cost of losing those passengers to other air carriers. The U.S. Government can best fulfill its role as protector by providing necessary information regarding the security status of foreign airports, while using diplomatic pressure to advance security interests.

b. *Suspending International Flights in a Less-Discriminatory Way*

Note that by deleting certain parts of the Security Act, U.S. Government flight suspension authority over security-deficient foreign airports would be eliminated. Other federal laws would continue to allow the U.S. government broader power in suspending international flights, generally. Flight suspension power would be broader where it allows flight suspension of more, if not all, foreign air carrier flights where the Security Act does not. By suspending *all* flights, the prejudice against domestic air carriers inherent in the Security Act would be precluded.

For example, The Aviation Act provides for the authority to suspend international flights for political reasons, including terrorist concerns. Section 1114 of the Aviation Act allows the President broad discretion in suspending the right of "an air carrier or foreign air carrier to provide foreign air transportation to and from that foreign country" that in any way arms, aids, or abets any terrorist organization within its jurisdiction.[120]

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119. As discussed *supra* such Presidential action would be unrealistic, unless there existed some kind of national security emergency, because of the international economic and political ramifications the United States would surely suffer. *See supra* text accompanying notes 111-118.

120. 49 U.S.C. §40106(b) (1994).

This suspension authority also applies to foreign air carriers that serve the targeted country and the United States, but which may not serve the United States and the targeted country directly.[121] That is, this section prohibits foreign air carriers who serve the United States from flying to a nation that maintains any kind of air link between itself and the terrorist-infested nation.[122]

Note that such authority closes the loophole that the Security Act allows: It prohibits a traveler from flying from the United States to an off-limits nation indirectly via a third nation. Recalling the ATA example, passengers would not be able to travel first to London and then negotiate passage via any number of airlines to the Lagos airport. Under the Presidential authority of § 1114, that traveler could not make it to Heathrow because all flights to that airport from the United States would be suspended on the basis that Great Britain would be a nation providing air passage to Nigeria.

Section 1114 of the Aviation Act has been used on several occasions to suspend flights between the United States and countries that are on the brink of war or suffering various kinds of political strife. For instance, President Bush exercised §1114 of the Aviation Act to block the execution of sales and other transactions between the United States and the Federal Republic of Yugoslavia in 1992.[123] The embargo included "any transaction by a U.S. person, or involving the use of U.S.-registered vessels and aircraft, relating to transportation to or from [Yugoslavia], the provision of transportation to or from the United States by any person in [Yugoslavia] . . . or aircraft registered in [Yugoslavia]."[124] Another example of the use of §1114 of the Aviation Act includes the prohibition of trade and certain transactions (including air carrier transactions) with Libya executed by President Reagan in 1986.[125]

2. *Harmonization of Law Regarding Foreign Airport Security*

Another approach, more complex and harder to implement, would be the harmonization of law regarding international airport security standards. International airport security standards are already harmonized to a great extent.[126] However, the procedures to be followed and the sanctions incurred when an international airport fails to meet those standards are not.

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121. *Id.* § 40106(1)(C).

122. *Id.*

123. Exec. Order No. 12,810, 57 Fed. Reg. 24, 347 (1992).

124. *Id.*

125. Exec. Order No. 12,543, 51 Fed. Reg. 875 (1986).

126. *See* The Chicago Convention, *supra* note 6, Annex 17, Chapters 2 and 3. Contracting states to the Chicago Convention, for example, all agree that their respective airports should at least meet the international standards set out in Annex 17.

The Chicago Convention, to date signed by 162 contracting states, provides a solid international basis for the harmonization of international aviation safety standards.[127] Relatively large steps have already been taken within the last decade by countries engaging in international air transportation to harmonize aviation regulations.[128] However, little harmonization has been accomplished with respect to either enforcement of airport security standards or to uniformity of sanctions for lax standards.[129]

If harmonization with regard to international airport security would be established, situations like the ineffective flight suspensions to Lagos would be eliminated. Upon the FAA/DOT finding that the Lagos airport fell below international security standards, all countries serving the Lagos Airport automatically would come to the same conclusion due to harmonized regulations and practices. Furthermore, all countries would take the same action: suspend direct flights to that security-deficient airport. Note, however, that such aviation law harmonization on an international scale, would, in a sense, contradict this Comment's aforementioned solution to the U.S.-enforced international flight suspension problem. This solution included keeping government out of the actual enforcement of suspension decisions, altogether, unless there existed a bona-fide national security emergency, at which time U.S.-enforced international flight suspension would apply to all air carriers, foreign as well as domestic.

But, this harmonization solution need not necessarily conflict with the notions of government non-interference and free-market rule. Alternatively, the international community could harmonize international aviation law in a way that prohibits government interference, except in an advisory capacity, and otherwise lets free-market forces determine which air carriers, if any, will fly to airports found by governments to be security-deficient. An international community whose aviation laws were harmonized in such a way would advise the flying public of the potentially dangerous situation at a given airport, but ultimately let individual carriers decide whether to continue offering flights to such destinations. Here, the foreign and

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127. *Memorandum on ICAO: The Story of The International Civil Aviation Organization,* ICAO Doc. 312031A, 1990 (on file with the author).

128. For example, the European Community formed the Joint Aviation Authorities (JAA) as a counterpart to the U.S.'s FAA. Since the inception of the JAA, numerous projects have been undertaken to harmonize the regulations of the U.S. with those of Europe, such as airworthiness standards for aircraft and design certification. Such harmonization insures that equipment that passes inspection in one country will pass inspection in the other country since the regulations are of the same caliber, and therefore, no re–inspection or certification is necessary before the equipment can be used in the latter country.

129. For a very detailed analysis of the FAA/JAA harmonization process, *See generally* Professor George A. Bermann, *Regulatory Cooperation with Counterpart Agencies Abroad: The FAA's Aircraft Certification Experience,* 24 LAW & POL'Y INT'L BUS. 669 (1993).

domestic air carriers (and their insurers) would decide whether to assume the risk of offering such service. Presumably, the market demand for such service would be the controlling factor. By allowing such freedom, the international air passenger would have better travel choices and services available rather than the hassle he or she is faced with presently as a result of the current federal law.

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RESTITUTION IN THE CZECH REPUBLIC: PROBLEMS AND PRAGUE-NOSIS

I. INTRODUCTION

After the Velvet Revolution in November 1989, the first freely elected government of Czechoslovakia decided that to implement a *free market* economy it was necessary to quickly transfer state-owned properties and enterprises into private hands.[1] The newly-elected political reformers believed that a free-market economy was based on private ownership of property, and they promptly began to explore means by which property could be shifted from state to private ownership.[2] The government saw the restitution of property to its original owners as a means not only to speed up the privatization process, but also a prerequisite for developing a free-market economy.[3] However, after implementing restitution laws, the government realized that these laws had quite the opposite effect. Although restitution laws initially slowed economic reform and privatization,[4] they in fact created a sense that some justice had been achieved[5] to compensate for the inexorable property confiscations and nationalization programs implemented by the communist Czechoslovak government.[6] The restitution laws also reintroduced the Czechs to concepts of private ownership and other market-oriented legal principles and practices.[7]

This Comment points out how these factors contributed to a newfound trust in Czech legal and democratic systems that has yielded increased economic growth and democratic reform. The Czechs will take more economic risks as they face fewer legal risks, and foreign investment should increase due to increased confidence in the Czech legal system. Although restitution laws initially slowed the privatization process, they should produce quicker reform and a more stable free-market economy and democracy for the Czechs.

Also analyzed are the effects of Czech restitution laws on the privatization process, and economic and democratic reform in the Czech Republic. This Comment is divided into four subject areas: (1) an historical account of how property and industry of the former Czechoslovakia was confiscated and

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1. Vojtech Cepl, *A Note on the Restitution of Property in Post-Communist Czechoslovakia*, 7 J. COMMUNIST STUDIES 367 (1991).

2. *Id.*

3. *Id.* at 368.

4. Diane Francis, *Who Owns What in Eastern Europe?*, FINANCIAL POST, Sept. 8, 1993, at 11, *available in* WESTLAW, INT-NEWS Database.

5. Deborah Scroggins, *Untangling Communism; Atlanta's Eastern European Émigrés Trying to Reclaim Ancestral Lands*, THE ATLANTA JOURNAL AND CONSTITUTION, Aug. 19, 1991, at A2.

6. *Czechs to Return Seized Property*, N.Y. TIMES, Feb. 26, 1991, at A10.

7. Cheryl W. Gray, *The Legal Framework for Private Sector Activity in the Czech and Slovak Federal Republic*, Working Papers, The World Bank, Introduction, Nov. 1992.

nationalized; (2) a summary of actual restitution and privatization laws; (3) how restitution laws initially retarded privatization, economic growth, and democratic reform; (4) why the restitution laws, even after causing a slow start to reform, will result in the Czech Republic being able to proceed with privatization and more stable economic and democratic reforms.

On January 1, 1993, the former Czechoslovakia split to become the Czech Republic and Slovakia.This Comment only covers the effects of restitution laws on the Czech Republic even though the laws were enacted under the government of the former Czechoslovakia. The reason for focusing solely on the Czech Republic is that the economy, political landscape, infrastructure, and geographic situation of the two newly-formed democracies differ, and the effects that these factors will have on the future of each country will not be the same.

II. HISTORICAL BACKGROUND

On October 28, 1918, in the aftermath of the First World War, Czechoslovakia became a modern nation state and enjoyed twenty years of relative peace and prosperity.[8] In 1938, in the face of Nazi expansion, Chamberlain, Daladier, Hitler, and Mussolini met in Munich and formulated the infamous Munich Agreement. This agreement allowed Hitler to annex the German speaking Sudetenland region of Czechoslovakia. Soon thereafter, the French and British informed Czechoslovakia that if they acted alone in resisting Hitler, such resistance would be considered a provocation of war.[9] Czechoslovakia remained compliant, and less than six months after the Munich agreement, Nazi troops marched on Prague.[10]

In 1944, with the end of the Second World War in sight, the leaders of the United States, Great Britain, and the Soviet Union met in Yalta to determine the fate of postwar Europe. Czechoslovakia was one of the dividing points. The leaders decided that the Soviets would liberate Prague; consequently, Czechoslovakia fell under the Soviet sphere of influence, which ultimately led to the 1948 communist takeover of Czechoslovakia.[11] From 1945 to 1948, the Czechoslovak (or Benes) government, acting within the scope of the 1920 Czechoslovak constitution, confiscated much of the land of the Sudeten Germans and Hungarian minority, who had collaborated or sympathized with the Nazis during the Second World War.[12] Many of the large industries

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8. R.W. Seton-Watson, A HISTORY OF THE CZECHS AND SLOVAKS 310 (1943).

9. A.H. Hermann, A HISTORY OF THE CZECHS 266 (1975).

10. Czechoslovakia: CROSSROADS AND CRISES 89 (Norman Stone and Eduard Strouhal eds., 1989).

11. Herman, *supra* note 9, at 268.

12. Cepl, *supra* note 1, at 69.

and businesses also were nationalized during these years.[13]

In February 1948, Soviet-backed communists took over Czechoslovakia[14] and started the mass confiscation of private property and nationalization of industry.[15] The final result of the Communist takeover was that Czechoslovakia endured the most intensive and comprehensive private property confiscation and business and industry nationalization of any of the Soviet bloc countries, excluding the Soviet Union. The communist government gave little or no consideration for confiscated property; "[s]eizures were often carried out illegally, even under the laws passed by the [c]ommunists. Owners of factories or farms were expelled from their houses on short notice, and sometimes sentenced at summary trials to hard labor, apparently for the sole crime of belonging to the 'enemy class.'"[16] Many of the other former Soviet bloc countries were able to maintain some level of private property and small businesses, whereas not even "mom-and-pop shops" remained in Czechoslovakia.[17] This extensive property and industry nationalization put Czechoslovakia at a severe disadvantage for reform in comparison to other former Soviet-bloc countries that broke free from communism in the revolutions of 1989.

III. THE PRIVATIZATION AND RESTITUTION LAWS

The Czech privatization plan has been controversial. Essentially, it is a three-step process. "The first step is the re-privatization [restitution] of shops and enterprises to their original owners; the second step is the privatization of small industries; and the final step will involve selling or breaking up the

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13. Jeffrey J. Renzulli, Comment, *Claims of U.S. Nationals Under the Restitution Laws of Czechoslovakia*, 15 B.C. INT'L & COMP. L. REV. 165, 166 (1992).

14. Stone and Strouhal *supra* note 10, at 162.

15. Renzulli, *supra* note 13, at 167.

16. *See supra* note 6, at A10. Deputy Prime Minister Pavel Rychetsky said in an interview, "Persecutions and confiscations were more intensive here than in neighboring countries, with the exception of the Soviet Union. There is greater moral awareness here about the appropriateness of returning property."

17. R.C. Longworth, *Czechoslovakia's Rush to Reform Becomes a Perilous Free-for-all*, CHICAGO TRIBUNE, Oct. 22, 1991, at 1C. "Unlike Poland or Hungary, Czechoslovakia had no private business - not even mom-and-pop shops - before the Communist government fell in 1989. Now the reform government wants to privatize businesses, big and small, and it wants to do it quickly."

large state conglomerates."[18] The supporters of this three step process envisioned a rapid privatization process that would radically transform the Czech economy similar to the Polish "shock treatment economics" program in 1989.[19] As one top governmental official remarked, "You can't understand the scope of the challenge and opportunity until you realize that here we don't own anything other than our toothbrushes."[20]

Three main restitution laws were enacted in the years immediately following the Velvet Revolution. These laws are as follows: (1) the Small Restitution Law, "Act on Relieving the Consequences of Certain Property Injuries", (2) the Large Restitution Law, "Extra-Judicial Act", and (3) the Land Law, "Adjustment of Ownership Rights of Land and Other Agricultural Property."[21] The speed of the privatization process depends upon how issues involving restitution are handled.[22] Czechoslovakia was the first former communist country to enact such a sweeping law on restitution of property that was either confiscated or nationalized by the former communist regime.[23] If the Czech Republic proves its sincerity about upholding property rights, foreigners may be encouraged to invest in or buy the remaining land and industry. Foreign investment is necessary to speed up the economic growth of this poor, formerly communist country.[24]

A. The Small Restitution Law

The Federal Assembly of the Czech and Slovak Federal Republic enacted the Law on the Mitigation of the Consequences of Certain Property Losses on October 2, 1990.[25] This law, also known as the

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18. Richard M. Phillips & Marian G. Dent, *Privatizing Eastern Europe: A Challenge for the Nineties*, PRACTICING LAW INSTITUTE, April 15-16, 1991, *available in* WESTLAW, JLR Database.

19. *Id.*

20. Richard S. Gruner, *Of Czechoslovakia and Ourselves: Essential Legal Supports for a Free Market Economy*, 15 HASTINGS INT'L & COMP. L. REV. 33 (1991).

21. Ivan Svitek et al., Investment 1992/93: A Current Guide to Business Laws, Regulations and Contracts in Czechoslovakia, 84-87 (Cara Morris & Mark Baker eds., 1992).

22. Michael L. Neff, Comment, *Eastern Europe's Policy of Restitution of Property in the 1990's*, 10 DICK. J. INT'L L. 357, 358 (1992).

23. *See supra* note 6, at A10.

24. Neff, *supra* note 22, at 370.

25. Law on the Mitigation of the Consequences of Certain Property Losses, of October 2, 1990, Law No. 403/1990 Coll. of Laws (Zakon o zmirnni nasledk nekterych majetkovych krivd) [hereinafter Small Restitution Law], 2 Central & Eastern European Legal Materials: Czechoslovakia, Privatization and Entrepreneurship, § 19 (Transnational Juris Publications, Inc., U.S., Graham & Trotman, U.K., Kluwer Academic Publishers, The Netherlands).

Small Restitution Law, went into effect on November 1, 1990. Claimants were given six months from this date to file a restitution claim.[26] This law applies to citizens who lost property pursuant to certain governmental regulations on nationalization enacted between 1955 and 1959.[27]

The Small Restitution Law limits restitution to the natural person or private legal entity from whom the government confiscated the property.[28] If the original owner is dead or declared to be dead, a rightful heir can claim the property.[29] The claimant bears the burden of demonstrating how and when the expropriation occurred and that he was the victim or victim's rightful heir.[30] If the claimant is a foreign national, he must prove that he had not previously settled his claim through an interstate property agreement.[31] This law does not apply to property acquired after October 1, 1990, and commercial companies and enterprises with foreign ownership participation are precluded

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26. *Id.* art. 19(1).

27. *Id.* art. 1. The specific governmental regulations are as follows:

> The law refers to the consequences of property losses caused to natural persons and private legal entities by the abrogation of ownership rights to real or movable property under governmental decree no. 15/1959 Coll. of laws on measures relating to certain property used by organizations in the socialist sector, under Law no. 71/1959 Coll. of laws on measures relating to certain private residential property, and through nationalization carried out on the basis of the decisions of certain ministries issued after 1955 and pertaining to the nationalization laws of 1948. Abrogation of ownership rights under this law is also understood to mean the transfer of ownership rights on the basis of a purchase contract pursuant to para. 1 and 2 of Art. 4 of government decree no. 15/1959 Sb.

28. *Id.* art. 2. These are the only governmental decrees under which a person is eligible for restitution under the small restitution law. *Id.*

29. *Id.* art. 3. (Eligible heirs, in order of entitlement, are a child, spouse, parent, or sibling of the original owner as well as testamentary heirs living at the time the law went into effect.)

30. *Id.* art. 3.

31. *Id.* art. 20. *See generally* Czechoslovakian Claims Settlement Act of 1981, Pub. L. No. 97-127, 95 Stat. 1675 (1981). *See also* note 13, at 174-77. The following is an example of such an agreement:

> In 1981, the two governments signed the U.S.-Czechoslovak Claims Settlement Agreement (Claims Agreement). Under the terms of the Claims Agreement, the U.S. government withdrew its objection to the release of 18,400 kilograms of gold belonging to Czechoslovakia which had been held since World War II by the Tripartite Commission for the Restitution of Monetary Gold. In return, the Communist government paid $81.5 million to the U.S. government in satisfaction of claims of nationals of the United States whose property rights in Czechoslovakia were impaired by nationalization measures in place from the end of World War II until 1981.

If a claim is settled under such an agreement, then the claim is ineligible for restitution. *Id.*

altogether.[32]

Upon written request from the "entitled person" (hereinafter *obligee*), an organization is obliged to complete the following: promptly restore the property to the obligee; with the obligee draw up an agreement on the restitution of the property; and upon the mutual settlement of claims, register the agreement with a notary public. If the organization fails to comply with any of these obligations, the obligee can seek satisfaction of his claims in court.[33]

Natural in kind restitution of the property in its present condition is normally awarded; however, pecuniary compensation is given by the state in some cases.[34] Cases where financial restitution is awarded include: (1) when the building was significantly improved or deteriorated, the owner receives the value of the original building and land;[35] (2) when the building was destroyed but nothing was built on the site, the owner receives the value of the land and building;[36] or (3) when the building was torn down and a new structure was erected, the owner receives the value of the original building and land.[37] If the claimant receives natural restitution he is not allowed to evict the persons currently occupying residential or non-residential premises. Legal regulations as to the use of apartments and subletting of non-residential premises shall also remain in force.[38]

B. The Large Restitution Law

The Federal Assembly of the Czech and Slovak Federal Republic enacted the Law on Extrajudicial Rehabilitation on February 21, 1991.[39] This law became effective on April, 1, 1991.[40] Claimants had six months from this date to file claims.[41] This law "concerns the redressing

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32. *See* Small Restitution Law, *supra* note 25, art. 4.

33. *Id.* art. 5.

34. *Id.* art. 10(1), (2).

35. *Id.* art. 10(3).

36. *Id.* art. 14(1).

37. *Id.* art. 14(1).

38. *Id.* art. 12.

39. Law on Extrajudicial Rehabilitation, of February 21, 1991 Law No. 87/1991 Coll. of Laws (Zakon o mimosoudnich rehabilitacich) [hereinafter Large Restitution Law], 2 Central & Eastern European Legal Materials: Czechoslovakia, Privatization and Entrepreneurship, § 21, (Transnational Juris Publications, Inc., U.S., Graham & Trotman, U.K., Kluwer Academic Publishers, The Netherlands).

40. *Id.* § 35.

41. Svitek, *supra* note 21, at 85.

of the results of certain property and other injustices arising from legal actions and rulings in both the civil and labor legal spheres...." Compensable injustices must have arisen between February 25, 1948 and January 1, 1990.[42] Some of these "other injustices" include people who were imprisoned, served in labor camps, had their jobs taken away from them illegally, or were not permitted to complete their education.[43] This law does not apply to property that was nationalized between 1945 and 1948 under the Benes government. Therefore, Sudeten Germans and ethnic Hungarians who collaborated with the Nazis are not eligible for restitution for any property that was confiscated during this time period. A large portion of industrial and church property that was nationalized during these postwar years is also ineligible for restitution under this law.[44]

The Large Restitution Law also encompasses the restitution claims of foreign nationals. In order to prevent émigrés from bringing claims and not making any use of the property they received, the obligee must be a physical person having his citizenship and place of permanent residence in the Czech and Slovak Federal Republic.[45] If the person who was dispossessed of property by the state is dead (or is proclaimed dead), his property can be claimed by a rightful heir, provided that the heir is a citizen of and has his place of permanent residence in the Czech and Slovak Federal Republic.[46] Émigrés from Czechoslovakia who had become foreign nationals could bring a restitution claim only if they returned to Czechoslovakia and reclaimed Czechoslovak citizenship and permanent residence in Czechoslovakia.[47] This restitution law precludes foreign nationals or Czechoslovak citizens who permanently reside abroad from bringing claims of restitution.[48] In the Large

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42. *See* Large Restitution Law, *supra* note 39, § 1.

43. *Id.* §§ 14(2), 16, 17, 18.

44. *Id.*

45. *Id.* § 3(1).

46. *Id.* § 3(2) (Eligible heirs, in order of entitlement, are a child, spouse, parent, or sibling of the original owner.)

47. *Id.*

48. Renzulli, *supra* note 13, at 166-67. The 1928 U.S. - Czech Treaty on Naturalization is an example of how foreign nationals could qualify for restitution under this law.

> On July 16, 1928, the United States and Czechoslovakia signed a treaty covering naturalization issues (Treaty on Naturalization). The Czechoslovak government entered into the Treaty on Naturalization in order to inter alia, prevent its nationals from temporarily emigrating to the United States in order to avoid military duty. The Treaty on Naturalization has assumed importance today, however, because the recently-adopted Czechoslovak restitution program allows Czechoslovak nationals who emigrated to return

Restitution Law, there is no equivalent to article 20 of the Small Restitution Law, which states that foreign nationals who have settled their claims according to an interstate property agreement are not eligible for restitution.[49]

Also, the Large Restitution Law imposes many duties and obligations on parties involved in the restitution of property. The "obliged person" (hereinafter *obligor*) is the state or legal person in possession of the property sought by the obligee. Assets held by private corporations or joint ventures not obtained from a legal person on or after October 1, 1990, were not restored. Property held by foreign states was not restored either.[50] The obligor was required to relinquish an article at the written request of the obligee and upon a showing of his right to transfer of the article and demonstration of the manner in which it became property of the state. The claimant was required to assert his claim within six months from the law's effective date or the right lapsed. If the obligor failed to comply with the request, the obligee could pursue the claim in court, provided it was done within one year from the law's effective date.[51] Upon the transfer of real estate, the obligee acquired all the rights and duties of a lessor, including any contracts or agreements vested in the property. If the obligee and the tenant could not come to agreement regarding the amount and conditions of rent payment, it would be set by the appropriate state administration. Even after a property was transferred to the obligee, if such property was used for certain socially beneficial purposes, it may be required to continue

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to Czechoslovakia permanently and reclaim lost property. Article I of the Treaty on Naturalization states that nationals of Czechoslovakia who are naturalized in the United States automatically lose their Czech nationality. Nationals of either country who are naturalized while their country of origin is at war, however, do not lose their original nationality. In addition, article III of the Treaty on Naturalization provides that individuals who return to their country of origin intending to remain permanent residents shall lose citizenship previously acquired by naturalization. According to the treaty, individuals intend to remain permanent residents in their country of origin if they return and reside more than two years in that country. The Treaty on Naturalization, ratified by the U.S. Senate on January 26, 1929, was still good law as of October 15, 1991.

49. Such treaties can impose unfair or unreasonable requirements on foreign nationals who would otherwise bring restitution claims. *Id.* (Citations Omitted). *See generally supra* note 39, *see also supra* note 25.

50. *See supra* note 39, § 4.

51. *Id.* § 5(4).

that use for up to ten years.[52] If possible, restitution in kind is to be made with the property in the condition existing on the day the written request for its surrender was received by the obligor.[53] Monetary compensation for the return of real estate is given under the same conditions as it is in the Small Restitution Law.[54]

C. *The Land Law*

The Federal Assembly passed the Land Law on May 21, 1991. This law outlines the rights and duties of present owners, original owners, users, and renters of land, as well as the role of the state in regulating the rights of both owners and tenants of land. The law went into effect on July 1, 1991, and eligible claimants were required to file claims before December 31, 1992.[55]

This law affected only land, buildings, and other assets confiscated between February 25, 1948, and January 1, 1990. It not only covers agricultural and forest land, residential and utility buildings, but also covers agricultural property belonging to the original agricultural settlements.[56] Furthermore, only 150 hectares (370 acres) of land or forest may be restored to any one owner. However, there is a proposed amendment to the Land Law that would provide for restitution of more than 150 hectares of land or forest to a single owner.[57]

The person seeking restitution must be the original owner. If the original owner is not living, then his property can be claimed by a rightful heir, such as a child, spouse, parent, or siblings. As in the Large Restitution Law, the heir must also be a Czechoslovak citizen and reside in the country. Persons other than the owner of the property may use land on a contract basis with the owner or the Land Fund. Goods produced on the land are the property of the owner. Furthermore, only citizens and residents of Czechoslovakia are eligible for restored assets

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52. *Id.* § 12. Such socially beneficial purposes include: the activity of diplomatic and consular missions; the carrying out of health and social services; the purposes of education; the carrying out of cultural activity; and the work of rehabilitation and/or employment physically disabled persons. *Id.*

53. *Id.* § 7(1).

54. *Id.* §§ 7, 8; *see also supra* notes 34-37 and accompanying text.

55. Svitek, *supra* note 21, at 86-87, No. 229/1991 Coll. of Laws, "Adjustment of Ownership Rights of Land and Other Agricultural Property", (Zakon o uprave vlastnickych vztahu k pude a jinemu zemedelskemu majetku), [hereinafter *Land Law*].

56. *Id.*

57. *Id.* at 87.

and land ownership is not transferable to foreigners.[58]

If land assets cannot be physically returned, the claimant receives compensation. The compensation received for the unreturned land is paid by the state. Furthermore, any compensation for unreturned assets is paid by the institution holding the asset at the time of its alteration or destruction. If the original owner is unknown, the Land Fund is entitled to rent the real estate until a claimant steps forward. Compensation will also be paid for all living and non-living inventory taken into a cooperative or confiscated in the time period covered by the law. Owners of cooperatives are not allowed to transfer their assets to citizens or other organizations if the transfer does not comply with the Law on Transformation of Cooperatives passed on December 21, 1991.[59]

D. The Jewish Restitution Law

The Czech government recently enacted a special restitution law for Jews. This law was enacted because of the special difficulties involved in finding eligible claimants. Jewish property was originally confiscated by Germans after 1939, but was not claimed because the Czech Jewish community was virtually eliminated by the Nazi holocaust. Jewish property is being given to surviving Jews so that the rightful owners or their heirs may be located. If heirs cannot be found, the Jewish community keeps the properties.[60] The return of this property to Jewish organizations in no way contravenes the eligibility date for receiving restitution, which is February 1948, when the Communist Party seized power.[61]

E. The Pre-1948 Restitution Law

The Czech Parliament enacted a fourth restitution law in April of 1992. This law calls for the return of land confiscated from ethnic Germans and Hungarians after the Second World War, as long as the former owners remained in the country and regained their citizenship.[62]

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58. *Id.*

59. *Id.*

60. Francis, *supra* note 4, at 11.

61. *Legislators to Propose Laws on Church Property*, CTK - Business News, Mar. 4, 1993, at 8, *available in* WESTLAW, INT-NEWS Database.

62. Gray, *supra* note 7, at 5.

F. The Small Privatization Law

The Federal Assembly of the Czech and Slovak Federative Republic passed the Act on the Transfer of State Ownership of Certain Property to Other Legal or Natural Persons, on October 25, 1990,[63] which took effect on December 1, 1990.[64] This law deals with the selling of small to medium sized businesses that were state owned and financed through either state budgets, state contributions, or national committees and had their right of management on or before November 1, 1990.[65] Both movable and immovable assets of a "business unit" that are not involved with agricultural production are subject to transfer of ownership.[66] This law does not apply to business units with foreign ownership or control, nor does it apply to property that has had a timely claim filed against it under the Small Restitution Law.[67] However, because the statute of limitations of the Small Restitution Law runs at the same time as the Small Privatization Law, a person can bring a restitution claim against a property that has already been purchased through privatization. Persons who were Czechoslovak citizens on or after February 25, 1948, are eligible for ownership of these business units.[68]

The state agency of the Czech or Slovak Republic organizes and authorizes a public auction in which it awards title to the business unit to the person (Czechoslovak citizen) who submits the highest bid.[69] Properties not successfully auctioned off in the first round are auctioned in a second round by authorized agencies of the Republics. During this second auction of a property, foreign investors may participate and acquire property rights to business units.[70] The highest bidder in either auction must pay the full auction price into a special account of the authorized agency of the Republic within thirty days.[71] If the highest

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63. Act on the Transfer of State Ownership of Certain Property to Other Legal or Natural Persons of October 25, 1990, Act No. 427/1990, Coll. of Laws (Zakon o prevodech vlastnictvi statu k nekterym vecem na jine pravnicke nebo fyzicke osoby) [hereinafter Small Scale Privatization Law], 2 Central & Eastern European Legal Materials: Czechoslovakia, Privatization and Entrepreneurship, § 22 (Transnational Juris Publications, Inc., U.S.; Graham & Trotman, U.K.; Kluwer Academic Publishers, The Netherlands).

64. *Id.* art. 27.

65. *Id.* art. 1.

66. *Id.* art. 2(1).

67. *Id.* art. 2(2).

68. *Id.* art. 3.

69. *Id.* art. 4.

70. *Id.* art. 13.

71. *Id.* art. 11(1).

bidder fails to pay the full auction price within the allotted time period, then the transfer of ownership is nullified.[72] This law is intended to transfer state owned property into private hands and generate needed capital for further reform programs quickly.

G. *The Large Privatization Law*

The Federal Assembly of the Czech and Slovak Federative Republic passed the Act on the Conditions of Transfer of State Property to Other Persons on February 26, 1991[73] which took effect on April 1, 1991.[74] This law defines circumstances under which the state ownership of certain enterprises, mainly medium to large sized businesses, have their right of management transferred to Czech, foreign juristic, or natural persons.[75] This law precludes from privatization any property that is subject to certain constitutional enactments, legislation, or the Small Restitution Law.[76] Privatization of property must accord with the approved privatization project for that enterprise or the state proprietary participation in entrepreneurial activity.[77] The founder, to whom the enterprise's privatization project proposal is submitted, is responsible for establishing the terms of the proposal.[78] After the founder evaluates all privatization proposals, if he is a federal central authority of state administration he submits them to the Federal Ministry of Finance; if not, he submits them to the competent authority of state administration of the Republic.[79] The Federal Minister of Finance or the competent authority of the state administration then must approve and publish the privatization proposal.[80]

Once a privatization proposal has been approved, it becomes part of the Federal Fund of National Property (hereinafter *Fund*), which

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72. *Id.* art 11(2).

73. Act on the Conditions of Transfer of State Property to Other Persons, of February 26, 1991, Law No. 92/1992, Coll. of Laws (Zakon o podminkach prevodu majetku statu na jine osoby) [hereinafter Large Privatization Law], 2 Central & Eastern European Legal Materials: Czechoslovakia, Privatization and Entrepreneurship, § 22 (Transnational Juris Publications, Inc., U.S., Graham & Trotman, U.K., Kluwer Academic Publishers, The Netherlands).

74. *Id.* art. 49.

75. *Id.* art. 1(1). (including state banking institutes, state insurance companies and other state organizations, as well as foreign trade companies).

76. *Id.* art. 3.

77. *Id.* art. 5.

78. *Id.* art. 7.

79. *Id.* art. 8.

80. *Id.* art. 10(1)(a).

has been established to direct the transfer of ownership.[81] Similar funds also exist for the Czech and Slovak Republics respectively. The Fund will take possession of the properties and uses them to form new companies, promote joint stock companies, or sell the company or parts of the company in public auctions to individual buyers.[82]

The investment coupon (or voucher) is another method of privatization incorporated within this law. Any Czechoslovak citizen who is 18 years of age at the date of issuance of the coupons and a permanent resident of Czechoslovakia is eligible to receive investment coupons for a nominal price.[83] The coupons can be used to purchase shares of any approved joint-stock company or participation in approved commercial companies.[84] The investment coupon is "a security (consolidated paper) in name giving the right to purchase shares specified for sale against coupons. The coupon shall be untransferable and the rights attached to the same can be transferred only to heirs. The coupon cannot be amortized."[85] Thus, voucher coupons are designed to restrict alienation to foreigners and to keep the Czechs from being exploited.

IV. How the Restitution Laws Initially Slowed Down Privatization and Economic Reform

A. The Fear of Unknown Restitution Claims

Initially, the restitution laws caused a slower privatization process and economic growth rate than anticipated. The restitution program was much more extensive and expensive than planned. Some estimates put the total cost of restitution as high as $10.7 billion[86] and the estimated time of completion for the restitution process between two to ten years.[87] Czechoslovak Minister of Finance, Vaclav Klaus, while

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81. *Id.* art. 27.

82. *Id.* art. 28.

83. *Id.* art. 23, 24.

84. *Id.* art. 25.

85. *Id.* art. 22.

86. *Prague Votes to Return Nationalized Property*, CHICAGO TRIBUNE, Feb. 22, 1991, at 1C. (Finance Minister Vaclav Klaus was quoted as telling parliament, "[a]s much as $10.7 billion worth of property nationalized by the communists after they took power in 1948 will be turned back to private owners under the so-called restitution bill approved Thursday....")

87. *Privatization in Czechoslovakia on Time, but Delays likely, Officials Say*, BNA INT. FIN. DAILY, Mar. 5, 1991. (Josef Danco of the Slovak planning commission stated that the government's willingness to deal with restitution would further complicate the privatization process. Danco stated. "the procedure could take two to three years, or maybe five to ten years."),

commenting on the financial aspect of restitution in February 1991, stated, "it is very complicated, as we do not know the exact number of people the restitution will apply to."[88]

One of the reasons the restitution claims will slow privatization and economic reform is that they are *de facto* liens. Restitution claims must be resolved before business and other properties can be privatized.[89] Consequently, restitution laws created uncertainty regarding property ownership,[90] which in turn causes delays in the process of approving privatization projects[91] and, ultimately, economic reform.[92]

Restitution laws also handicapped the privatization process because of the sheer number of claims made. The effect of numerous restitution claims in agriculture, for example, almost caused privatization to come to a complete stop.[93] The Minister of Agriculture, Josef Lux, stated that 228,179 restitution claims totaling thirty-four billion koruny[94] were made for agricultural property.[95] Czech agriculture officials projected that eighty percent of the agricultural restitution claims would be cleared by the end of 1993.[96]

Perhaps the biggest problem resulting from the implementation of restitution laws has been awarding restitution in kind (the actual property or land being given back) in lieu of monetary or voucher restitution. Restitution in kind creates many problems such as moving

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88. *Czechoslovak Federal Assembly Passes a Bill on Extra-Judicial Rehabilitations*, CTK Ecoservice, Feb. 22, 1991, at 12, *available in* WESTLAW, INT-NEWS Database, (Klaus made this comment while addressing the Federal Assembly on February 21, 1991).

89. Francis, *supra* note 4, at 11.

90. *Official Sees End of State Ownership of Businesses*, CTK Ecoservice, May 27, 1991, at 4, *available in* WESTLAW, INT-NEWS Database.

91. *Privatization Projects Considered by Slovak Ministry*, CTK Ecoservice, Jan. 10, 1992, at 6, *available in* WESTLAW, INT-NEWS Database.

92. *Privatization in Czechoslovakia: Learning to Walk*, THE ECONOMIST, Feb. 2, 1991, at 71.

93. *Deputy Minister on the Privatization Process*, CTK Ecoservice, June 29, 1993, at 3, *available in* WESTLAW, INT-NEWS Database. Deputy Minister for Administration of National Property, Jaroslav Jurecka, said "that the original expectation that restitution would be the fastest way for privatizing has not come true. In agriculture, for instance, restitution has almost stopped the privatization process. A plan to fix this has been worked out, but a certain amount of time has been lost." *Id.*

94. (USD $1. = 27-31 Czech Crowns (koruny) as of summer, 1993).

95. *Agriculture Minister on Progress of Privatization in Farming and Food Industries*, BBC MONITORING SERVICE - EASTERN EUROPE, June 10, 1993, *available in* WESTLAW, INT-NEWS Database.

96. *EC Experts and Agriculture Ministry Want Regular Communication*, CTK National News Wire, Oct. 20, 1993, *available in* WESTLAW, INT-NEWS Database.

or compensating current tenants when the rightful owner obtains title to the property, the expanse of time involved in proving and settling claims, and the conflict created when claims arise against property that has already been privatized.[97]

Tremendous controversy surrounded both the passage and implementation of the restitution laws because all allow for restitution in kind.[98]

The restitution laws also produce a general disincentive to foreign investors against investing in the Czech Republic. The Czech restitution laws deter investment because they preempt privatization laws. Thus, the management of a business must search the records of the registry of deeds to ascertain whether there was a pre-1948 private owner before commencing a privatization project. If there would be a private owner who would be entitled to file a claim, then the privatization project should be delayed until the statute of limitations for filing the claim has expired.[99]

Czech citizens and foreign nationals alike are hesitant to invest in companies or to buy land or businesses because of the risk of an unknown restitution claim being brought against the property.[100] Prior to the split, Czechoslovaks were afraid to invest their voucher points or capital, and foreign investors were afraid to invest their hard currency and advanced technology. Both are desperately needed for the weak Czech economy to survive. The Czech Republic needs well-defined property rights that will protect foreign and domestic investors from losing their property through restitution. Even other former communist countries dealing with the restitution issue express the desire to avoid the experience of Czechoslovakia. Polish Finance Minister, Leszek Balcerowicz said, "It's time we learn from someone else's mistakes, not our own."[101]

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97. *Ten Slovak Parties and Movements Oppose Restitution in Kind*, CTK National News Wire, Feb. 12, 1991, *available in* WESTLAW, INT-NEWS Database.

98. Mary Battiata, *Issue of Seized Property Divides Poles; Ex-Owners' Prospects Founder in Financial Straits of the New Rule*, THE WASHINGTON POST, May 5 1991, at A35.

99. Vratislav Pechota, *Privatization and Foreign Investment in Czechoslovakia: The Legal Dimension*, 24 VAND. J. TRANS. LAW 305, 312 (1991).

100. *60 Food Processing Enterprises Await Privatization*, CTK Ecoservice, July 28, 1993, at 8, *available in* WESTLAW, INT-NEWS Database. "Enterprises like the Pelhrimov and Strakonice breweries in South Bohemia cannot be privatized due to restitution disputes. Both of the brewers and the famous Karlovy Vary (Carlsbad) producer of Becherovka liquor have made restitution claims on the breweries."

101. Battiata, *supra* note 98, at A35. (referring to the Czechoslovak restitution program).

B. *The Problem of Unclear Title*

Title to property in the Czech Republic is unclear at best and nonexistent at worst. The communists failed to maintain accurate title registries to properties. Some land registries were not even kept after 1964, and the government deliberately destroyed others. The result of this non-practice has been that it is very difficult and time consuming for a claimant to prove he is the rightful owner or heir to the asset in question, and there is more than one claimant in some cases. For some, enduring this bureaucratic nightmare is not worth the effort.[102]

Restitution claims brought under the land law could be made until December 31, 1992. However, claimants' challenges to the present possessors' denials of the claims will most likely extend the pendency of claims for quite some time, thus delaying the time when all restitution claims will be settled.[103] The communist regime further clouded title to property by transferring agricultural land between different enterprises without any consideration of former ownership. The prior neglect in keeping title records has made title investigation virtually useless and resulted in investors having to "wait and see" if anyone would show up to claim the land.[104]

Due to the problem of unclear titles existing in Czechoslovakia, the restitution claims took much more time to process than planned. This results in slowing the progress of privatization and increasing the burden on the judiciary.[105] In addition, title insurance was nonexistent in Czechoslovakia and caused further loss of incentive for investment. Clear and reliable property rights must be established if the Czech Republic is to progress into a viable democracy with a free-market economy.

C. *Increased Burden on the Judiciary*

The restitution laws have placed a great burden on the judiciary. Because Czechoslovakia has one of the highest rates of nationalization of the former communist countries, the number of restitution claims

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102. Scroggins, *supra* note 5, at A2.

103. Henry W. Lavine et al., *Czech and Slovak Privatization: Issues and Approaches for Western Investors*, Practicing Law Institute Mar. 18, 1992, *available in* WESTLAW, JLR Database.

104. Milan Ganik et al., *Czech Reform Has Investors Guessing*, 14 NAT'L L.J. 17, 20 (1991).

105. See *infra*.

has been great, and probably too extensive for a poor country like the Czech Republic.[106] The extensive Czech restitution program has put great stress on the already overburdened and underpaid judicial system.[107] Although many claimants under the Large and Small Restitution Laws have settled, numerous disputes over restitution persist in the courts.[108] Section 5 (4) of the Large Restitution Law states that if the person obliged to return the property to the person entitled to it does not do so within the time period allotted, then the entitled person can pursue a claim in court if done within one year from the effective date of the law.[109] These disputes, often between competing claimants or between former owners and current tenants, are jamming the court system because none of these collateral disputes are required to be dealt with extrajudicially.[110] Simply put, the added weight of collateral and derivative restitution claims on the judicial system has slowed the privatization process at a time when the Czech judicial system is too weak to try to satisfactorily complete the task of resolving additional restitution disputes.

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106. Pechota, *supra* note 99, at 308. Comparing the extent of nationalization in former communist countries Pechota stated,

> In contrast to Polish and East German Socialism, which tolerated, to a certain extent, small businesses on the manufacturing and service sectors, the Czechoslovak socialist 'perfectionists' nationalized or 'persuaded' private owners to transfer practically all businesses to the state or to a cooperative. The 1960 Czechoslovak Constitution celebrated this feat as an astounding victory for socialism.

107. This gives some idea of how extensive a nationalization program Czechoslovakia was subjected to and infers that it will make the restitution process that much more difficult. Lloyd N. Cutler & Herman Schwartz, *Constitutional Reform in Czechoslovakia: E Duobus Unum?*, 58 U. CHI. L. REV. 511, 539 n.72 (1991). "The Czech Republic alone is said to be short at least 330 judges. One hundred were dismissed after November 1989, and another 120 left voluntarily, with only 115 new judges appointed to replace them. Unfortunately, the salary and social status of judges are both very low." (emphasis added). *Id.*

108. Gray, *supra* note 7, at 24. Gray presents numerical data as to how overburdened the judicial system actually is,

> As in other CEE countries, judicial institutions in the CSFR are ill-prepared to cope with the rapidly emerging challenges of a market economy. The plethora of new legislation in the past 2 years has bred many new types of disputes never before seen by this generation of judges and lawyers. In 1991, some 121,000 commercial cases were filed in the Czech Republic (48,000 in Prague alone) and some 60,000 in the Slovak Republic. That number is expected to jump significantly higher in 1992 as new restitution cases enter the courts and as the moratorium on bankruptcy claims is lifted.

Id.

109. This demonstrates that the judiciary is currently overloaded and that the restitution claims will place a further burden on the system. *See supra* note 39, art. 5.

110. Gray, *supra* note 7, at 5.

The extensive Czech restitution program has yielded increased litigation and court costs when the money could have been better spent elsewhere. Estimates have placed the cost of the restitution process near $11 billion.[111] Moreover, while legislators debated over what form the restitution laws should take, the privatization process was delayed for several months.[112]

These problems have resulted in undue amounts of time and money being wasted, whereas more efficient deployment of these valuable resources could be used to advance the Czech Republic's privatization and economic reform.

D. Other Problems Resulting From Restitution In Kind

Where returned property is not in the same condition as when confiscated, monetary compensation can be awarded. Monetary compensation is limited to $1,000 in cash, with the balance paid in vouchers or bonds for investment in new privatization projects.[113] However, these vouchers and bonds have not been a very sound way to invest, given the state of the fledgling Czech economy, where businesses and industries are not certain to withstand the transformation into a free market economy.

Many of the properties are returned in poor condition or beyond repair from years of neglect. Thus, many entitled to such properties are hesitant to take them because of the cost of restoration and improvement. Although foreigners may have the capital and technology to improve and make efficient use of the property, most Czech citizens

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111. Peter S. Green, *Czechoslovak Restitution Could Cost $11 Billion*, UPI, Feb. 21, 1991, *available in* LEXIS, Nexis Library, MAJ-PAP File. "The government said it could cost as much as $11 billion to make restitution for businesses and other real estate that were confiscated and privatized in 42 years of communism."

112. Edward P. Lazear, *Politics Thwarts Reform*, CHRISTIAN SCIENCE MONITOR, April 16, 1991, at 18. Lazear points out how the debate over the form of the restitution laws actually slowed down the reform process:

> Reforms have been slowed by debates that pit one interest group against another. In Czechoslovakia, privatization was held up for a few months while legislators argued about the form that restitution of property to its historical owners would take. Eventually, a compromise was struck, but the details of capital distribution are still not decided.

Id.

113. If the issue of how the restitution laws were to be implemented had been settled quicker, then the privatization process would not have been held up as long. *See supra* note 6, at A10.

do not. George Lobkowicz, a European banker who had never been to Czechoslovakia, recently became a Czech prince, and his family became one of the country's biggest landowners as a result of the restitution laws. But, instant riches are not all they are cracked up to be. Lobkowicz says, "It's a nightmare, properties are in horrid shape and many are beyond repair. One cannot selectively ask for restitution. If you want the great artworks back in a castle that's falling apart, you must take both or get neither. There are other problems. I have 2,500 acres of vineyards and know absolutely nothing about winemaking, so I've had to bring in consultants from Germany."[114]

This issue of privatizing agricultural lands also caused heated debate amongst reformers. The controversy over the transfer of agricultural land to private owners was seeded in the rare success of the collective and state farms. "The industrial regimen that the communists inflicted on agriculture may have driven the Soviet Union into famine and disorder, but it fostered efficiency in Hungary and Czechoslovakia and bestowed both with a rare economic success."[115]

Under the pre-collective system, a farmer in Czechoslovakia worked from sunrise to sunset seven days a week; a day off was unimaginable. Under the Communist regime, farmers on collectives rotated on eight hour shifts, so everyone got a two-day weekend in addition to having vacations, holidays, and sick leave. The collective farmers in the Czech Republic only earn about as much as Czech factory workers. Anti-Communist activists maintain that the farmers are taken advantage of by communists struggling to keep their power and ideology in the countryside, but most farmers do not want to change.[116] Also, many claims involve parcels of land that are in the middle of huge fields that are now part of collective farms.[117]

Another problem is that many people are interested only in obtaining land, but have no plans for its future use.[118] After all of the restitution claims settle and land returns to the rightful owners, the collective and state farms fulfilling many important economic functions may no longer exist. However, letting properties or agricultural lands remain idle while

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114. Diane Francis, *Restitution of Property to Pre-1948 Owners Can Be Expensive*, FIN. POST, Aug. 27, 1992, at 11.

115. Carol Williams, *Czech, Hungarian Collectives Are Rare Success Story--and Apt to Stay; Agriculture: A Plan to Return Farmlands Taken Away 40 Years Ago Draws Little Interest from Today's Workers*, LOS ANGELES TIMES, Feb. 24, 1991, at D8.

116. *Id.*

117. Josef Burger, *Politics of Restitution in Czechoslovakia*, 26 EAST EUROPEAN QUARTERLY 485, 493 (1993).

118. *Minister of Agriculture Comments on Government Agrarian Program*, CTK Ecoservice, Nov. 16, 1992, at 3, *available in* WESTLAW, INT-NEWS Database.

destroying a collective farm system that functions well is an inefficient allocation of resources, a policy that the Czech economy can ill afford.

Protective rent and tenant restrictions have created yet another problem. The civil code of 1992 covering owner/tenant relations states that an owner cannot evict a tenant unless the tenant fails to pay rent, or if the owner or tenant of a ground level shop in the same building wants to move into one of the flats. When a landlord legally evicts a tenant, the legal foundation for deciding who is responsible for finding adequate substitute accommodations for the evicted tenant is not clear.[119]

Protective rent controls place owners in a precarious situation by not allowing rent increases to keep pace with maintenance costs. For example, in 1992 a residential apartment of approximately 860 square feet could be rented for $64 per year, with the occupants protected by favorable tenancy laws.

> One letter to the editor documented the economics of despair in the case of a solidly built brick row of apartments (15 units) in a highly desirable area, which under current rent levels could produce a total rent income of $5,500 per year. The property required $43,000 in immediate repairs to prevent further deterioration. On the real estate market the building is valued at $300,000, though as an investment it cannot yield a return commensurate to this price.[120]

Rent controls have also kept residential rents exceedingly low compared to rates found in a free market system. Rents have doubled, but they are still unnaturally low.[121] The Czech government has found itself in a dilemma; it is unjust to restrict the owner's right of free-alienation, yet it is also against public policy to displace long time tenants.

E. Who Should be Entitled to Restitution and Where Should the Line Be Drawn?

Much debate centers around which groups can bring restitution claims and where the line in time should be drawn. Should Sudeten Germans or ethnic Hungarians who collaborated with the Nazis in World War II receive restitution? Should persons whose land or industries the Benes government nationalized before 1948 receive compensation?

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119. Svitek, *supra* note 21, at 81.

120. Burger, *supra* note 117, at 490-91.

121. Gray, *supra* note 7, at 7.

Should former communists (who claim that commercial entities were constructed with the voluntary contributions of its members, rather than with state assets) be entitled to restitution?

Recent restitution laws have dealt with some of these questions, but many remain unanswered. The Jewish Restitution Law will provide for restitution of property owned by Jews if it was owned in 1947. The Pre-1948 Restitution Law is essentially the same as the Jewish Restitution Law but applies to gentiles. This law excludes any claims by Jews or the two million ethnic Germans who comprised the economic elite in pre-war Czechoslovakia simply because the line in time determining eligibility does not reach that far back. A Czech legislator explained that, "It would be politically impossible to give property back to those ethnic Germans because many controlled the economy and many also collaborated with the Nazis. The Germans in Czechoslovakia were kicked out after liberation in 1944 and their lands confiscated."[122] Are there political motivations behind the restitution laws? One independent Czech paper "Lidove Noviny" says,

> [t]hat those who fight for such restitution taken to the point of absurdity merely satisfy their doubtful political ambitions. History does not know restitution of such an extent. Not even Louis XVIII resorted to something like that in the Bourbon Restoration. Poland and Hungary are silent about restitution and they know well why. Only we are perhaps poor enough to be able to afford it. Because the rich ones cannot. It adds that those who want to go before February 1948 cannot ignore the property of Slovak Jews, transferred Germans and, last but not least, the land reform of 1919 and the expropriations after the battle of White Mountain in 1620. How far is there to go to absurdity?[123]

F. Some Suggestions As To How Restitution Could Be Handled

Instead of focusing on restitution in kind, other forms of compensation such as financial or voucher coupons should be awarded. Thus, those seeking to buy or invest in property and businesses would not have to worry about a potential restitution claim being brought against them. This would allow the privatization process to move ahead

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122. Francis, *supra* note 4, at 12.

123. *Papers Warn Against Too Extensive Return of Property*, CTK National News Wire, Feb. 12, 1991, *available in* LEXIS, Nexis Library, MAJ-PAP File.

unimpeded and result in greater economic growth, strength, and stability for the Czech Republic. Perhaps a comprehensive compensation fund established at the outset for awarding money, voucher, or stock restitution would alleviate many of the problems associated with restitution in kind. As for agricultural lands, the Czechs should follow Hungary's example of giving privatization coupons that can be exchanged for land only if the land is intended for farming. Otherwise, coupons could be used to buy stock in industrial enterprises.[124]

There could also be more incentives given for foreign nationals to seek out and bring restitution claims. This could be done by offering joint-venture options, investment, tax, or customs incentives. Czech Restitution Laws made it difficult for foreign nationals to instigate and prevail on restitution claims. For example, U.S. nationals of Czech origin were required to submit several items to the Czechoslovak Embassy in Washington before they were allowed to present any evidence of ownership to the current occupiers of the property. Among these items were:

> [a]n application for temporary or permanent residency in Czechoslovakia, four photographs exactly passport sized, and a letter specifically explaining one's life story with specific explanation of one's financial assets, education, training, skills, and occupational experience. These claimants were also required to submit a detailed family tree, describing all relatives, their dates of birth, citizenships, and their occupations, and a notarized letter from a person who agreed to assume responsibility for the claimant's housing and medical expenses when the claimant returned to Czechoslovakia. Finally, if the claimant had emigrated from Czechoslovakia because of crimes that had purportedly been committed, the claimant was required to submit evidence of the punishment given by the communist government and a request that such punishment be stricken from the government's records.[125]

Even after these items had been submitted to the Czechoslovak Embassy, they were still subject to the approval by the Czechoslovak Government. Approval of these submissions could take an unduly long amount of time and result in the claimant missing the statute of limitations for filing restitution claims. Applications for residency alone could take three months or longer to be processed. After applications are approved,

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124. Williams, *supra* note 115, at D8.

125. Renzulli, *supra* note 13, at 183-84.

the claimant must certify possession of good title to the property. If the claimant is unable to obtain the title deed, a local lawyer might be required to search the land records to confirm the status of the property.[126] Had the Czech Restitution laws been more accommodating to foreign nationals, there would have been an increase in foreign investment, capital, and advanced technology.

Before this comment went to print, the Czech Constitutional Court deleted two parts of the Large Restitution Law. Involved are the provisions that make eligibility for restitution conditional on permanent residence in Czechoslovakia or the Czech Republic and the six-month window in which claimants must have filed.[127] The Court's decision, which takes effect in November 1994, enables persons with Czech citizenship, who have been ineligible until now, to file restitution claims for the first time. Permanent residents of Czechoslovakia or the Czech Republic who failed to bring restitution claims are not subject to the court's decision.[128] However, it should also be noted that some government officials believe that the Constitutional Court has overstepped its powers by deciding to delete these provisions of the Large Restitution Law.[129] There are many political considerations impacting the Court's decision, but hopefully the Czechs will decide against prolonging the restitution process or they may see the fruits of their progressive reforms spoil or go unharvested.

The many difficulties and uncertainties present for foreign nationals eligible for restitution actually discourage foreign investment. In fact,

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126. *Id.*

127. *Constitutional Court Extends Deadline for Restitution Claims*, BBC MONITORING SERVICE - EASTERN EUROPE, July 14, 1994, *available in* WESTLAW, INT-NEWS Database. According to Vojen Gurtler, the justice-rapporteur in the case,

> The Law on extra-judicial rehabilitations was aimed at redressing the most serious property and other wrongs, from which emigrants could not be excluded. The condition of permanent residence in the country ignored the freedom of movement and residence, embeded (*sic*) in the Charter of Basic Human Rights and Freedoms and also granted by the Czech Constitution, and thus contravened these documents. The court also confirmed the reservation of the deputies that the several-month deadline set for potential claimants to start action, were "inappropriately short' and discriminated against the citizens from abroad, mainly overseas. They may not have learnt (*sic*) about the restitution possibility in the time set by the law, and thus were prevented from raising their justifiable demands.

Id.

128. *Id.*

129. *Ministers Say Constitutional Court Oversteps its Competence*, BBC MONITORING SERVICE - EASTERN EUROPE, July 16, 1994, available in WESTLAW, INT-NEWS Database.

most émigrés who took up citizenship in other countries that offered refuge from communist Czechoslovakia, "have spent decades building new lives for themselves and now consider these countries to be their homes. As they are getting older, they are unwilling to return to Czechoslovakia for another new start in a country with a very uncertain future."[130]

Capital, technology, and the experience of foreign investors are needed for the Czech Republic to achieve rapid economic reform. The Czech government has begun working with foreign nationals, especially those who have proven business records and hard currency, to convert their returned properties and businesses into capital producing entities. These foreign nationals bring expertise on functioning within a capitalist system, a concept foreign to many Czechs. Perhaps the most famous of these agreements was struck with the Toronto shoe magnate, Thomas Bata.

> Some of the most closely watched negotiations to privatize a state enterprise have involved the Svit shoe-manufacturing factory in Zlin, an industrial center of 90,000 in central Czechoslovakia. Founded at the turn of the century, the company was the property of the Bata family, which moved to Canada from Czechoslovakia in 1939, well before the interim postwar government confiscated it in October, 1934. After the Communists fell, Toronto millionaire Thomas Bata, 76, the chairman of Bata Ltd., renewed his claim as the rightful owner of the Zlin factory and demanded restitution. Czechoslovakia's restitution laws, enacted last June, entitle former owners of small businesses such as barbershops or bakeries seized by the Communists to reclaim their properties. But so far, the government has not applied the same rules to large, potentially profitable enterprises.
>
> After more than a year of tough negotiations, Bata and government officials reached an initial compromise in October. The agreement, which goes into effect this month, has created Bata CSFR, a $30 million joint venture initially compromising 30 retail stores and one small shoe factory. The 30 stores, including the flagship store on Prague's Wenceslas Square, will be allowed to distribute a maximum of 20 percent of the shoes sold in the country. Under the terms of the agreement, Bata Ltd. will have a 70 percent stake in the operation, as well as an option to acquire the Czechoslovakian government's 30

130. *Ex-Czechs Get No Checks*, THE WASHINGTON TIMES, Apr. 26, 1992, at B5.

> percent stake over the next five years. The Bata company will manage Bata CSFR, as well as providing marketing and technological expertise, extensive employee training and other improvements. [131]

These kind of compromises are not only beneficial to the Czech economy and privatization process, but also to the restored owner.[132] More of these mutually beneficial compromises will allow the Czech Republic to move ahead with free-market and economic reform at a quicker pace.

A final alternative is to move forward with privatization and economic reform without regard to the transgressions of the communist system. During the debate of the restitution laws, then Finance Minister Vaclav Klaus said, "The whole issue of restitution is extremely difficult, perhaps impossible. I don't know if there's an answer. I might almost be inclined to regard Communism as a natural disaster and not give anything back to anybody."[133] However, dealing with restitution in this manner could have resulted in dire consequences. Extensive nationalization of private property in Czechoslovakia has created a prevailing sense of indignation amongst the populace. Thus, in the former Czechoslovakia's unique situation, the restitution laws also served an important moral purpose. Without some sense of renumeration for the crimes of the communists, there may have been a movement by the people to seek justice for these crimes in another manner. Because Czechoslovakia has dealt with this issue, Czechoslovakia may end up being years ahead of its formerly communist neighbors in the privatization and economic reform process.

V. LONG TERM EFFECTS OF THE RESTITUTION LAWS

A. Initial Slowdown of Reforms v. Rapid Future Reform

Reformation and privatization for the Czech Republic were initially slow, but as the restitution process ends, the Czechs can look forward to rapid future reform. Democracy, capitalism, and the privatization process can now move forward without the fear of new restitution claims,

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131. Barbara Wickens, *Post-Communist Chaos (Investing in Eastern Europe)*, MACLEAN'S, Jan. 20, 1992, at 36.

132. Barbara Wickens, *Picking Up The Pieces; Thomas Bata Gives Czech Capitalism A Boost*, MACLEAN'S, July 9, 1990, at 35.

133. Lawrence Joseph, *Prague's Spring Into Capitalism*, THE N.Y. TIMES, Dec. 2, 1990, § 6, pt. 2, at 20.

laws, and the accompanying political turmoil. A main reason for enacting the restitution laws was to address the moral outrage of the Czech people against the communist regime. Former Finance Minister, Vaclav Klaus, said, "We are convinced that if there is restitution, the price tag is not important. It is a moral issue."[134] This issue has been dealt with at the cost of slowing privatization and economic reform. However, providing the Czechs with some sense of justice for the egregious wrongs committed by the communists appears to be a necessary step to growing the cause of democracy and economic reform. Not taking this step might have resulted in a much worse long range outcome for the Czechs.

Although the restitution laws initially slowed privatization and economic reform, these laws successfully introduced the concepts of private property and ownership, which were previously unknown to most Czechs. These laws also familiarized the Czechs with market-oriented legal principles and practices.[135] A solid understanding of these concepts is essential to transforming a state-run economy into a free-market economy. The Czechs should now be prepared to make a quicker transformation. Moreover, some long-term results of the restitution laws include clearing up cloudy title, better defining property rights, and establishing real property law, all of which will be relied upon by future generations.[136]

B. Other Factors Contributing to Successful Economic and Democratic Reform in the Czech Republic.

There are several other underlying factors that should contribute to successful economic and democratic development in the Czech Republic. First, Czechoslovakia had an established industrial tradition, a highly skilled labor force, and a stable infrastructure.[137] Czechoslova-

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134. Green, *supra* note 111. (Klaus made this comment while speaking at a parliament session that was explaining restitution laws).

135. Gray, *supra* note 7, at introduction.

136. *Czechoslovakia Moves Toward Privatization For Small Retail Businesses, Service Sector*, INT'L TRADE REPORT, Oct. 17, 1990, *available in* LEXIS, MAJ-PAP File.

137. *World Bank Economic Survey of Czechoslovakia*, CTK Ecoservice, Nov. 22, 1991, at 15, *available in* WESTLAW, INT-NEWS Database.

> "The country's labor force of about 7.8 million is well-educated and highly skilled . . . . Czechoslovakia was the richest of the "successor states" that emerged from the Austro-Hungarian Empire following World War I. Its economy had not been damaged during the war, and the country contained over two-thirds of the industry of the old empire, but only one-fourth of its population and one-fifth of its area. . . . Although more economically

kia also performed well economically, when compared to neighbors who had centrally planned economies.[138] These factors should compensate for the initially slower privatization process and lead to economic and democratic success for the country. Additionally, three per cent of all privatization receipts now go to a compensation fund for restitution claims,[139] and many companies reserve an additional three per cent of their shares as a part of their privatization projects.[140] These funds should defray the future costs of restitution and help mitigate many future privatization problems.

Economic indicators also denote a bright future for Czechoslovakia. The Czech Republic has a very low foreign debt as compared to other Eastern European countries, and has built up a good reputation among Western investors.[141] This is due to political stability, a well-educated workforce, and low inflation.[142] The Czech Republic also has a low total debt as a percentage of Gross Domestic Product (GDP), no budget

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and institutionally isolated than its neighbors, Czechoslovakia's performance has compared well with other formerly centrally planned economies".

Id.

138. *Czechoslovakia: Big Deals Begin Despite Legal Confusion*, IMC Business Communications M & A EUROPE, Nov/Dec. 1990, at 60, *available in* LEXIS, MAJ-PAP File.

"Czechoslovakia is the dark horse in Eastern Europe's race toward free-market economies. It has great potential in the long run, thanks to its established industrial tradition, highly skilled labor force and relatively strong infastructural base. But it is a slow starter, lagging behind Hungary in privatization and behind Poland in economic reforms".

Id.

139. Pechota, *supra* note 99, at 314; *see also* notes 81 and 82.

The Large-Scale Privatization Act creates a new agency, the Federal Fund of National Property (Federal Fund), and entrusts the task of carrying out the privatization program to the Federal Fund and to the Czech Fund of National Property and the Slovak Fund of National Property. The latter two funds will be established by the legislatures of the respective republics. The Federal Fund will assume the ownership of any federal property to be privatized, whereas the funds of the republics will become the owners of all republican assets chosen for privatization.

The Federal Fund is a legal entity separate from the state. The property of the Federal Fund cannot be used by the state to generate revenues or to meet budgetary needs; the property can be utilized only for privatization and for satisfying restitution claims.

140. Lavine et al., *supra* note 103.

141. *Czechoslovakia Needs Foreign Capital and Know-How, Finance Official Says*, BNA INT'L TRADE DAILY, Mar. 27, 1991, *available in* LEXIS, MAJ-PAP File. Pavol Parizek, chief international finance of the Czechoslovak Finance Ministry said that, "Czechoslovakia had an advantage over other East European countries in having little foreign debt, totaling $7.5 billion at the end of the last year, and no domestic debt." *Id.*

142. *Czech Privatization, Blood Sweat and Capitalism*, THE ECONOMIST, June 19, 1993, at 71.

deficit as a percentage of GDP and an extremely low long-term interest rate.[143] Additionally, the Czech Republic has the lowest unemployment rate in all of Europe at 2.7 percent.[144]

The geographic location of the Czech Republic is beneficial as well and must not be overlooked. A good portion of the Czech Republic borders Germany and Austria, and Prague is further west than Vienna. This gives the Czech Republic a strategic advantage in foreign trade and investment over other Eastern European countries. The similarity of German, Austrian, and Czech Cultures should aid in communication and understanding of customs, which are important to foreign trade. Furthermore, an increase in exports and imports, a great decrease in the cost of production, and a stable Czech Crown (Koruny) also point to successful reform for the Czech Republic.

The Czech Republic has enjoyed much political and social stability in recent years, brought about by its economic reform programs. The exclusion of any political party with less than five percent of the vote has spared the Czech parliament from the fragmentation that has afflicted Poland.[145] The aforementioned factors make it evident that the Czech Republic is in a unique position to embrace economic recovery and democratic reform.

VI. CONCLUSION

Although the restitution laws resulted in an initial slowing of the privatization process and economic and democratic reform, the Czechs will ultimately be stronger for squarely addressing the restitution issue and its attendant problems. The Czechs will see their country blossom into one of the world's strongest new free-market economies, where real property law and democracy truly exist for the first time in over forty years. Though the restitution laws could not fully compensate people for the lives, careers, and happiness taken away during the four decades of Soviet domination, at least some sense of justice has been served. The new laws have created confidence in the legal system and democratic process, which will result in increased Czech and foreign national investment. With fewer economic risks and a more stable legal and political system, the Czech Republic should become a leading nation

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143. *Eastern Europe: The Old World's New World*, THE ECONOMIST, Mar. 13, 1993, at 21.

144. *See supra* note 142, at 71.

145. *Klaus Can Well Be Satisfied With Reforms -- ANSA*, CTK National News Wire, Oct. 20, 1993, *available in* LEXIS, NEXIS Library, CTK File.

in Eastern Europe, and, possibly, one of the first former communist countries to become a member of the European Community. The restitution laws brighten the future of the Czech Republic by serving the dual purpose of forestalling future problems while alleviating the pain associated with the old ones.

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